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Work and the Legal Person in Thomas More's *Utopia*

Andreea D. Boboc, Ph.D.*

I. INTRODUCTION

Whether expressed as *opus*, *ars*, or *labor*, work figures prominently in Thomas More's *Utopia*, anchoring in law the personhood of both sovereign and lawbreaker.¹ This paper discusses the kinds of work involved in shaping the legal person of the sovereign and the thief, and explains how these disparate legal persons are surprisingly joined together by the concept of royal justice. My argument draws upon the shifting attitudes towards the death penalty for theft in early modern England, the effects of enclosure under Henry VIII, and the long tradition of viewing medieval and early modern kings as artisans.

Focusing on work as a critical ingredient in defining the person-at-law allows us to reconcile the legal complexities of *Utopia*, a text that on the surface purports to dispense with the subtleties of law and lawyers altogether. Already in Book I, the English lawyer, a defender of the status quo, is unceremoniously silenced by the Cardinal, who prefers to hear Raphael Hythloday's arguments against the death penalty for theft; and in Book II, readers learn not only that lawyers are banished from *Utopia*, but also that Utopians work as lawyers for themselves:

As for lawyers, a class of men whose trade it is to manipulate cases and multiply quibbles, they exclude them entirely. They think it is practical for each man to plead his own case, and say the same thing to the judge that he would tell his lawyer. This makes for less confusion and readier access to the truth. [. . .] This sort of plain dealing is hard to find in other nations, where they have such a mass of incomprehensibly intricate laws. But in Utopia everyone is a legal expert. For the laws are very few, as I said, and they consider the most obvious interpretation of the law to be the fairest.²

In a text replete with such legal iconoclasm, why concentrate on the legal person at all? As I argued elsewhere, while the pre-modern English legal person is conceptually ambiguous and difficult, its inherent tensions and idiosyncrasies

* A version of this paper was given at the University of the Pacific School of Law (McGeorge) on February 25, 2016, as part of the symposium UTOPIA 500. I am grateful to Professor Michael Malloy and to his students for the illuminating conversation that ensued. I am also grateful to Professor James Boyd White for his helpful comments on an earlier draft of this essay.

1. THOMAS MORE, *UTOPIA: LATIN TEXT AND ENGLISH* (George M. Logan, Robert M. Adams & Clarence H. Miller eds., Cambridge Univ. Press 2006).

2. *Id.* at 195.

make it particularly suitable for literary interpretation—my *métier* as a literary historian—and interdisciplinary work.³ Moreover, the law of persons precedes any other kind of law: we cannot talk about penalties in criminal law, for instance, without having a nuanced understanding of those whom we punish—a person-at-law. Joseph Vining reminds us that:

Persons do not come before a court self-defined or ready-made. A court must make a judgment before it can perceive, hear, or talk about “he,” “she,” “you,” “it,” “the plaintiff,” “the challenger,” or whatever other general term is used to refer to those who make the arguments on the merits. That judgment is guided by law like any other judgment. [. . .] The law of legal persons is separable and prior to any particular case.⁴

When defining a person-at-law, courts implicitly establish a person's social function.⁵ The legal and the social person cannot be divorced from one another. In fact, as Elizabeth Fowler points out, “legal persons . . . are best understood as personifications of social relations, as abstractions of social bonds that have been elaborated and given discursive life.”⁶ Social relations, in turn, are best delineated in the distribution of labor, especially in a society roughly divided into “those who pray, those who work, and those who fight.”⁷

To be sure, modern readers cannot take at face value More's proposition that a criminal's personhood be reworked through forced labor; nor can readers fully embrace it as a solution to contemporary problems within the criminal justice system. For American readers, the groups of convicts fettered together in *Utopia* bring to mind the chain gangs of the 1930s with all their racist connotations.⁸ The British, too, would sooner leave their penal labor laws in the early 20th century.⁹ Such slippages of the early modern imaginary into modern legal practice are a

3. THEORIZING LEGAL PERSONHOOD IN LATE MEDIEVAL ENGLAND 1–28 (Andreea D. Boboc ed., Leiden: Brill Academic Publishers, 2015). See *What We Talk about When We Talk about Persons: The Language of a Legal Fiction* HARV. L. REV. 1745, 1745–68 (2001). [hereinafter *Talk about Persons*] (discussing modern legal persons).

4. JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 144 (Yale Univ. Press 1978).

5. *Talk about Persons*, *supra* note 3, at 1760–61.

6. ELIZABETH FOWLER, *LITERARY CHARACTER: THE HUMAN FIGURE IN EARLY ENGLISH WRITING* 186 (Cornell Univ. Press 2003).

7. MEDIEVALIST.NET, *Those Who Pray, Those Who Work, Those Who Fight* (Jan. 31, 2016) <http://www.medievalists.net/2016/01/31/those-who-pray-those-who-work-those-who-fight/> (on file with *The University of the Pacific Law Review*).

8. Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 441–78 (1997).

9. England and Wales abolish penal servitude, hard labor, and prison divisions in 1948 through an act of Parliament called *The Criminal Justice Act*. The Criminal Justice Act, 11 & 12 Geo. 6 c. 58 (Eng. & Wales). Scotland and Northern Ireland make similar provisions in 1949 and 1953, respectively. Criminal Justice (Scotland) Act 1949, 12, 13 & 14 Geo. 6 c. 49 (Scot.); Criminal Justice Act (Northern Ireland) 1953, c. 14 (N. Ir.), <http://origin-www.legislation.gov.uk/apni/1953/14> (on file with *The University of the Pacific Law Review*).

testament to the afterlife of *Utopia*, however stark they may seem for our modern sensibilities.

Nevertheless, when it comes to communal engagement with the rehabilitation of criminals, the American criminal justice system has yet to devise better solutions than More's utopian blueprint, according to which the entire community of the realm watches over those convicted of crimes and helps with their rehabilitation.

In a recent article that appeared in *The Atlantic*, Whitney Bennis explains how the exception to the Thirteenth Amendment to the Constitution is put to work in Louisiana by using the example of Angola Prison.¹⁰ Because section one of the Amendment forbids slavery or involuntary servitude "*except as punishment for crime whereof the party shall have been duly convicted,*" incarcerated persons may be compelled to work against their will.¹¹ Refusal to work can result in harsh punishments, such as "solitary confinement . . . and revocation of family visitations."¹² These kinds of punitive measures have been repeatedly correlated with a variety of mental health issues, most recently in Stephen C. Richards' provocative volume on the Marion Experiment.¹³ Yet such practices persist in criminal sentencing, and solitary confinement was only recently banned for juveniles in federal prison in 2016.¹⁴

Solitary confinement is an 18th century penal development, ironically introduced with good intentions by the Philadelphia Society for Alleviating the Miseries of Public Prisons, a group composed largely of Quakers, who met for the first time at the house of Benjamin Franklin in 1787.¹⁵ The idea was to give prisoners the privacy necessary to contemplate their sins, repent, and find redemption while safeguarding them against "more viscerally cruel punishments such as flogging, the public humiliations of the pillory and stocks, and the misery of filthy, violent, overcrowded jails."¹⁶ To be fair, the initiators of solitary confinement could not have foreseen its pernicious effects stemming from lack of meaningful work and companionship, especially over prolonged periods of time. Nevertheless, as Laura Rovner points out, "as far back as 1890, the U.S. Supreme

10. I am grateful to Cynthia Dobbs for pointing this article out to me. Whitney Bennis, *American Slavery, Reinvented*, THE ATLANTIC (Sept. 21, 2015), <http://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> (on file with *The University of the Pacific Law Review*).

11. U.S. CONST. amend XIII, § 1.

12. Bennis, *supra* note 10.

13. THE MARION EXPERIMENT: LONG-TERM SOLITARY CONFINEMENT AND THE SUPERMAX MOVEMENT (Stephen C. Richards ed., Southern Illinois Univ. Press 2015) [hereinafter MARION EXPERIMENT].

14. Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html (on file with *The University of the Pacific Law Review*).

15. MARION EXPERIMENT, *supra* note 13, at 141.

16. HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT 3 (Jean Casella et al. eds., 2016).

Court recognized the significant harms solitary confinement causes and nearly declared it unconstitutional.”¹⁷ What is astonishing, however, is that contemporary jails retain and expand on this form of lawful torture despite (or perhaps, because of) its deleterious effects on the human psyche.¹⁸ In many jails, solitary confinement is purposefully deployed as a mechanism of intimidation and control.¹⁹ In his 2015 plea to Congress, Justice Kennedy spoke against the twin evils of prison overcrowding and solitary confinement, and criticized lawmakers for focusing more on guilt and innocence rather than correction and rehabilitation.²⁰

Ironically, although the Middle Ages have traditionally been demonized as a cruel and primitive time, medieval lawmakers would not have contrived a punishment so ruthless that it completely cut off an individual's ties to the community of the realm.²¹ In fact, as G. Geltner has taught us:

Most male prisoners, for example, could maintain their extramural status by situating themselves in an appropriate ward, through arranging for suitable services, and by relying on existing patronage ties. . . . Medieval prisons operated as spatial and temporal extensions of urban [communities], connecting free society back to itself.²²

Moreover, medieval criminal law allowed offenders to abjure the realm under the protection of sanctuary (and, in time, find a different community to belong to).²³ In ecclesiastic law, excommunication, the harshest form of punishment, which involved public shaming, shunning, or even banishment, could be revoked in response to public penance, thus restoring individuals' ties to their communities.²⁴ Recent legal research supports such medieval legal remedies, demonstrating that not only correction and rehabilitation, but also deterrence and crime prevention, fail without the involvement of the community-at-large.²⁵

Work is the most meaningful form of communal participation, and experience shows that convicts are more likely to do the internal work necessary

17. Laura Rovner, *Solitary Confinement and the Law*, in *HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT* 179, 179 (Jean Casella et al. eds., 2016).

18. *MARION EXPERIMENT*, *supra* note 13, at 60–61.

19. *Id.* at 3.

20. Editorial Board, *Justice Kennedy's Plea to Congress*, *N.Y. TIMES* (Apr. 4, 2015), available at <http://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html> (on file with *The University of the Pacific Law Review*).

21. GUY GELTNER, *FLOGGING OTHERS: CORPORAL PUNISHMENT AND CULTURAL IDENTITY FROM ANTIQUITY TO THE PRESENT* 62–68 (2014).

22. GUY GELTNER, *THE MEDIEVAL PRISON: A SOCIAL HISTORY* 81 (2014).

23. Eilperin, *supra* note 14.

24. *Id.*

25. See DAVID M. KENNEDY, *DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION* (2009).

to rehabilitate themselves when inspired by good role models from the community of the realm.²⁶ In fact, as Etienne Benson reports, before the “punitive turn” of the 1970s, inmates were routinely encouraged to make progress towards their rehabilitation and reintegration in society by “develop[ing] occupational skills and resolv[ing] psychological problems.”²⁷ One critical difference between More’s fictional proposals for rehabilitating criminals through work and similar measures in the American justice system is that More’s utopian offenders are reintegrated into the community-at-large immediately after sentencing.²⁸ In contrast, American offenders are allowed to commune only with other criminals and their wardens during their prison sentence while their ultimate reintegration into the community remains doubtful.²⁹ Because they lack professional skills and often suffer from substance abuse and mental health issues, not to mention societal bias, up to seventy percent of American male parolees are prone to recidivism within three years of their release.³⁰

More imagines a solution for the prison-overcrowding problem (that also plagued his medieval and early modern contemporaries) without making “good behavior” in prison the prerequisite for community reintegration.³¹ In contrast, “good behavior” in American prisons often means turning a blind eye to racism and labor law violations embedded in some prison practices.³² Refusal to work in American prisons is routinely construed as refusal to integrate, not as a protest against the abuses to which many prisoners are subjected behind prison walls.³³ More’s convicts do not face such problems since the whole community keeps a watchful eye on them from the beginning of their sentence and takes a compassionate interest in their moral rehabilitation and safety.³⁴

Psychologically, too, More’s proposal for the rehabilitation of criminals is superior to current American practice. The proposal places agency squarely into the hands of convicts, who must progress morally or risk disappointing their community-at-large, which munificently welcomes them back despite their misdeeds. In More’s *Utopia*, community models generosity for the evildoers,

26. NATHAN JAMES, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 14 (Jan. 12, 2015).

27. Etienne Benson, *Rehabilitate or Punish?*, AM. PSYCHOL. ASS’N (2003), <http://www.apa.org/monitor/julaug03/rehab.aspx> (on file with *The University of the Pacific Law Review*).

28. MORE, *supra* note 1.

29. MARION EXPERIMENT, *supra* note 13.

30. Elizabeth Marlow & Catherina Chesla, *Prison Experiences and Reintegration of Males Parolees*, ADVANCES IN NURSING SCI. E-17 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2886197/> and <https://fas.org/sgp/crs/misc/RL34287.pdf> (on file with *The University of the Pacific Law Review*); JAMES, *supra* note 26, at 7.

31. MORE, *supra* note 1.

32. Gorman, *supra* note 8, 472, 477.

33. *Id.* at 452–53.

34. MORE, *supra* note 1.

whose personhood is redeemed through both inner and communal work.³⁵ In contrast, current prison practices often model cruelty and abuse while expecting—quite illogically—that inmates develop into better people.³⁶

One should be cautious, however, not to construe More's *Utopia* as a forthright call to reform penal practice in early modern England. Although some of More's proposals for reintegrating prisoners through work have become reality in subsequent centuries, within *Utopia's* framework, the intent of those proposals remains equivocal. Nothing in *Utopia* is straightforward; even the word "utopia" is ambiguous because, in Ancient Greek, it can mean both "a good place" and "no place," and many of the names of persons and places in *Utopia* point to nonsense.³⁷ More's ambiguity, due partly to his position within Henry VIII's legal apparatus, and partly to the volatile political environment he inhabited, requires us to treat *Utopia* with hermeneutic caution, yet frees us to embrace satire and irony as forms of circumstantial truth, just as circumstantial evidence must suffice when direct evidence is unobtainable.³⁸

More's arguments for punishing theft with penal labor, rather than death, become clearer when they are contextualized in the shifting attitudes towards the death penalty in his legal environment. Throughout the Middle Ages, the death penalty, which had been on the books for felonies, including theft above 12 pence, had been enforced only in a minority of cases.³⁹ As Thomas A. Green has taught us, juries often resorted to nullification, pre-screening of offenders, partial verdicts, or simply refused to convict in order to shield "lesser" criminals from the death penalty.⁴⁰ The reputation and the circumstances of the accused (for instance, whether the accused was angry or "in dire straits" when he committed the crime) acted as mitigating circumstances in the decision of the medieval jury, which had the "power to render verdicts against the evidence."⁴¹ For the most part, only inveterate reoffenders who posed a real danger to the community were sentenced to death.⁴² This state of affairs changed dramatically in early modern England, a period that was marked by "notable developments in the law of

35. *Id.*

36. Gorman, *supra* note 8.

37. MORE, *supra* note 1, at xxvi; *Study Guides for Utopia*, THE CTR. FOR THOMAS MORE STUD. 2 (2005), http://thomasmorestudies.org/utopia/Utopia_guide.pdf (on file with *The University of the Pacific Law Review*) (listing Utopian names and places).

38. This ambiguity might come from writing *Utopia* under the reign of a sovereign known for his mercurial and ruthless character. See Thomas Wolf, *Social Utopia and Political Reality in Thomas More*, 3 U. TOL. L. REV. 327, 328–29 (1971). For R. W. Chambers, "Utopia is, in part, a protest against the New Statesmanship: against the new idea of the autocratic prince to whom everything is allowed." R. W. Chambers, *From Utopia and the Problems of 1516*, in THOMAS MORE UTOPIA: A REVISED TRANSLATION BACKGROUND CRITICISM 172, 173 (George M. Logan ed. 3d ed. 2011).

39. THOMAS GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800 60–61 (1985).

40. *Id.* at 61.

41. *Id.* at 26.

42. *Id.*

theft . . . either statutory . . . or judicial.”⁴³ Consequently, 72,000 thieves were hanged during the reign of Henry VIII alone.⁴⁴ In Book I, Raphael bitterly condemns the practice of putting thieves to death, noting that the death penalty benefits neither the thieves nor the community, nor does it act as a deterrent.⁴⁵ Before we delve into the ways in which work transforms criminals in *Utopia*, we need to become acquainted with the tradition of viewing English kings as craftsmen because, as More argues implicitly, it is the sovereign who must craft new, forward-looking laws for punishing criminals in ways that turn them into useful members of society. In More’s *Utopia*, work unexpectedly binds together the legal persons of the thief and the sovereign. Both thief and sovereign labor in the service of the community: While the thief works towards his rehabilitation, the sovereign works to insure the existence of punitive measures that allow the thief to do so.

II. THE LEGAL PERSON OF THE KING AS A CRAFTSMAN

As Lisa Cooper has taught us, the king-as-craftsman is a significant trope in the cultural history of England from the 9th to the 16th century.⁴⁶ There are numerous examples of the *rex as artifex* in the genre called the mirror of princes, which are books that illustrate proper and desirable conduct for sovereigns:

[the mirror of princes] uses artisanal metaphors or episodes that involve crafting figures to ask its readers, often more than once, to contemplate the modes, means, and effects of princely action; each work brings the artisan forward for (putatively) princely purview as a subject whose labor the king must not only regulate, but upon which he must also depend and model his own art of rule.⁴⁷

The trope of *rex as artifex*, fashions the personhood of the sovereign as someone who must “forcefully wield the (human) tools at his disposal in the crafting of a kingdom.”⁴⁸ Law is perhaps the most impactful tool a monarch can wield.

Thomas More extends the craftsmanship metaphor into the legal domain by proposing in Book II of *Utopia* a legal personhood for the sovereign as craftsman of new penal laws.⁴⁹ These new laws do away with the death penalty and allow convicts to redeem themselves through work beneficial to the community of the

43. *Id.* at 120.

44. MORE, *supra* note 1, at 57 n. 19.

45. *Id.*

46. LISA H. COOPER, ARTISAN AND NARRATIVE CRAFT: IN LATE MEDIEVAL ENGLAND 147 (2011).

47. *Id.*

48. *Id.* at 154.

49. MORE, *supra* note 1.

realm.⁵⁰ Craftsmanship (and later, craftiness) becomes policy for the sovereign who shapes consequential, forward-looking punishments for the convicts.⁵¹

There are numerous examples of sovereigns wielding both craftsmanship and craftiness in Book II of *Utopia*.⁵² In fact, the two coexist in the person of the sovereign, whose *raison d'état* allows him to circumvent traditional (private) morality for political (public) ends.⁵³ One of these public ends for the leaders of Utopia is keeping their people alive during combat.⁵⁴ Privately, Utopians consider war a bestial endeavor.⁵⁵ For them *bellum*, the Latin word for war, comes via folk etymology from *beluarum*, the Latin genitive plural of *belua*, “beast”:

Bellum utpote rem plane beluinam, nec ulli tamen beluarum formae in tam assiduo, atque homini est usu, summopere abominantur [They utterly despise war as an activity fit only for beasts, yet practiced more by man than any other animal].⁵⁶

Faced with the destruction of their commonwealth, Utopian rulers employed craftiness—in Latin *ars* and *dolus*—that is, skill and cunning, to preserve the lives of their people.⁵⁷ They outsource their wars to the Zapoteles, who are amoral and gold-greedy and presumably deserve to die;⁵⁸ they “shift their ground silently by night or get away by some stratagem” if they are outnumbered;⁵⁹ they “fortify their camps thoroughly” and “with unbelievable speed”;⁶⁰ and they invent new kinds of weapons and war machines—for instance, an armor in which they can swim as a standard part of their training.⁶¹ Utopian rulers prove Machiavellian in their goals that always justify their means: they bribe the enemy combatants to kill those among them who started the war⁶² or prevented surrender⁶³—two of the very few instances in which the Utopians approve of the death penalty.⁶⁴ They consider these stratagems legitimate because “they pity the mass of the enemy’s soldiers almost as much as their own citizens, for they know

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 201 n.102.

54. *Id.* at 205.

55. *Id.* at 201.

56. *Id.* Unless otherwise noted, all quotations are from THOMAS MORE, *UTOPIA: LATIN TEXT AND ENGLISH TRANSLATION* (George M. Logan, Robert M. Adams & Clarence H. Miller eds., Cambridge Univ. Press 2006).

57. *Dolus*, D. R. HOWLETT, *DICTIONARY OF MEDIEVAL LATIN FROM BRITISH SOURCES* (1997).

58. MORE, *supra* note 1, at 211.

59. *Id.* at 215.

60. *Id.*

61. *Id.*

62. *Id.* at 213.

63. *Id.* at 217.

64. Chronologically, of course, More’s sovereigns are pre-Machiavellian. *Id.*

common people do not go to war of their own accord, but are driven to it by the madness of princes.”⁶⁵

There is consistency between the leaders’ craftiness in war and their ingenuity in fashioning for criminals a legal personhood that reforms them through work rather than robbing them of their lives. The leaders’ legal resourcefulness relies on biblical models—Thomas More is a Catholic martyr, after all—for both the sovereign and for the criminal. The model for rulers is God as artisan and maker of the world, while the model for criminals brings to mind Adam and Eve’s transgression—not incidentally the theft of the forbidden fruit—and their rehabilitation through manual work for him as well as manual work and labor in childbirth for her.

Thomas More focuses on thieves to arouse moral outrage against the injustices inherent in criminal sentencing in early modern England. Ironically, More’s focus on finding alternative punishments for non-violent offenders is also one of the reasons why *Utopia* resonates so well with American lawmakers. Modern criminal sentencing has not been free of abuse. For instance, California only recently revoked the life prison sentences mandated by Proposition 36, also known as the three-strikes law, for non-violent offenders who no longer pose a danger to society.⁶⁶ In medieval England, juries imposed the death penalty on thieves in a minority of cases, although they had the right to do so if the value of the stolen goods was higher than 12 pence and the theft constituted a felony.⁶⁷ Many such felonies, however, were presented as mere criminal trespasses or not prosecuted at all, probably because “there was no category of excusable, i.e., pardonable, theft,” and people were loath of sending their neighbors to death.⁶⁸

III. THE LEGAL PERSON OF THE THIEF AS A SOCIAL OUTCAST

This state of affairs changes with the Tudors, an age that experiences a “regular thief genocide.” As I mentioned before, 72,000 thieves are hanged during Henry VIII’s reign alone.⁶⁹ More found this punishment both excessive and unjust: In Book I, he elucidates the causes of theft by focusing on thieves as needful people abandoned by an unjust society, rather than the act of theft itself.⁷⁰ For Thomas More, theft becomes the linchpin for an analysis of the social and legal injustices of his time, and an oblique criticism of Henry VIII as a craftsman

65. *Id.* at 207.

66. *Progress Report: Three Strikes Reform (Proposition 36); 1,000 Prisoners Released*, STAN. L. SCH. THREE STRIKES PROJECT & NAACP LEGAL DEF. AND EDUC. FUND (2013), http://www.naacpldf.org/files/publications/ThreeStrikesReport_v6.pdf (on file with *The University of the Pacific Law Review*).

67. Green, *supra* note 39, at 61.

68. *Id.* at 61.

69. MORE, *supra* note 1, at 57 n. 19.

70. *Id.*

of unjust laws. As Logan, Adams, and Miller point out in the introduction to their edition of Thomas More's *Utopia*:

The analysis of the problem of theft constitutes a scathing indictment of a system of "justice" in which the poor are "driven to the awful necessity of stealing and then dying for it". . . . The root cause of this situation lies in the pride, sloth and greed of the upper classes. Noblemen live idly off others' labour, and also "drag around with them a great train of idle servants" . . . who, when they are later dismissed, know no honest way of making a living.⁷¹

The moral failures of noblemen all but ensure the criminality of their servants, who are first objectified for their masters' use and then cast away with no means to support themselves after they are no longer needed. The English realities discussed in *Utopia* differ greatly from the ways Utopians treat their criminals, who can redeem themselves through work either in the eyes of the community, or at least in their own eyes, if their punishment is permanent. Punishments in *Utopia* transform the thief's legal personhood from an object of social opprobrium into a subject able to reshape his social standing for the better. If the English society wants to progress, More seems to suggest, justice must also pertain to the social (not merely the criminal) realm. This idea is congruent with the communal justice ideal that informs much of More's work.

By drawing attention to the social causes of theft, Thomas More continues a tradition of medieval literature that identifies poverty and need as conducive to crime.⁷² In so doing, he brings theft before the communal conscience rather than making it a failure of an individual's character. Andrew Hope and Paul Strohm explained the shift from collective to individual conscience in early modern England.⁷³ When it comes to the punishment of thieves, however, Thomas More disregards this shift by making theft a crime motivated by social failings rather than individual interests. He points out that the death penalty for theft opposes the public good, especially since recidivist rates for theft remained high in England:

. . . this way of punishing thieves goes beyond the call of justice, and is not in any case for the public good. The penalty is too harsh in itself, yet it isn't an effective deterrent. Simple theft is not so great a crime that it

71. *Id.* at xxiv.

72. Louise O. Fradenburg, *Needful Things*, in *MEDIEVAL CRIME AND SOCIAL CONTROL* 49, 63–64 (Barbara A. Hanawalt & David Wallace eds., 1999).

73. Andrew Hope, *Thomas More and Humphrey Monmouth: Conscience and Coercion in Reformation England*, in *THEORIZING LEGAL PERSONHOOD IN LATE MEDIEVAL ENGLAND* 244 (Andreea D. Boboc ed., 2015); PAUL STROHM, *CONSCIENCE: A VERY SHORT INTRODUCTION* (2011).

ought to cost a man his head, yet no punishment however severe can restrain those from robbery who have no other way to make a living.⁷⁴

More paints a socially sympathetic picture of the thief as a crippled war veteran who has fought hard to protect the common good and now is abandoned in the name of guarding it: “These men, who have lost limbs in the service of the common good or the king, are too shattered to follow their old trades and too old to learn new ones.”⁷⁵ More further drums up compassion for servants who turn to theft after they are abandoned by masters who “live idly like drones off the labor of others”⁷⁶ and spend prodigally, but who are too stingy to support their former servants when they become old or incapacitated.⁷⁷

Those who are turned out soon set about starving, unless they set about stealing. What else can they do? Then when a wandering life has taken the edge off their health and the gloss off their clothes, when their faces look worn and their garments are tattered, men of rank will not care to engage them. And country folk do not dare to do so, for they don’t have to be told that one who has been raised softly to idle pleasures, who has been used to swaggering about like a bully with sword and buckler, is likely to look down on the whole neighborhood and despise everybody else as beneath him. Such a man cannot be put to work with spade and mattock; he will not serve a poor man faithfully for scant wages and sparse diet.⁷⁸

More highlights as a form of abuse the masters’ indifference to preparing their former servants for alternative careers before abandoning them.

The servants’ displacement is as much of a reason for theft as the displacement brought about by enclosure, whereby people metaphorically become fodder for sheep. The views against enclosure expressed by Hythloday in Book I were fairly popular in More’s time.⁷⁹ No doubt, the gradual amalgamation and fencing of open fields for sheep pasture, a process that began in the 12th century and continued into the 19th, worsened the lot of many laborers and resulted in the destruction of their homesteads. Hythloday details the lasting economic impact of enclosure on the English people:

This enclosing has led to sharply rising food prices in many districts. Also, the price of raw wool has risen so much that poor people . . . who

74. MORE, *supra* note 1, at 57.

75. *Id.*

76. *Id.*

77. *Id.* at 59.

78. *Id.*

79. The early modern English protests against enclosure culminate in 1549 in Kett’s Rebellion, which was bloodily suppressed.

used to make cloth can no longer afford it, and so great numbers are forced from work to idleness. One reason is that after so much new pasture-land was enclosed, rot killed a countless number of sheep – as though God were punishing greed by sending on the beasts a murrain⁸⁰ that rightly should have fallen on the owners! . . . For the high cost of living causes everyone to dismiss as many retainers as he can from his household; and what, I ask, can these men do but rob or beg? And a man of courage is more easily persuaded to steal than to beg.⁸¹

Hythloday argues that all these social ills not only set people up for failure through pernicious social conditioning and practices but also punish the people for the system's failure:

Certainly, unless you cure these evils it is futile to boast of your justice in punishing theft. Your policy might look superficially like justice, but in reality it is neither just nor expedient. If you allow young folk to be abominably brought up and their characters corrupted, little by little, from childhood; and if then you punish them as grown-ups for committing the crimes to which their training has consistently inclined them, what else is this, I ask, but first making them thieves and then punishing them for it.⁸²

IV. REFORMING THE THIEF THROUGH LABOR

Having constructed the legal person of the English thief as a composite of individual misdeeds and social ills, Thomas More proceeds to argue that any effort of the individual towards self-reformation and improvement needs a corresponding effort from the society, which should not only punish the thief for his transgressions but also create suitable conditions for him to reform. What might these reforms of character and society look like?

Raphael Hythloday's strategies for reforming the thief rely on two different models: the first one comes from the utopian society of the Polylerites, who live in a vassal country that pays tribute to the Persian king; the second, from the land of Utopus himself. As Erik Wolf has pointed out, Thomas More combines the Platonic ideal of reforming the criminal through punishment (as expressed, for instance, in Plato's *laws*) with the practical objective of advancing the public good, since thieves are made to work on public projects.⁸³ Here, the Latin

80. See generally *Murrain*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/murrain> (last visited Aug. 15, 2016) (defining "murrain" as "a pestilence or plague especially affecting domestic animals") (on file with *The University of the Pacific Law Review*).

81. MORE, *supra* note 1, at 65.

82. *Id.* at 67.

83. Erik Wolf, *Social Utopia and Political Reality in Thomas More*, 3 TOL. L. REV. 327, 339 (1971).

vocabulary changes from *ars* to *labor*, a word that in the Medieval Latin vocabulary of work connotes toil, exertion, and pain. (We retain the same connotations today when we talk of a woman being in labor.)⁸⁴ Readers are told that, aside from constant labor (*praeter asiduum laborem*), the thieves' lives are quite comfortable (*nihil incommodi est in vita*).⁸⁵

Unless they also committed atrocities, thieves in the land of the Polylerites preserve their freedom of movement and are fed from public stores or supported through alms; they contribute to the commonwealth through their hard work and retain their ties to the community-at-large. Thieves are easily identified because they all wear the same distinctive uniform—in some districts they must wear a badge—and because the tip of one of their ears is cut off.⁸⁶ Their punishment is so crafted—and here More's Catholicism comes through again—that it destroys sin and saves sinners.⁸⁷ Since they are treated well, convicts cannot but become good people: *Servantis hominibus atque ita tractatis ut bonos esse necesse sit*.⁸⁸ As long as one does good work, "no one is quite without hope of gaining his freedom eventually if he accepts his punishment in a spirit of patient obedience and gives promise of good future conduct."⁸⁹

The sovereign of the Polylerites does not profit from theft because restitution of goods is made to the owner, not to the prince, as was the custom in many European countries. Erasmus, one of More's closest friends, deplores this custom in his work, *The Education of a Christian Prince*.⁹⁰ Money was a significant reason behind so many hangings in Henry VIII's time because, once a felon was killed, his property reverted to the crown.⁹¹ Henry VIII was infamous not only for his murderous bent but also for his obsession with accumulating wealth.⁹² Like More, Erasmus opposed the death penalty on principle, advising that "a prince should try every remedy before resorting to capital punishment, keeping in mind that the state is a single body. No one cuts off a limb if [the patient] can be restored to health by any other means."⁹³

Work for the public good is one such remedy, especially because thieves are shown that their transgressions have put them in the debt of their communities, which like Utopia, are founded on work. In the community established by

84. D. R. HOWLETT, *DICTIONARY OF MEDIEVAL LATIN FROM BRITISH SOURCES FASCICULE V 1531* (1997).

85. MORE, *supra* note 1, at 73.

86. *Id.*

87. *Id.* at 75.

88. *Id.*

89. *Id.*

90. DESIDERIUS ERASMUS, *THE EDUCATION OF A CHRISTIAN PRINCE* (1936) (cited in MORE, *supra* note 1, at 73 n.38).

91. J.G. BELLAMY, *THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND* 117 (1998).

92. ALISON WEIR, *HENRY VIII: THE KING AND HIS COURT* (2008).

93. ERASMUS, *supra* note 90, at 225.

Utopus, the dignity of work is repeatedly emphasized.⁹⁴ Here, we encounter an additional synonym in the Latin text—*opus*—which adds a layer of meaningfulness and creativity to work by stressing its completion.⁹⁵ Immediately after Utopus conquers the country, “[h]e put[s] not only the natives to work at this task, but all his own soldiers too, so that the vanquished would not think the labor a disgrace.”⁹⁶

Utopia relies on a stratification of work, with intellectual work ranking highest and the hunting and slaughtering of animals ranking lowest. But given that everyone works, the punishment as work is dignified and hopeful. People can advance their position in society by flaunting their skills and talents at their current job, and eventually graduating to higher-ranking labor. Conversely, intellectuals can lose their job if they prove inefficient: “[i]f any of these scholars disappoints the hopes they had for him, he is sent packing, to become a workman again.”⁹⁷ Work thus becomes the engine of social mobility. The dignity of punishment is based on the dignity of work and informs the dignity of the criminal’s legal person; such punishment reintegrates criminals into society through their achievements and contributions to the commonwealth.

Everyone works in Utopia, including the community leaders (syphogrants), “who by law are free not to work: yet they don’t take advantage of the privilege, preferring to set a good example to their fellow citizens.”⁹⁸ Work would have resonated with religious and political leaders in Thomas More’s time. Cardinal Wolsey was an extremely hard worker for the young Henry VIII, for whom decision-making and signing off on documents proved loathsome; the older Henry, however, became “an exceptionally [informed and] hard-working monarch” in his own right, relying on an efficient network of postal messengers that was frequently dealt with and dispatched within the same day.⁹⁹

While regular citizens merely work six-hour days, heinous criminals are enslaved and made to work constantly; they are always kept fettered.¹⁰⁰ The Utopian punishment for criminals is harsher in comparison to the punishments the Polylerites mete out to their felons.¹⁰¹ Utopians reserve slavery, however, for atrocities committed by their own people, whom they punish the harshest, since

94. See generally MORE, *supra* note 1 (emphasizing the value of work in the context of criminal rehabilitation, warfare, and religion, among others).

95. D. R. HOWLETT, *DICTIONARY OF MEDIEVAL LATIN FROM BRITISH SOURCES FASCICULE VIII* 2040 (1997).

96. MORE, *supra* note 1, at 111.

97. *Id.* at 131.

98. *Id.*

99. WEIR, *supra* note 92, at 431.

100. MORE, *supra* note 1, at 185.

101. Compare *id.* at 73 (describing Polylerites’ punishment of criminals as whipping, locking prisoners in cells, but without humiliation), with *id.* at 185 (Utopian citizens who must be punished harshly and strictly because of their strong moral upbringings).

they chose to become criminals despite proper upbringing and education.¹⁰² Having avoided the internal work necessary to become citizens who live productively doing the kinds of honest work they might enjoy, criminals must now accept forced labor—the lowest option in the hierarchy of work.¹⁰³ In addition to enslaving their own inveterate criminals, Utopians take into slavery (or, one might say, into rescue) foreign felons who have been condemned to death in their own countries.¹⁰⁴ Slavery in Utopia is neither shameful nor exceptionally hard. In fact, some poor people from other countries choose it willingly:

A third class of slaves consists of hard-working penniless drudges from other nations who voluntarily choose slavery in Utopia. Such people are treated with respect, almost as kindly as citizens, except that they are assigned a little extra work, on the score that they're used to it. If one of them wants to leave, which seldom happens, no obstacles are put in his way, nor is he sent off empty-handed.¹⁰⁵

Slavery in Utopia thus lacks the social stigma that a modern audience expects and is only differentiated by the types and the quantities of work that slaves are allowed to do. Destigmatizing former criminals makes all the difference since often stigma continues to separate former convicts from the community-at-large long after they have paid their debts to society by imprisonment or hard labor.

Even though Utopians do not mark their felons physically, they mark them psychologically by reshaping their habits of viewing and approaching their work through the tasks.¹⁰⁶ Pamela H. Smith has written provocatively about the ways in which work produces knowledge and ultimately reshapes the body.¹⁰⁷ Early modern artisans regarded imitation through repetition as “a learned bodily habit that became a cognitive practice and, finally, led to knowledge and the production of effects.”¹⁰⁸ Stripped of its modern racial connotations, slavery, as advocated by More, involves a continuous reshaping of the body and the mind of criminals through repetition, as slaves are constantly kept at work.¹⁰⁹ From a modern standpoint, one may ask what kind of benefit might come from performing the lowest (and one may argue, the cruelest) kinds of work, such as hunting and slaughtering animals. Incidentally, however, this was precisely the

102. MORE, *supra* note 1, at 185.

103. *Id.* at 187.

104. *Id.* at 185.

105. *Id.* at 187.

106. *Id.* at 193.

107. PAMELA H. SMITH, *THE BODY OF THE ARTISAN: ART AND EXPERIENCE IN THE SCIENTIFIC REVOLUTION* 98 (2004) (using Leonardo da Vinci as an example of how artists' judgments of bodies within their art informed judgments about their own bodies).

108. *Id.*; *see also* PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 52 (1990).

109. MORE, *supra* note 1, at 187.

work that fit best the now-unemployed, former servants of rich landowners—that is, those who had “been raised softly to idle pleasures, who ha[d] been used to swaggering about like bull[ies] with sword and buckler.”¹¹⁰ In medieval and early modern times, hunting remained a pleasurable pursuit of the upper class, a pursuit in which servants participated. Therefore, one may interpret More’s proposal as restoring those servants, now destitute, to some of their former glory. More’s utopian slavery rehabilitates criminals through work, allowing them to achieve productive lives in the communities they previously wronged.

In Utopia, all property is held in common and private property is absent, so even petty criminals like thieves wrong the whole community through their actions.¹¹¹ One consequence of this structure is, as Stephanie Elsky has noted, that “in a land with no private property, laws are almost superfluous and customs take their place.”¹¹² (Here the puns on More, Morus, and *mores* come to mind.) For Utopians, common law is defined by custom, which draws on a collective source of authority—just like work. Writing in 1528, Christopher St. German, one of Thomas More’s contemporaries, noted that English common law relies partially on custom:

The third ground of the law of England stands upon diverse general customs of old time used through all the realm . . . the said customs . . . have always been taken to be good and necessary for the commonwealth of the realm; therefore they have obtained the strength of a law, insomuch as he that does against them, does against justice.¹¹³

The Utopians’ reductive approach to punishment is based on simplifying what few laws they have so their interpretation aligns with community values.

In all areas of life, Utopians recognize how significant custom is in shaping human behavior.¹¹⁴ The custom of rectifying anti-social behavior through work, rather than imprisonment or death, addresses the exigencies of Thomas More’s own age in a constructive, integrative manner. Henry VII and Henry VIII both tried to solve the problem of vagrants, loiterers, beggars and other suspect persons who seemed able to work but refused to do so.¹¹⁵ The Vagabonds and Beggars Act from 1494 (11 Henry VII c.2) mandated that such persons be put in stocks for three days, be kept on a diet of bread and water, and then be thrown out of town; those able to work were ordered to return to their places of

110. *Id.* at 59.

111. *Id.* at 57.

112. Stephanie Elsky, *Common Law and the Commonplace in Thomas More's Utopia*, 43 ENGLISH LITERARY RENAISSANCE 181, 200 (2013).

113. CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 45 (T.F.T. Plunkett & J. L. Barton eds., 1975).

114. Elsky, *supra* note 112, at 198.

115. RALPH B. PUGH, IMPRISONMENT IN MEDIEVAL ENGLAND 40 (1968).

residence.¹¹⁶ In the Vagabond Act of 1530 lightened the punishment, probably given the overwhelming number of vagrants.¹¹⁷ Whipping replaced the stocks for able-bodied vagabonds and beggars who refused to work, whereas those poor who were aged, sick, or disabled could apply for a begging license from their local justice of peace.¹¹⁸

Imprisonment (and often a fine) was the punishment for “those who left their employment prematurely”¹¹⁹ in 1445, and for those “who would not work for prescribed rates until they should have found security to do so” in 1515.¹²⁰ Imprisonment in medieval and early modern times could be grim for impoverished prisoners who lacked support and patronage, since prisoners often depended on charity and friends for sustenance.¹²¹ Pugh notes a couple of cases from the 13th and 14th centuries where prisoners died of hunger.¹²² To avoid such situations, the Gaols Acts of 1532 mandated that gaols “be sited in populous places so that the largest possible sums could be contributed by the pious as prisoners’ alms.”¹²³ But even those prisoners who fared well suffered from overcrowding conditions and the corrupt atmosphere of the prison, which habituated criminals to more numerous and increasingly sophisticated crimes.¹²⁴ Thomas More responds to these exigencies by humanizing punishments through meaningful work and retaining harsher methods (fettters, hard labor) only for the most incorrigible of criminals. Through its polysemy of work, Thomas More’s *Utopia* demonstrates how the legal person of the legislator and the legal person of the criminal inform one another in the practice of justice. Subversively, *Utopia* suggests a better model of personhood for the ruthless Henry VIII, that is, a royal person deeply concerned with the judicious imposing of punishments and the rehabilitation of criminals, with the goal of ultimately reintegrating them into the community of the realm.

Once we translate *Utopia* with the legal concerns of a modern audience in mind, we become aware of its contemporary resonance: treating felons humanely (not only for the sake of their humanity but also for the sake of ours), destigmatizing them after they pay their debts to society, and injecting hope and meaning into the punitive system.

116. 11 Henry VII c.2.

117. 22 Henry VIII c. 12.

118. *Id.*

119. 11 Henry VII, c. 22, s.2.

120. 6 Henry VIII, c.3, s. 3; PUGH, *supra* note 115, at 40.

121. PUGH, *supra* note 115, at 327.

122. *Id.* at 319.

123. *Id.* at 330.

124. See Guy Geltner, *Medieval Prisons: Between Myth and Reality, Hell and Purgatory*, 4 HISTORY COMPASS 4, 4 (2006).