

# The Conscience of Thomas More: An Introduction to Equity in Modernity

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## 1. Introduction

In 1999, the same year as new Civil Procedure Rules in England and Wales, the Law Society Gazette polled members of the legal profession in the United Kingdom asking for nominations for the most influential legal figure of the preceding millennium<sup>1</sup>. The poll sought an individual who embodied virtues in law at the close of a millennium, to an age of transition and root and branch reforms such as the *Human Rights Act* 1998 and the *Access to Justice Act* 1999. It is perhaps no surprise that the individual who emerged foremost in the Gazette's poll was one who represented a significant and formative tradition in British law, but also its human, conscientious and equitable side combined with a staunch and unwavering belief in law's authority. That individual was Sir Thomas More<sup>2</sup>.

Several commentators have spilt a great deal of Ink defending and attacking Thomas More since his death in 1535. More's achievements as, to borrow Robert Bolt's infamous label, 'a man for all seasons', have created deep-rooted mythologies<sup>3</sup>. And like Roland Barthes' discussion of the eminent twentieth-century physicist Albert Einstein, has reified him for the benefit of future generations<sup>4</sup>. With Einstein, Barthes considered his

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<sup>1</sup> Evlynne Gilvarry. 1999. Lawyer of the Millennium: Gazette Survey *The Law Society Gazette*, 24<sup>th</sup> November; see also: Lawyer of the Millennium [Online] Available at: [http://www.thomasmorestudies.org/rep\\_lawyer.html](http://www.thomasmorestudies.org/rep_lawyer.html) (accessed 20 Oct 2019)

<sup>2</sup> Rebecca Towers. 1999. Man for the Millennium, *The Law Society Gazette*, 17<sup>th</sup> December; see also: Lawyer of the Millennium [Online] Available at [http://www.thomasmorestudies.org/rep\\_lawyer.html](http://www.thomasmorestudies.org/rep_lawyer.html) (accessed 20 Oct 2019)

<sup>3</sup>, For example, Robert Bolt. 1996. *A Man for all Seasons*. Harlow: Heinemann

<sup>4</sup> Roland Barthes. 2000. *Mythologies*. London: Vintage

brain as that 'object for anthologies, a true museum exhibit'<sup>5</sup>. With Thomas More a candidate for exhibition in this mythological museum of superhuman artefacts would undoubtedly be his *conscience*, to which, Dennis Klinck remarks, More was 'notoriously devoted'<sup>6</sup>. It was this internalised faculty More used to significant public and private effect in his administrative and procedural activities as a statesman, lawyer and, crucially, Lord Chancellor of the Equity jurisdiction<sup>7</sup>. An analysis of Equity in modernity involves, therefore, not just Thomas More, who remains a highly valued symbol of English law, but an understanding the impact of conscience through Chancery as indicative of Equity's value to English law.

I consider the nature of Equity in capitalist modernity to be contingent upon a combination of materially historical, socioeconomic, political and psychological factors<sup>8</sup>. As the *Gazette* poll implied, it was the high moral integrity and authority of More's conscience that is an enduring pillar of the nation's legal tradition. *The Times* newspaper further concluded that the former Lord Chancellor was the most likely representation the English people would give of a man who embodied all that was best in English civilization and history<sup>9</sup>. Further, that at his death, as John Guy claims, More had 'earned his place among the very few who have enlarged the horizon of the human spirit'<sup>10</sup>.

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<sup>5</sup> Barthes, 2000, p.68

<sup>6</sup> Dennis R. Klinck. 2010. *Conscience, Equity and the Court of Chancery in Early Modern England*. Farnham: Ashgate, p.42

<sup>7</sup> J.A. Guy. 2000. *Thomas More*. London: Arnold, pp.1-18; Russell K. Osgood. 2006. Law in Sir Thomas More's *Utopia* as Compared to His Lord Chancellorship. *Thomas More Studies 1: Utopia*, pp.177-187; Travis Curtright. 2009. Humanist Lawyer, Public Career: Thomas More and Conscience. *Moreana*, Vol.46, No. 176

<sup>8</sup> The expression of modernity that can be traced throughout this article is indelibly marked by capitalism as form of 'systematic production' broadly defined, although capitalism itself will not be examined in depth here. Modernity is construed, moreover, as a 'Western' phenomenon, insofar as, to echo Anthony Giddens, references to the development or evolution of civil justice is a reference 'to institutional transformations that have their origins in the West' (Anthony Giddens. 1991. *The Consequences of Modernity*. Cambridge: Polity Press, p.174)

<sup>9</sup> *The Times*, 7<sup>th</sup> February 1978, quoted in Guy, 2000, p.17.

<sup>10</sup> J.A. Guy. 1980. *The Public Career of Sir Thomas More*. Brighton: The Harvester Press, p.203

For both More's predecessor Cardinal Wolsey and More himself 'conscience remained front-and-centre as far as Chancery was concerned'<sup>11</sup>. The cusp of the Reformation saw the medieval order 'yielding to an intellectual and economic revolution', and Christendom 'rent by the divisions between Protestant and Catholic'<sup>12</sup>. Thomas More's conscience smashed, with devastating effect, against the first brutal vestiges of modernity and it cost him his life. More also guided Equity towards modernity by, for example, insisting on injunctions 'to prevent unconscientious use of legal rights', an early example of the doctrine of unconscionability that remains indicative of Equity's relative flexibility and discretion within the Common Law<sup>13</sup>.

## 2. Conscience and moral authority

Examining More's conscience as both mythical and historical provides a bridge between early modern Equity and its present form in the twenty-first century. Christian doctrine relied on metaphysical definitions of Equity as an *ideal* or *principle* which find early formulation, primarily, in Aristotle, to inform the role and place of conscience as More understood it<sup>14</sup>. More's impact on the history of Equity was his contribution to a form of civil justice adjudication directed by conscience and permeated by a significant moral

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<sup>11</sup> Klinck, 2010, p.43

<sup>12</sup> John Cardinal Wright. 1976. Saint Thomas More, patron of Lawyers and Model for Our Changing Times. *Moreana*, No. 51 (September), p.98

<sup>13</sup> Harold Potter. 1931. *An Introduction to the History of Equity and its Courts*. London: Sweet & Maxwell, p.45. The extent of the flexibility and discretion of Equity is widely debated and often discussed in terms of the level of containment of flexibility *within* the rules-based framework and by the points at which rights arise. As Alison Dunn maintains in her discussion of *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472, despite the view of 'Equity as one in which good morals, ethical justice, duties and reason hold sway, the location of its operation is often within tightly construed property principles' (Alison Dunn. 2012. *National Provincial Bank Ltd v Ainsworth* (1965). *Landmark Cases in Equity*. Edited by Charles Mitchell and Paul Mitchell. London: Bloomsbury, p.580); see also: Lord Eldon LC in *Shedden v Goodrich* (1803) 8 Ves 481 at 497; Langton J in *Greenwood v Greenwood* [1937] P 157 at 164; Lord Neuberger in *Chukorova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 20, at 97 and 98

<sup>14</sup> Following Aristotle's conception of Equity (see for example Aristotle. 2009. *Nicomachean Ethics*. Translated by David Ross. Oxford: Oxford University Press, p.99), it was Christian authors including Thomas Aquinas and Jean Gerson that would provide the substantive arguments for its authority that underpinned More's thinking. See Timothy O. Endicott. 1989. The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity. *Toronto, Faculty of Law Review*, Vol. 47, No. 2, pp.549-570

ethos, what Ralph A. Newman calls, concerning contemporary Equity, 'the expression of standards of decent and honourable conduct which are the mark of a morally mature society'<sup>15</sup>.

More's conscience engendered a particular form of authority informed by faith and Catholic doctrine. More's conscience directed towards enforcing the will of God and the Church led him, for example, to spend a great deal of energy rooting out, convicting and executing heretics in the years before his Chancellorship<sup>16</sup>. Based on the confession of Sir George Throckmorton to Henry VIII in October 1537, Guy describes how 'More wanted to be remembered not for *Utopia* or his achievements as Lord Chancellor, but for his stand against Henry VIII'<sup>17</sup>. A stand that More principally took in the face of the King's desire: a desire to divorce his first wife, Catherine of Aragon, and a desire to remarry against the will of the Pope and the Catholic Church, to whom More was a resolute devotee. Yet, that same conscience in the hands of the inquisitor-More - a side of his character some commentators have suggested he might have shared with the Nazis<sup>18</sup> - made him a fanatic.

More's conscience-in-action informed positive and negative intellectual projects: a stand against a King whose fevered desire threatened the traditional foundations of the nation, and the torture and murder of so-called 'heretics'. More, like the dualities of Equity, engendered authority and an 'anti-legal element' as a kernel of discretion at the heart of

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<sup>15</sup> Ralph A. Newman. 1973. The General Principles of Equity, in *Equity in the World's Legal Systems: a Comparative Study (dedicated to Rene Cassin)*. Edited by Ralph Newman. Brussels: Établissements Émile Bruylant, p.599

<sup>16</sup> More's role as inquisitor and persecutor of what the Catholic Church perceived to be heretics (Lutherans in the main) has played a significant role in many of the revisionist histories of recent years. Whilst these histories serve to reformulate how More's conscience is perceived and alters the complexion of his Chancellorship, his role as a heretic-hunter, a mission he conducted via the Star Chamber rather than Chancery, can be viewed for present purposes as something separate from his role vis-à-vis Equity.

<sup>17</sup> Guy, 2000, p.21

<sup>18</sup> See, for example, Jasper Ridley. 1982. *Statesman and Fanatic: Thomas Wolsey and Thomas More*. London: Constable

formal law and governance in which rule-compliance underpinned by precedent were becoming the norm<sup>19</sup>. Hence, conscience was the moral principle which gave Chancellor More 'the cognitive and coercive authority to pronounce decisions in his courts and bind litigants to observe them'<sup>20</sup>. From the perspective of the history of Equity, W.S. Holdsworth describes this period as one in which 'the common law became more rigid, and less closely connected with the person of the king'<sup>21</sup>. 'The stream of equity ceased to flow through the channel of the common law courts', Holdsworth argues, 'and flowed through the channel of the Council and the Chancery'<sup>22</sup>.

As a divine moral authority, More's conscience had long aimed at forms of authoritarianism by, for instance, enabling 'abstract justice to be done in individual cases, at the cost of dispensing (if necessary) with the law of the state'<sup>23</sup>. Further, More did not claim conscience as a personal standard 'but an objective one', hence its independence from 'the king's prerogative or the individual magistrate'<sup>24</sup>. Harold Potter maintains that the ecclesiastical Chancellors, of which More was arguably the last in vocation and spirit if not precisely in his training, 'tended naturally to derive their ideas from the conceptions of the canonists. These conceptions depended upon the theory that the law of God governed the universe, and hence His law and the law of nature and reason, which were nearly synonymous, predominated the rules of any State'<sup>25</sup>. When applied to the theory of transcendentalism that accounts for More's application of conscience as a devout Catholic, statesman and lawyer it is clear from Potter's claim that, shaped by the

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<sup>19</sup> 'Anti-legal' was a definition of the nature of Equity made by the twentieth-century jurist Roscoe Pound. See Roscoe Pound. 1905. *The Decadence of Equity*. *Columbia Law Review*, Vol. 5, No. 1 (Jan), pp. 20-21

<sup>20</sup> Guy, 1980, p.43

<sup>21</sup> W.S. Holdsworth. 1925. *Sources and Literature of English Law*. Oxford: Clarendon Press, p.178

<sup>22</sup> Holdsworth, 1925, p.178

<sup>23</sup> Guy 2000, pp.186-208; Holdsworth, 1925, p.179

<sup>24</sup> Fortier, 2005, p.102

<sup>25</sup> Potter, 1931, p.37

teachings of the Catholic Church, More's conscience provided him with a single point of reference for his actions.

A backdrop to the change in the socioeconomic and political landscape of Tudor England that More witnessed remained his faith in the laws of God. How faith manifested in More's Equity brings to mind Pierre Teilhard de Chardin's notion of faith as an operative power, meaning an efficacy to prayer that is both tangible and certain in the world. As de Chardin suggests, in a manner that resonates with descriptions of the moral authority of More's conscience discussed here, 'all the natural links of the world remain intact under the transforming action of "operative faith"; but a principle, an inward finality, one might almost say an additional soul, is superimposed upon them'<sup>26</sup>.

Further, the influence of Catholicism contributed to More's Equity as a paternal order. Pierre Legendre talks of paternity within the procedural juridical structure as More would have recognised it, dominated as More's Equity was by the centrality of a judge-cum-father (confessor)<sup>27</sup>. And despite Legendre's focus on Roman Law, a civil law system that Guy maintains did not threaten the authority of the Common Law system during the Tudor period, the paternal figure as both external, public judge and internal, private father-confessor finds form in the image of Chancellor More<sup>28</sup>.

More undertook both formal, morning sittings as a judge in Chancery and Star Chamber and an open hall confessional at his home in Chelsea in the afternoon, so he might allow litigants to 'more boldly come to his presence'<sup>29</sup>. More was viewed (and viewed himself),

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<sup>26</sup> Pierre Teilhard de Chardin. 1964. *Le Milieu Divin: An Essay on the Interior Life*, London: Fontana, pp.135-136

<sup>27</sup> Pierre Legendre. 1997. *Law and the Unconscious: A Legendre Reader*. Edited by Peter Goodrich. Translated by Peter Goodrich with Alain Pottage and Anton Schütz. Basingstoke: Palgrave Macmillan; Guy, 2000, p.171

<sup>28</sup> J.A. Guy. 1977. *The Cardinal's Court*. Hassocks: The Harvester Press, p.131

<sup>29</sup> William Roper. 1626. *Life of Sir Thomas More*. [Online] Available at <http://www.fordham.edu/halsall/mod/16Croper-more.asp> (accessed 31 Oct 2019)

in this sense, as a ‘family man’ who garnered respect not only from his wife and children, but the extended family of litigants who sought his counsel, wisdom, discretion, and, above all, the divine moral authority of his conscience. William Roper, More’s son-in-law, highlights this view of More in his book, *Life of Sir Thomas More*<sup>30</sup>. More acknowledges his paternal role and duty in an illustration of domesticity that implies a belief in principles that extend far beyond his home life:

You see, when I come home, I’ve got to talk to my wife, have a chat with my children, and discuss things with my servants. I count this as one of my commitments, because it’s absolutely necessary, if I’m not to be a stranger in my own home. Besides, one should always try to be nice to the people one lives with, whether one has chosen their company deliberately, or merely been thrown into it by chance or family-relationship – that is, as nice as one can without spoiling them, or turning servants into masters<sup>31</sup>.

More’s intellectual tradition and understanding of conscience – his legacy of a moral ethos underpinning general equitable principles and doctrines of, *inter alia*, honourable conduct – has assumed a mutant form in contemporary civil justice. Whilst More offers a conceptual bridge between Equity then and now, the socioeconomic and political contexts in which Equity exists today have changed. What I refer to as Equity fetishism shows that, whilst the language of conscience remains at the forefront of contemporary civil justice and a basis for Equity’s reasoning and adjudication, conscience is transformed by the demands of economic reason. In place of conscience as the rich form of moral reasoning that More understood, is a hollow and transient ethics that tightly cleave to private property and notions of wealth creation and management.

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<sup>30</sup> Roper, 1626

<sup>31</sup> More’s letter to Peter Gilles in the preface to Thomas More. 1965. *Utopia*. Translated by Paul Turner. Harmondsworth: Penguin, p.30

It is important at this point to recognise the importance of the dialogue between socioeconomic and political factors, themes of conscience, and Equity, but, equally, that the dialogue is not new. John Guy, F.W. Maitland and others posit More as a key figure during a transitional phase in Equity's history, a 'sea-change' as Dennis R. Klinck suggests<sup>32</sup>. More's Equity existed on the cusp of two worlds. The first an ideal and intellectual project, a utopian view of Equity balancing out the need for certainty in rulemaking with the need to achieve fair results in individual circumstances through measures of discretion, agility, adaptability and flexibility. The second, Equity as a system of codification, precedent and rule, in which institutionalised moral capacities are those of brute economic and commercial efficiencies and cost-effectiveness. More's Equity and the conscience that guided it was a trigger for divisions within civil justice that capitalism has, since, exploited for the benefit of stakeholders.

### 3. More's sacred adjudication of profane equity

Nicholas Phillip's bill complained that although four out of five feoffees to his use were willing to execute their estate to him, one John Lilley had refused against 'all right and conscience'. Having neither 'ability nor power' to enter, and having no remedy at common law, the plaintiff begged More to compel Lilly to agree with his co-feoffees. No degree is extant in the case, but a writ of *subpoena* was issued, ordering the defendant's immediate appearance in Chancery to explain his alleged breach of trust<sup>33</sup>.

More's rise to the high office of Lord Chancellor, and the subsequent impact this office had upon Equity and civil justice, can be explained in the following ways. First, More was born into a family with legal traditions. Becoming a lawyer was all but determined for More at

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<sup>32</sup> Klinck, 2010, p.44

<sup>33</sup> Case report quoted in Guy, 1980, p.55



birth, and by late youth he was on track for a noteworthy legal career. Second, the indelible mark left on More and the wider legal landscape from the Tudor period onwards by his predecessor as Lord Chancellor, the formidable, ambitious, and despised, Cardinal Wolsey. Guy has suggested that the policies and procedures developed by Wolsey during his fourteen years as Lord Chancellor – many of which echo Legendre’s principle of paternity discussed above – were highly influential on More’s Chancellorship following Wolsey’s disgrace in 1529. Guy maintains that as Lord Chancellor, Wolsey insisted that litigants should present their complaints to him personally,

His system was of his own creation. He expected suitors to follow the procedures he laid down, to submit to independent arbitration wherever possible, and to be governed by the golden rule of equity: 'Do as you would be done by' – as Christ himself commanded in the Sermon on the Mount<sup>34</sup>.

Wolsey has a large part in the story of More's Equity. Potter describes Wolsey as the 'last of the succession of great ecclesiastical Chancellors who had built up a jurisdiction capable of great elasticity, and founded upon peculiar principles, dependent as they were primarily upon conscience rather than external acts'<sup>35</sup>. More trained and practised as a lawyer for several years before his Chancellorship. This means he differed from the prelate Wolsey in having training in law, although More continued to subscribe to Wolsey’s view of Chancery as an institution through which he could communicate and apply the laws of God.

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<sup>34</sup> Guy, 1980, p.131

<sup>35</sup> Potter, 1931, p.43

As the first lawyer in one hundred and fifty years to become Chancellor, More inherited Wolsey's ecclesiastical approach to the office as one between the sacred institutions of the church and the profane institutions of the law. As a lawyer, More's view of Equity was equally subject to an intellectual legal tradition not shared by Wolsey. What distinguished More's Chancellorship from Wolsey's was, arguably, More's emphasis upon tighter and more efficient forms of bureaucracy. 'Whereas Wolsey had been hubristic and relaxed about justice' Guy claims, 'More tightened up the practical procedures'<sup>36</sup>. More highlighted this distinction, as a lawyer rather than prelate, in the speech he gave at his trial for treason for failing to support Henry VIII's move away from the papal authority of Rome, when he thanked his King for placing him in so high an office as that of Chancellor, 'that he never did to temporal man before'<sup>37</sup>. As both a young lawyer and senior servant of the King, More's temporal and spiritual life coalesced in his professional life, as a human *corpus aequitas* that was, for a time, mirrored in and exercised through his command of Chancery Equity. This characterisation of More is perhaps most recognisable in the ambivalence of his features, at once unyielding and compassionate, in the famous portrait by Hans Holbein the Younger in 1527.

More's devotion to the Catholic Church provided a constant backdrop to his every word and deed as a lawyer, so even though he may have loved the King and the law, he ultimately had only one master, God<sup>38</sup>. His devotion to God and the Catholic Church were so profound that many, including his father, an eminent Common Law judge, believed it would take him away from practising law and into the priesthood<sup>39</sup>. Whilst still a young

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<sup>36</sup> Guy, 2000, p.218

<sup>37</sup> Sir Thomas More's Speech at his Trial. 1535. [Online] Available at <http://www.luminarium.org/renlit/moredefense.htm> (accessed 28th October 2019)

<sup>38</sup> Steven D. Smith. 2003. Interrogating Thomas More: The Conundrums of Conscience. *University of St Thomas Law Journal*, Vol. 1, No.1 (Fall), p.581 – 'More was a paragon of piety in its various dimensions'; Robert Keane. 2004. Thomas More as a Young Lawyer, *Moreana*, Vol.41, 160 (Dec.), p.71; Osgood, 2006, p.185 – 'More was a cruelly divided man, meaning he was torn between his desire to serve the Crown and his own wish to prepare for heaven'

<sup>39</sup> Keane, 2004, p.51

lawyer, following his daytime observance at the courts of Westminster Hall and the necessary socialising in the collegiate atmosphere of Lincoln's Inn, More would regularly decamp to the contemplative surrounds of Charterhouse. Then on the very fringes of the City of London Charterhouse was a place 'for men who sought asceticism, poverty, solitude and lifelong chastity [...] a place for men who were willing to detach themselves from the pursuit of pleasure, estates, riches and titles'<sup>40</sup>. This was a practice that More continued as an elder statesman and Chancellor, although eventually only in a private chapel near his house in Chelsea called the New Building.

Charterhouse was very different in temperament and tempo to Westminster Hall. The ascetic life More fostered in Charterhouse was the opposite of the proprietary and material assertions and aspirations of many of the litigants More encountered as Lord Chancellor. While the Christian Church remained a powerful and influential guiding hand in society, a growing interest in the value and power of private property showed ever clearer to More. In a telling parallel with the nineteenth century, this made the sixteenth century what R. H. Tawney has called, both an age of social speculation and social dislocation<sup>41</sup>. Capitalism was yet to emerge as a dominant social and political idea and force, and More saw nothing resembling the commercial form capitalism would assume in the aftermath of the Enlightenment<sup>42</sup>. The green shoots of both great theories of modernity were, however, in More's world in terms of the advantages that wealth and private property offered an individual who could successfully enforce a right or stake a claim. Hence, during his relatively short time as Chancellor More oversaw a sharp

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<sup>40</sup> Keane, 2004, p.52

<sup>41</sup> R.H Tawney. 1990. *Religion and the Rise of Capitalism*. London: Penguin, p.76

<sup>42</sup> Ellen Meiksins Wood argues that: 'The Enlightenment is typically conceived of as a, if not the, major turning point in the advance of modernity, and the conflation of modernity with capitalism is most readily visible in the way theories of modernity connect the Enlightenment with capitalism' (2017. *The Origins of Capitalism: A Longer View*. London: Verso, p.183)

increase in the business of Chancery involving, in the main disputes over real property and chattels real<sup>43</sup>.

The role of the Catholic Church (and the beginnings of Protestantism<sup>44</sup>) in the day-to-day life of civil justice under More's Chancellorship was significant. As was the influence of Canon Law, which proved a major battleground between More and another key figure in the development of Equity during this period, Christopher St. German<sup>45</sup>. 'St. Germain's [*sic*] studies in the canon law, and his knowledge of English law, naturally led him to interest himself in the development of equity', maintains Holdsworth, 'which, up to this time, had been closely connected with the canon law, because it had been mainly developed by the ecclesiastical Chancellors', notably Wolsey and to a lesser extent More<sup>46</sup>. 'More would have transformed the common law', argues Timothy Endicott, 'where St German would transform the chancellor's equity'<sup>47</sup>. More's adversarial dialogue with Christopher St. German centred on the latter's book, *Doctor and Student*, a text that framed secular conceptions of Equity for generations and questioned More's application of conscience in a nexus of sacred and profane adjudication<sup>48</sup>. 'On one side of the transition from spiritual to temporal supremacy lay the shattered and increasingly subordinate

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<sup>43</sup> Guy, 1980, p.50

<sup>44</sup> Even as More accepted the Great Seal and the office of Chancellor, the Reformation Parliament of 1529 was taking its seat and the inseparability of legal, political and religious interests of rival hues bound up in the activities of State was to become all the more acute, spearheaded by Henry VIII's unremitting desire to break free of his marriage to his Queen, no matter the extremity of action that would entail, and a level of anticlericalism advocated by the Common's (Guy, 1980, pp.110-125)

<sup>45</sup> More's devotion underpinned a particular and powerful belief in Canon Law as the true Law of Christendom; J.A. Guy. 1984. Thomas More and Christopher St. German: The Battle of the Books. *Moreana*, XXI, 83-84 (Nov.), p.14. In spite of the pervasive role of churchmen in shaping Equity and Chancery up to and in many ways including More, it is worth noting that, as Richard Hedlund claims, the 'exact influence of canon law on English equity is subject to debate. There was not a direct translation from the ecclesiastical courts into Chancery, but there are some stark similarities, in terms of both substantive and procedural rules' (2015. The Theological Foundations of Equity's Conscience. *Oxford Journal of Law and Religion*, Vol. 4, Issue 1, p.123)

<sup>46</sup> Holdsworth, 1925, p.186

<sup>47</sup> Endicott, 1989, p.567

<sup>48</sup> Holdsworth, 1925, p.185; Guy, 1984, pp.5-25

jurisdiction of spiritual law', argues Peter Goodrich, and the 'distinction is signalled most powerfully in the debate between Sir Thomas More and Christopher St German'<sup>49</sup>.

The importance of *Doctor and Student* is clear in the formation of modern Equity, and its endurance as one of the first legal textbooks is evidence of this. As Franklin Le Van Baumer states, *Doctor and Student* functioned as 'the basic handbook for law students up to the time of Blackstone', by which time the systemisation of Equity under the rising influence and authority of a nascent capitalism was underway and the Equity More fostered out of favour<sup>50</sup>. Contrary to More, St German stipulated that conscience in Equity did not rely on the Catholic imagination but was 'consistent with the ordinary law' and grounded in the 'law of reason, the law of God, and – particularly significant for his project – the law of man'<sup>51</sup>. In the eighteenth century, William Blackstone established directions as to the proper function of the Common Law courts in his *Commentaries*, including a clear rebuke to the role of conscience in adjudication.

Blackstone did not precisely echo St German's work but built on the foundations to further distance Equity from More's reasoning. Blackstone saw the systemisation of the law as his key aim, but it was, arguably, a continuation of the project of reconciling Christian thought and practice with aspects of the modern, secular law started by St German's desire to remove conscience 'as the motive force in equity'<sup>52</sup>. The foundations St. German laid are thus in evidence in the following passage from Blackstone:

For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and

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<sup>49</sup> Goodrich, 1996, p.16

<sup>50</sup> Franklin Le Van Baumer. 1937. Christopher St. German: The Political Philosophy of a Tudor Lawyer, *The American Historical Review*, Vol. XLII, No. 4, (July), p.631

<sup>51</sup> Klinck, 2010, p.50 and p.56

<sup>52</sup> Endicott, 1989, p549; Goodrich, 1996, p.17 – 'the principle effect of his [St. German's] arguments was to insist upon the right of the common law to incorporate or to subsume the spirituality. It is not that the spiritual jurisdiction should be removed or abandoned but rather that it be transferred so as better to reflect the 'true state of English law'.

steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded - *Non omnium, quae a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum quae constituuntur, inquiri non oportet: alioquin multa ex his, quae certa sunt, subvertuntur*<sup>53</sup>.

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<sup>53</sup> William Blackstone. 2009. *Commentaries on the Laws of England Book I*. [Online] Available at <https://www.gutenberg.org/files/30802/30802-h/30802-h.htm> (accessed 19 June 2019) at 69 and 70

Holdsworth argues that, for St. German in the sixteenth century ‘the rules of the common law were still fluid, and the rules of equity were still more so’, therefore, ‘it was possible that changes in common law rules, which made recourse to equity no longer necessary, would enlarge the jurisdiction of the common law courts and curtail the jurisdiction of the court of Chancery’<sup>54</sup>. ‘This was not possible’, concludes Holdsworth, ‘in the middle of the eighteenth century’<sup>55</sup>.

Dennis Klinck cautions against seeing St. German as the ‘harbinger of a new age of equity’, however, as his position was ‘hardly an abrupt departure from medieval concepts’ and he was as much ‘the inheritor and perpetuator of an old tradition as he was the progenitor of a new one’<sup>56</sup>. Despite their differences, therefore, both More and St. German contemplated the present and future of Equity and Common Law as much through the stained glass of the nave window, as from the ‘crib’ in Westminster Hall from where law students and young lawyers watched proceedings in the Court of Common Pleas, King’s Bench, and Chancery<sup>57</sup>.

Lawyers like More and St. German were men ‘who were by no means barren of piety and religion’, but as the discussion earlier showed, the figure of More as a lawyer is especially difficult to separate from the figure of More as a deeply pious man<sup>58</sup>. During his declaration upon being made Lord Chancellor More claimed he would ‘serve his majesty, but he *must* obey his God: he would keep the king’s *conscience* and his *own*’<sup>59</sup>. And in Roper’s *Life* is the notion that the Court of Chancery was the place that More’s private

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<sup>54</sup> W.S. Holdsworth. 1929. Blackstone’s Treatment of Equity. *Harvard Law Review*, Vol. 43, No. 1 (November), p.14

<sup>55</sup> Holdsworth, 1929, p.14

<sup>56</sup> Klinck, 2010, p.51

<sup>57</sup> Keane, 2004, pp.43-44

<sup>58</sup> Keane, 2004, p.59

<sup>59</sup> Lloyd, 1766, p.62

and public virtues converged; a public theatre for the expression of More's proto-saintliness that allowed it to achieve a firm grip on the popular imagination of the time<sup>60</sup>.

It is briefly important to note that the intellectual underpinnings of More's Equity were not limited to the divine but included humanist ideas traceable to the influence of mercantilism and philosophies in continental Europe<sup>61</sup>. More's friend Erasmus, his counterpart in the Roman law system of France and a publisher of *Utopia*, Guillaume Bude, and via another notable European humanist scholar Juan Luis Vives, who was both a visiting lecturer at Oxford and sometime houseguest of More's were all influential in his life and thinking. As Travis Curtright maintains, More was acquainted with humanist jurisprudence and the centrality of Equity to humanist doctrines was important in More's reasoning<sup>62</sup>.

In *Rhetoric*, Aristotle says of Equity that 'people regard it as just; it is, in fact, justice which goes beyond the written law'<sup>63</sup>. More would have been exposed to these Aristotelian ideas during his time as a student at Oxford in the early 1500s when waves of humanism were washing ashore from the continent<sup>64</sup>. More's peppers his reflections on humanism and humanist ideas throughout his *Utopia*, and especially during his fictitious discussions with Raphael in Book I, where they exchange views on the quality and value of ancient Greek and Roman notions of justice<sup>65</sup>. More's Equity as both sacred *and* profane, therefore, represents a key duality in the history of Equity and has marked and shaped both Equity and civil justice since.

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<sup>60</sup> Guy, 2000, pp.126-127

<sup>61</sup> Smith, 2003, p.581; Curtright, 2009

<sup>62</sup> Curtright, 2009, pp.81-83

<sup>63</sup> Aristotle. 2004. *Rhetoric*. Translated by W. Rhys Roberts. New York: Dover Publications, p.49

<sup>64</sup> Guy, 2000, pp.24-27

<sup>65</sup> More, 1965, pp.37-68



## 5. The popular and energetic bureaucrat

More was a dedicated and effective Chancellor, and evidence for both exists in the records of the suits that came before him. As Guy suggests, litigants presented More with 2,356 suits in the thirty-one months of his office, an average of 912 per year<sup>66</sup>. 'More's suitability for the lord chancellor's judicial work had been an important consideration at the time of his elevation to office', Guy continues, 'and the official expectation that he would become energetically involved in the management of Chancery and Star Chamber was soon fulfilled'<sup>67</sup>. More was a dedicated and perhaps somewhat fastidious bureaucrat, concerned with every detail of the causes that came before him and the accuracy and efficiency of their disposal<sup>68</sup>. More was, as a servant of the court, both willing and capable of confronting the rapidly increasing business of Chancery. A jurisdiction that was, by his hand, becoming increasingly distinct from the Common Law and forging peculiar forms of adjudication.

More inherited from Wolsey and continued to grow a very popular and sought-after institution in Chancery. 'There has *always* been some sort of an effort to bring private law into line with what the public interest is currently thought to require', argues Steve Hedley, in 'medieval and early modern times, legislation was a poor tool for this, and common law autonomy from the rest of government was accordingly quite strong – the occasional legislative inroad into the common law could be dismissed as just an unimportant refinement of the common law system'<sup>69</sup>. An increasingly litigious fervour concerning property and land disputes that arguably anticipated types of civil justice adjudication under capitalism swept into More's Chancery, but also reached across the

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<sup>66</sup> Guy, 1980, p.50

<sup>67</sup> Guy, 1980, p.50

<sup>68</sup> Some of this fastidiousness can be seen More's letter to his friend Peter Gilles, reprinted in the introduction to *Utopia*, in which More talks of being, 'extremely anxious to get my facts right' when discussing with Gilles the finer detail of the world he has conjured in the book. (More, 1965, p.30)

<sup>69</sup> Steve Hedley. 2011. Is Private Law Meaningless? *Current Legal Problems*, Vol. 64, p.91

private (civil) and criminal law spectrum, from commercial disputes to false imprisonment<sup>70</sup>. This fervour needed an outlet that was better than the equivalent at Common Law, and Chancery Equity could answer those needs.

'The court of conscience would archetypically proceed according to rules of conscience and would apply the norms of a justice that transcended the temporal law and its positive procedures', claims Goodrich, but more than that 'the courts of spiritual justice existed alongside the community and process of common law, not to apply a separate law to the community of the ecclesiastical estate in its institutional sense, the clerics and all who could plead the privileged of the clergy, but also to provide a parallel set of rules for those who would seek some other justice than that available at common law'<sup>71</sup>. Equity did not achieve this feat by contradicting the Common Law (the Court of King's Bench and Common Pleas). The practices of many lawyers straddled both jurisdictions, and it was not in their interests to undermine the other jurisdiction without inflicting damage upon themselves. As Guy explains, 'Wolsey's emphasis on Chancery and Star Chamber was only possible in the first place because he had secured the co-operation of many top common lawyers', and More continued to maintain this crucial, if somewhat difficult, relationship between the two jurisdictions<sup>72</sup>.

Equity's popularity, and the litigant's increasing desire for it, came from a simple fact of bureaucratic efficiency based on 'an independent body of rules regulating, amongst other things, the transfer and enjoyment of real property', where 'the Chancellor had taken on the mantle of an appellate court, meddling with the proceedings and reviewing the decisions of the common law courts according to principles of equity or conscience'<sup>73</sup>. But

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<sup>70</sup> Guy, 1980, p.50

<sup>71</sup> Goodrich, 1996, p.25.

<sup>72</sup> Guy, 1980, p.40

<sup>73</sup> Georg Behrens. 1998. An Early Tudor Debate on the Relation between Law and Equity. *Legal History*, Vol.19, No.2 (August), p.144

desire also came from a pervasive and popular appreciation of Equity as an idea. There was a sixteenth-century culture saturated in Equity as a 'powerful concept' that More would undoubtedly have appreciated and understood<sup>74</sup>. 'Notions of equity play a prominent part in discourses that have or seek to have influence on major social conflicts and issues', Mark Fortier explains, continuing:

Equity appears in conjunction with other powerful notions, supporting them or simply accompanying them. Some of these notions – god, king, conscience, the people – may be more ubiquitous than notions of equity, but equity is their companion and is often deeply connected with the ideas that matter most. At times equity takes on a relation of identity with such ideas: god's law is equity, as is the king's law; the Christian conscience is guided by equity; the welfare of people is equity. In the realm of early modern ideas, equity moves in the highest company<sup>75</sup>.

As a popular institution, the Tudor Chancery, as we have seen, offered an alternative forum for adjudication and remedy unavailable at Common Law. This lack at the heart of the Common Law led to the 'mass defection' of litigants from the common law court to Chancery, which Georg Behrens argues, did not abate under More's Chancellorship but sped up<sup>76</sup>. By exposing the lack and inadequacies of the Common Law, More and the Equity of the Tudor Chancery ignited jurisdictional tensions. Equity's undermining of the Common Law in matters of civil justice, both procedural and doctrinal, prompted a counterattack from the Common Law on Equity's principles embedding longstanding tensions between the two jurisdictions<sup>77</sup>. Sir Henry Maine points to Equity's claim to override the Common Law 'by supposing a general right to superintend the

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<sup>74</sup> Fortier, 2005, p.2

<sup>75</sup> Fortier, 2005, p.2

<sup>76</sup> Behrens, 1998, p.144

<sup>77</sup> Behrens, 1998, p.144

administration of justice' based on the paternal authority of the King as untenable<sup>78</sup>. 'The growth of the English constitution rendered such a theory unpalatable after a time', argues Maine, 'but, as the Jurisdiction of the Chancery was then firmly established, it was not worth while [*sic*] to devise any formal substitute for it'<sup>79</sup>. The reason that Chancery was so firmly established in modernity as an authoritative and respected legal institution was, I argue because of More's influence.

#### 4. Conclusion

Under More's Chancellorship Equity functioned in harmony with the demands of its public, and the growing case-load of Chancery revealed a general and popular enthusiasm for its forms of civil justice over those of the Common Law courts. It is because of More's bureaucratic skills, knowledge, and deeply held faith that Chancery appeared and functioned as it did. His intellectual battle with St German puts More, and the emphasis he placed on conscience in particular, at odds with the secular course set for Equity from the middle of the 16<sup>th</sup> Century, making him a relic rather than a reformer. Yet More's enduring and transformative effect on the legal imagination is clear.

More is an important bridge between the relative authorities of inner and public lives. More was a pre-capitalist legal divine before the onset of Enlightenment self-regarding ethics took hold and unleashed the rise of capitalism. More's time was, as R. H. Tawney maintains, a period 'seething with economic unrest and social passions', which led to his untimely death faced with the passions of the Reformation and Henry VIII's schism with the Pope and Rome<sup>80</sup>. But he also contributed to the elevation of private property to an unconditional right and the development of a creed of the individual as 'absolute master of his own, and, within the limits set by positive law, may exploit [property] with a single

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<sup>78</sup> Sir Henry Maine. 1972. *Ancient Law*. London: J.M. Dent & Sons Ltd., p.42

<sup>79</sup> Maine, 1972, p.42

<sup>80</sup> Tawney, 1990, p.142

eye to his pecuniary advantage, unrestrained by any obligation to postpone his own profit to the well-being of his neighbours, or to give account of his actions to a higher authority'<sup>81</sup>. It was a theory of property, as Tawney maintains, 'which was later to be accepted by all civilized communities'<sup>82</sup>.

More's Equity emerged as a juridical form desired rather than loathed or feared by those who sought its brand of civil justice. More was a deeply spiritual lawyer and gatekeeper to the bounty of Equity in the sixteenth-century Chancery. His vision of Equity and its authority grounded in conscience would make Equity a moral project with centuries of 'worrying at its core'<sup>83</sup>. Capitalism continues to carve out Equity as an object of devotion within the field of civil law, a fetish for those who seek it and for whom it promises rights and protections in private property and wealth. More is, for better or worse, responsible for making Equity what it is today.

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<sup>81</sup> Tawney, 1990, p.151

<sup>82</sup> Tawney, 1990, p.151

<sup>83</sup> Alastair Hudson. 2014. *Great Debates in Equity and Trusts*. London: Palgrave, p.61