



1-1-2016

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Recommended Citation

M.H. Hoeflich, *St. Thomas More & Antebellum American law and Lawyers*, 48 U. PAC. L. REV. (2017).

Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol48/iss1/11>

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St. Thomas More & Antebellum American Law and Lawyers

*M.H. Hoeflich**

Traditionally, legal historians tend to look to decided cases and published legal treatises in order to understand the development of legal doctrine.¹ Inherent in this approach is the assumption, first of all, that there will be an adequate number of available decided cases as well as published treatises to provide sufficient material to write decent history. Legal historians have, over the past several decades, gone beyond this approach and begun to look at other potential source materials including notebooks, letters, diaries, and annotated copies of books once owned by important lawyers and judges. Daniel Hulsebosch's studies of annotated volumes from Chancellor James Kent's library and Mary Sarah Bilder's studies of James Madison's annotated books have provided new and important insights into the law and politics of the early Republic.² My own work has focused on studying the history of law book publishing and distribution in the early Republic as well as the contents of antebellum American lawyers' and judges' libraries to understand what American lawyers were reading and how this reading affected their views on the law.³ My method is relatively straight forward. I study lawyers' library and auction catalogues from the period and combine this with a study of book distribution and citation to attempt to understand the influence of particular books on period lawyers and judges. I supplement this with a study of public and institutional library catalogues that represent collections that lawyers and judges might have used to supplement their own libraries. This method is far from perfect, of course. For the most part, surviving catalogues represent the larger libraries of the period. Further, the fact that a book was in a particular library does not mean that it was read. Only a study of actual book annotations, such as done by Hulsebosch and Bilder, can provide certainty that a book was, in fact, read by the owner/annotator. Nevertheless, even with these methodological limitations, I believe that a study of who owned, read, and cited particular books is well worth attempting. When Professor Malloy wrote to me and asked whether I would give a paper relating to

* John H. & John M. Kane Distinguished Professor of Law, University of Kansas, I want to acknowledge the significant contribution to this article by Jacob Wilson, KU Law '18.

1. See e.g., Jenni Parrish, *A Guide to American Legal History Methodology with an Example of Research in Progress*, 86 LAW LIBR. J. 105, 108–16 (1994) (describing the methodology of researching the law of slavery to understand legal history of Southern America).

2. Daniel Hulsebosch, *An Empire of Law: James Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. R. 377 (2009); see also, John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993); MARY SARAH BILDER, *MADISON'S HAND, REVISING THE CONSTITUTIONAL CONVENTION* (2015).

3. See, e.g., M.H. HOEFLICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE* (1997); M.H. HOEFLICH, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA* (2010).

Saint Thomas More I quickly agreed because I thought it would be quite interesting to apply my methodology to his works, particularly his most famous work: *Utopia*.

Both Thomas More and *Utopia* have beguiled generations of readers. Thomas More, of course, is best known through the drama *A Man for All Seasons*, but as compelling as this fictionalized More may be, the true Thomas More was even more so. The child of a successful lawyer, More attended Oxford for a brief period and then moved to Lincoln's Inn where he was called to the Bar in 1501.⁴ For almost two decades after his admission More carried on a successful law practice in both the Common Law courts and the Court of Chancery.⁵ He was also politically engaged and served in the Commons, becoming Speaker in 1523,⁶ served as an Under-Sheriff in London, and also served as a Royal Counselor beginning in 1518.⁷ He was knighted in 1521.⁸ More was also a man of great piety, having served as a young man in the household of Archbishop Robert Morton, and he showed great interest in the monastic orders during his early manhood.⁹ He became Lord Chancellor of England in 1529, succeeding the disgraced Cardinal Wolsey.¹⁰ As Chancellor he was responsible for the execution of several so-called Protestant "heretics."¹¹ More's political and professional downfall came with the introduction of legislation sponsored by the King requiring the swearing of an oath that King Henry was the "supreme head of the church in England."¹² This More would not do. In 1532 he lost all of his offices and on July 1, 1535, More was indicted for High Treason.¹³ He was quickly tried and found guilty and executed on July 6.¹⁴

Throughout his life as a lawyer, politician, and courtier, More was also a man of letters. He was a friend of the great humanist, Desiderius Erasmus, whom he brought to England, and corresponded with many of the humanistic scholars then active in Europe. Perhaps, the most important fruit of More's humanism was his

4. For a brief synopsis of More's life, see Gilbert Huddleston, *St. Thomas More*, THE CATHOLIC ENCYCLOPEDIA (1912), available at <http://www.newadvent.org/cathen/14689c.htm> (last visited Sep. 21, 2016) (on file with *The University of the Pacific Law Review*).

5. See e.g., William D. Bader, *Saint Thomas More: Equity and the Common Law Method*, 52 DUQ. L. REV. 433, 434 (2014); WILLIAM ROPER, LIFE OF SIR THOMAS MORE, KNT. 6 (1905).

6. Germain P. Marc'hadour, *Sir Thomas More*, ENCYCLOPEDIA BRITANNICA (last visited August 21, 2016), <https://www.britannica.com/biography/Thomas-More-English-humanist-and-statesman> (on file with *The University of the Pacific Law Review*).

7. See A THOMAS MORE SOURCE BOOK 204 (Gerard B. Wegemer & Stephen W. Smith eds., 2004) (stating that a letter written in 1518 was written from More in his new office as Royal Counselor).

8. Huddleston, *supra* note 4.

9. See *id.*: "His mind wavered for some time between joining the Carthusians or the Observant Franciscans, both of which orders observed the religious life with extreme strictness and fervour."

10. Huddleston, *supra* note 4.

11. See *id.*

12. *Id.*

13. See *id.*

14. See *id.*

Utopia, first published at Louvain in 1516 in Latin¹⁵—as all proper humanist works were. The first English translation by Ralph Robinson was published in 1551¹⁶—a sufficiently long enough period after More’s execution and Henry VIII’s death to make such a publication safe for the translator and publisher—and the second, by Gilbert Burnet, Bishop of Salisbury, was published in 1684.¹⁷

Utopia is an eccentric and puzzling work in the Platonic tradition as modified by humanist thought. That a successful and politically ambitious English lawyer would publish such a book, one that reviles the legal profession and most of the principles of the English monarchy and feudal system, is exceptional. Indeed, the debate over whether *Utopia* is a serious work or whether it was intended to be read as a satire continues unabated to this day. I would suggest that *Utopia* is a prime exemplar for analysis by deconstructionists and those who adhere to reader-response theory, i.e. to a large extent how one reads and understands *Utopia* very much depends on the knowledge and predilections one brings to it.¹⁸ Indeed, one can read *Utopia* in many ways and take from it many quite diverse and often contradictory lessons.

More’s *Utopia* had special meaning for the English colonists in North America because many believed that the location of the mythical *Utopia* was intended to be there. And, even were this not the case, many of those colonists were, to some degree, utopians who had fled England in the hopes of establishing a better world. Many of the early colonists sought to create religious utopias based upon Biblical models. Others sought to create secular social institutions that would replace the hierarchical and aristocratic society they had left. Whatever the subtle distinctions between the various types of utopian thought in each of the colonies, we cannot doubt that More’s *Utopia* would have had great appeal.

Ideas do not exist in a Platonic dimension. Rather they exist in the real world and to gain influence in the real world they must be communicated. Thus, the printing history of More’s *Utopia*, is critical to our understanding the spread of his ideas contained therein. While *Utopia* was first printed on the continent in Latin, the majority of editions have appeared in England and in English translation.¹⁹ There were two major translations that were available to the North American colonists. The first was by the English humanist, Richard Robinson, and was published at London in 1551 with a revised edition issued in 1556.²⁰ It

15. See Romuald Lakowski, *International Thomas More Bibliography (U): Utopia, Part A: Editions and Translations*, TELUS (Aug. 15, 2016), <http://www3.telus.net/lakowski/Utopbib0.html#LatinEditions> (on file with *The University of the Pacific Law Review*).

16. *Id.*

17. *Id.*

18. On reader-response theory, see, eg., WOLFGANG ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* 20–50 (1978).

19. See generally Lakowski, *supra* note 15, at Part A.

20. *Id.*

was reprinted in 1597, 1624, and 1639.²¹ That the volume went through five printings in less than a century indicates that the book was popular and that there was a steady market for it throughout the sixteenth and first half of the seventeenth century. Certainly, it was well received by critics and commentators. For instance, Thomas Pope Blount, in his *Censura Cebrriorum Authorum* of 1710, devoted nearly five pages to Thomas More and his writings, much of it about the *Utopia*.²² The second translation of *Utopia* was made by the Bishop of Salisbury, Gilbert Burnet, and published at London in 1684.²³ Burnet justified his new translation because of the textual errors and omissions that marred the earlier work of Robinson. Burnet's translation was reprinted multiple times over the next century not only at London but, also, at Dublin and Glasgow.²⁴ Although neither translation of *Utopia* was reprinted in the North American colonies, the frequent British and Irish printings combined with the transatlantic trade in books insured that copies of the work were available to the American colonists. Thus, it is not surprising to find that a substantial number of colonial libraries possessed copies of More's *Utopia*. In fact, Richard Beale Davis, in his classic *A Colonial Southern Bookshelf*, reports that the *Utopia* was "found in dozens of southern collections before 1800."²⁵ For instance, William Byrd of Westover, who possessed one of the greatest libraries in colonial Virginia, had multiple editions of *Utopia*.²⁶

Indeed, one of Thomas More's descendants played an important role in the founding and governance of the English colony in Maryland. Father Henry More, Thomas' great grandson and a Jesuit, was, according to Bradley Johnson, a close advisor to two generations of the Lords Baltimore and was instrumental in the founding of the Maryland Colony as a refuge for Catholics who were being oppressed in England.²⁷ Since individual freedom of worship was one of the key aspects of *Utopia* as More described it, it seems quite likely that More's great grandson's advice to the Lords Baltimore included passages from *Utopia*. Indeed, Johnson points out the close parallels between passages in *Utopia* and the Act Concerning Religion of 1636.²⁸

21. Information on editions of the *Utopia* is drawn from Romuald Lakowski, *A Bibliography of Thomas More's Utopia*, *Early Modern Literary Studies* 6.1-10 (Feb. 14, 1998), <http://purl.oclc.org/emls/01-2/lakomore.html> (on file with *The University of the Pacific Law Review*); Romuald Lakowski, *International Thomas More Bibliography*, *supra* note 15; ONLINE COMPUTER LIBRARY CENTER, WORLD CAT: FORMATS AND EDITIONS OF UTOPIA, <http://www.worldcat.org/title/utopia/oclc/49294774/editions?referer=di&editionsView=true> (on file with *The University of the Pacific Law Review*).

22. THOMAS POPE BLOUNT, *CENSURA CELEBRIORUM AUTHORUM*, 561-65 (1610).

23. See Lakowski, *A Bibliography of Thomas More's Utopia*, *supra* note 21.

24. Lakowski, *supra* note 15, at Part A.

25. RICHARD B. DAVIS, *A COLONIAL SOUTHERN BOOKSHELF* 48 (1979).

26. KEVIN T. HAYES, *THE LIBRARY OF WILLIAM BYRD OF WESTOVER* 569 (1997).

27. See BRADLEY T. JOHNSON, *THE FOUNDATION OF MARYLAND AND THE ORIGIN OF THE ACT CONCERNING RELIGION OF APRIL 21, 1649*, 134-39 (1883), <https://archive.org/details/foundationofmary00johnrich> (on file with *The University of the Pacific Law Review*).

28. *Id.*

From the legal historian's perspective, there are a number of interesting aspects of More's *Utopia*, aside from the notion of individual freedom to worship as one chooses. More, for instance, expresses strong opinions against the then prevalent wide scale use of capital punishment for property crimes.²⁹ Another issue that More discusses that has drawn great interest is the role of lawyers and the law. There are no lawyers in More's *Utopia*. They are not needed because the law in *Utopia* is simple (unlike the complexity of the Common Law) and easily understood by all the citizens. In *Utopia*:

They have few laws, and such is their constitution that they need not many. They very much condemn other nations whose laws, together with the commentaries on them, swell up so many volumes; for they think it is an unreasonable thing to oblige men to obey a body of laws that are both of such a bulk, and so dark as not to be read and understood by every one of the subjects.³⁰

Since every citizen could read and understand laws, lawyers were superfluous:

They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters and to wrest the laws, and, therefore, they think it is much better that every man should plead his own cause, and trust it to the judge, as in other places the client trusts it to a counselor, by this means they both cut off many delays and find out truth more certainly³¹

In this passage More, of course, reflects complaints that have appeared in popular literature throughout virtually the whole history of early modern and modern England and in the United States to the present. Complaints of unnecessary legal complexity and obscurity that make the Common Law a mystery, put clients at the mercy of their lawyers, and caused massive delays in the doing of justice, when justice is done at all, may be found in popular literature since the very beginnings of the Common Law. This distrust of lawyers and the legal system was pervasive during the colonial period. Many of the colonists had fled England as a result of persecution under laws enacted by Parliament and implemented by the courts.³² Lawyers and judges were the

29. See STEPHEN DUNCOMBE, THOMAS MORE: OPEN UTOPIA 47 (2012), <http://theopenutopia.org/wp-content/uploads/2012/09/Open-Utopia-fifth-poofs-facing-amended.pdf> (on file with *The University of the Pacific Law Review*).

30. *Utopia*, II, at 147. Quotations from More's *Utopia* used in this article come from DUNCOMBE, *supra* note 29.

31. *Id.*

32. See, e.g., JAMES TRUSLOW ADAMS, THE FOUNDING OF NEW ENGLAND 122 (1921) ("They wanted to be rid of growing and incalculable exactions of government.").

individuals who carried out legal oppression. The colonists found that they had the freedom to shape their own legal regimes within the broad and lax regulation of the colonies by Mother England. Thus, as John R. Aiken has argued in his study of utopianism in Colonial New York, colonial laws tended to favor a legal system in which “everyman could be his own lawyer” and in which the profession of law and the litigation to which it seemed to give rise was disfavored.³³ In some colonies, like Quaker Pennsylvania, this led to severe restrictions on lawyers’ fees, an economic disincentive designed to discourage anyone from becoming a lawyer. In the Carolina colony the law code stated:

It shall be a base and vile thing to plead for money or reward.³⁴

Other colonies had similar provisions.³⁵ Many of the colonies abandoned the complexities of the English legal system in favor of fewer courts and simpler pleading rules. Indeed, these legal disincentives were effective; the number of lawyers in the American colonies up to the middle of the eighteenth century was quite small. While we cannot say that More’s *Utopia* was the cause of the adoption of such laws, certainly the wide distribution of the volume in the colonies and the similarities between More’s writing about law and lawyers in the *Utopia* and the colonial laws about lawyers and courts is very suggestive.

When one looks at the libraries and writings of the Founding Fathers one sees that the *Utopia* had not disappeared. Again we must remember that the Founders were, in a very real sense, charged with the task of building a new utopia, albeit a real world version, and were rebelling against the English government, a position certainly consistent with More’s in the *Utopia*. Indeed, even the lawyers among the Founders seem to have owned and viewed the *Utopia* positively. Thomas Jefferson’s library contained two copies of the work. He owned a copy of the original Latin work published at Cologne in 1555.³⁶ He also owned a copy of the Burnet English translation published by Foulis at Glasgow in 1743.³⁷ Neither volume contains marginalia, but the English translation bears Jefferson’s initials on the first signature.³⁸ Jefferson also owned a copy of the first volume of the *Political Classics* published at London in 1794–95, a volume that includes Algernon Sidney’s *Discourses on Government*, Rousseau’s *Treatise on the Social Compact*, and More’s *Utopia* in the Burnet translation.³⁹ The fact that Jefferson owned three different copies of the *Utopia*,

33. JOHN R. AIKEN, UTOPIANISM AND THE EMERGENCE OF THE COLONIAL LEGAL PROFESSION 79 (1989).

34. *Id.* at 95.

35. *Id.* at 95–111.

36. See CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 15 (E. Millicent Sowerby ed., 1953).

37. *Id.*; see also Douglas L. Wilson, *Sowerby Revisited: The Unfinished Catalogue of Thomas Jefferson’s Library*, 41 THE WILLIAM AND MARY QUARTERLY 615–28 (1984).

38. *Id.*

39. *Id.*

including an early Latin version, clearly attests to his long-term interest in the work. Jefferson included these volumes in his transfer of his library to the Library of Congress after its collection was destroyed by fire during the British invasion.

While we do not have a record that John Adams owned a copy of *Utopia*, it seems likely that he did because he wrote about it in detail. In 1771 Adams expressed his delight at discovering what he considered to be a superior translation of *Utopia*:

Kent brought with him, *Utopia*, or the happy Republic, a Philosophical Romance, by Sir Thomas More . . . The Translation I think is better than mine, which is by another hand. The Romance is very elegant and ingenious—the fruit of a benevolent and candid Heart, a learned and strong Mind. The good Humour, Hospitality, Humanity, and Wisdom of the Utopians, Charming—the Elegance and Taste is engaging—their Freedom from Avarice, and foppery, and Vanity is admirable.⁴⁰

In a 1785 letter to John Jay, who was then serving as the U.S. Secretary of Foreign Affairs, Adams quoted from the *Utopia* on a question of American ship building:

The more I consider what I see and hear every day, the more I am inclined to think We shall be obliged to imitate the Utopians who as Sir Thomas More informs: ‘As to their Exportation, thought it better to manage that themselves, than to let Foreigners come and deal in it . . .’⁴¹

James Madison was also an admirer of More’s *Utopia*. In 1783 he sent a list of books that he recommended for purchase to the Library of Congress.⁴² One of the categories of books was “politics.” In this category he recommended thirty-eight works, including Plato’s *Republic*, Aristotle’s *Treatise on Government*, and More’s *Utopia*.⁴³

Given the popularity of More’s *Utopia* during the colonial period and among the Founders one would expect that its popularity would continue into the early

40. John Adams, *Papers* (November 1771) FOUNDERS ONLINE, NATIONAL ARCHIVES, available at <http://founders.archives.gov/documents/Adams/01-02-02-0001-0008> (on file with *The University of the Pacific Law Review*).

41. John Adams, *Letter to John Jay, 30 August 1785*, FOUNDERS ONLINE, NATIONAL ARCHIVES, available at <http://founders.archives.gov/documents/Adams/99-01-02-0210> (on file with *The University of the Pacific Law Review*).

42. FOUNDERS ONLINE, REPORT ON BOOKS FOR CONGRESS, [23 JANUARY] 1783, NATIONAL ARCHIVES (July 12, 2016), available at <http://founders.archives.gov/documents/Madison/01-06-02-0031> (on file with *The University of the Pacific Law Review*).

43. *Report on Books for Congress, [23 January] 1783*, FOUNDERS ONLINE, NATIONAL ARCHIVES (July 12, 2016), available at <http://founders.archives.gov/documents/Madison/01-06-02-0031> (on file with *The University of the Pacific Law Review*).

Republic and that it would have been reprinted in the United States as the American publishing industry grew. However, this did not occur. In fact, More's *Utopia* was only reprinted once in the United States during the antebellum period. Hilliard, Gray of Boston published a reprint of More's *Utopia* in 1834.⁴⁴ This reprint was paired with *The History of Richard III* and was volume 9 in the publisher's series, *The Library of Old English Prose Writers*.⁴⁵ It is interesting that the publishers thought to include it in a series of literary reprints rather than in either political science or law series, especially since Hilliard, Gray was one of the leading law publishers of the period. The lack of interest in More's *Utopia* among antebellum American publishers may be an indication of a decline in the work's popularity. This would appear to be confirmed (to the extent one accepts the validity of the method) by a search for the terms "Thomas More" and "utopia" using Google's nGram search algorithm.⁴⁶ A search for "Thomas More" turns up no meaningful results for the antebellum years. A search for "utopia" turns up a remarkably small percentage: in 1820 the percentage is 0.000000618 and in 1840 it is 0.000002609. These numbers suggest that the work was not generally popular and, thus, confirm the wisdom of American publishers' decision *not* to reprint it during this period.

We might want to stop at this point and ask why More's *Utopia* would appear to have become less popular among the general public during this period before we look at lawyers' interest in the work. First, it is notable that there was no such decline in England. Indeed, one of the great English litterateurs and bibliographers, Thomas Frognal Dibdin, published an edition of the *Utopia* in 1808 with extensive notes and introduction.⁴⁷ If there was a decline in the popularity of More's *Utopia* in the United States, I suspect that there are several reasons for this. First, it is important to remember that the American colonists were, in fact, English culturally, legally, and politically. More's *Utopia*, particularly in the Burnet whiggish translation, was very much a book for English men and women unsatisfied with the current state of English law, government, and society. It was a work that echoed the concerns of progressive colonists who chafed under the English political and legal regimes. For the Founders, men and women, consumed with breaking away from England's sovereignty and establishing a new republic, the *Utopia* was also of great interest, as were the ancient republics of Greece and Rome as sources of inspiration for their dreamed

44. Lakowski, *A Bibliography of Thomas More's Utopia*, *supra* note 21.

45. *Id.*

46. I recognize that the use of Google's nGram algorithm is far from determinative but, even in its present primitive form, it is worth notice. See nGram Viewer, GOOGLE BOOKS (last visited Aug. 23, 2016), <https://books.google.com/ngrams/> (search "Thomas More" and "Utopia" respectively, scroll over graph to see percentages in each year) (on file with *The University of the Pacific Law Review*).

47. THOMAS MORE, *UTOPIA* (T.F. Dibdin ed., 1808). The Reverend Thomas Frognal Dibdin was one of the greatest English bibliographers and rare bookmen of the nineteenth century. The introduction in this volume, although somewhat dated, is still extremely useful.

of new republic.⁴⁸ But after the successful conclusion of the Revolution, attention shifted. The new form of government and of the legal system was now established and generally accepted, at least in its broad outlines. As I have already noted, some aspects of More's utopian vision, like the individual freedom to worship as one pleased, were already incorporated into the new nation. Other aspects, such as universal education and criminal justice reform, also had their proponents. But some of More's utopian ideas, such as the abolition of the legal profession, were not as attractive to the citizens of the new nation (although I must note that popular dislike of the legal profession continued to grow throughout the antebellum period). Lamentably, one also cannot discount the prevalent early American bias against Catholics and the Catholic faith. Although not yet canonized by the Church in the nineteenth century, More was remembered as a Catholic martyr and enemy of the Reformation.

Although the audience for More's *Utopia* may have declined after the Revolution and before the Civil War, the book did not disappear from the American scene nor did it lose all favor with lawyers in spite of its anti-lawyer bias. If one looks at non-law library catalogues of the period and at the works of historians and literary critics of the antebellum period, certainly one does find references to the *Utopia*. For instance, the 1836 catalogue of the American Antiquarian Society, America's oldest scholarly society, shows that the Society owned a copy of the 1743 Foulis Glasgow edition of the *Utopia*.⁴⁹ The 1837 catalogue of the Loganian Library in Philadelphia shows that this collection also included a copy of the Glasgow printing of the *Utopia* as well.⁵⁰ The 1870 auction catalogue of John A. Rice's library (this is a post-mortem catalogue and the library itself is primarily an antebellum collection) includes a copy of Dibdin's 1808 London edition.⁵¹ James Wynne's 1860 publication, *Private Libraries of New York*, best known for its description of Chancellor Kent's library, includes a description of the library of George M. Strong's library.⁵² Wynne relates that this library contained a folio edition of More's complete works, including the *Utopia* published at London in 1557.⁵³ The Boston Athenaeum library, one of the foremost libraries in the antebellum United States, also owned a copy of this edition of More's works, according to its 1827 catalogue.⁵⁴ Even more interesting, perhaps, the Boston Mercantile Library

48. See M.N.S. SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION* (1994); MEYER REINHOLD, *CLASSICA AMERICANA: THE GREEK AND ROMAN HERITAGE IN THE UNITED STATES* (1984).

49. *CATALOGUE OF BOOKS IN THE LIBRARY OF THE AMERICAN ANTIQUARIAN SOCIETY* 45 (1836).

50. *CATALOGUE OF BOOKS BELONGING TO THE LOGANIAN LIBRARY* 268 (C. Sherman and Co., 1837).

51. *CATALOGUE OF MR. JOHN A. RICE'S LIBRARY* 309 (J. Sabin & Sons, 1870). Interestingly, the price realized for this volume as written in the copy in my library is \$35, an exceptionally high price for the time indicating the value placed by contemporaries on this edition.

52. JAMES WYNNE, *PRIVATE LIBRARIES OF NEW YORK* 377-84 (1860).

53. *Id.* at 381.

54. *CATALOGUE OF BOOKS IN THE BOSTON ATHENEUM* 219 (1827).

catalogue of 1852 lists a copy of the 1834 Hilliard, Gray Boston edition as part of its collection.⁵⁵ This is interesting not only because it owned a copy of the sole American edition of the work, but also because mercantile libraries were created specifically for the education and betterment of the thousands of young men who were moving to cities seeking employment and wealth during the antebellum period.⁵⁶ Thus, the fact that the proprietors of the Boston Mercantile Library deemed More's *Utopia* worth acquiring demonstrates that in their minds the book had significant practical educational value for the young ambitious patrons whom they served. This attitude toward the book confirmed by the fact that the Mercantile Library Association of New York's 1837 catalogue similarly records that this library, too, owned a copy of *Utopia*.⁵⁷

What one sees from this admittedly modest survey of antebellum American non-law library catalogues is that libraries which held copies of More's *Utopia* either as part of a larger collection of his works or in a separate edition, by and large, owned older English copies. We know that there were many such copies of the work in colonial America. These would not have disappeared after the Revolution. Thus, what does it mean that Americans publishers, with one exception chose not to reprint More's work but many libraries, even those created after the Revolution, held copies of the work? The answer, I believe, is that interest in the work had declined enough so that publishers, believing that there was not a profitable market for the work, chose not to reprint it, but that there was still some continuing interest in the work demonstrated by library and individual holdings. There is further evidence of this continued general interest in the *Utopia* from additional sources. The 1834 American reprint of the *Utopia* is listed in O.A. Roorbach's *Bibliotheca Americana* of 1852, an important antebellum bibliography of American books in print.⁵⁸ George Bancroft, the great historian, praised More in an article in the 1841 *North American Review*. He said:

God has not often combined charity with enthusiasm. When he has done so, he has produced his most noble work—a More or a Fenelon.⁵⁹

Samuel Lorenzo Knapp, one of the preeminent biographers and literary critics of the antebellum period also praised More and his *Utopia* as a book well worth reading in his *Advice in the Pursuits of Literature* published at New York

55. CATALOGUE OF THE BOSTON MERCANTILE LIBRARY 181 (1854).

56. Sidney Ditzion, *Mechanics' and Mercantile Libraries*, 10 THE LIBRARY QUARTERLY: INFORMATION, COMMUNITY, POLICY, 192, 194 (1940).

57. CATALOGUE OF BOOKS IN THE MERCANTILE LIBRARY OF THE CITY OF NEW YORK 253 (1837).

58. CATALOGUE OF AMERICAN PUBLICATIONS, INCLUDING REPRINTS AND ORIGINAL WRITINGS, FROM 1820-1852, 377 (O. A. Roorbach ed., 1852).

59. George Bancroft, *History of the United States from the Discovery of the American Continent*, 52 N. AMERICAN REV. 75, 79 (1841).

in 1841.⁶⁰ He praised the book not primarily for its utopian philosophy although he does not speak ill of it, but, instead, for its excellent literary style:

Sir Thomas More, the author of the *Eutopia*, was one of the very great men of that age. He was born in 1480. He was educated in the best manner of the times. He was a man of first rate talents, and was called to discharge many high and important duties as a public functionary.

He was undoubtedly pre-eminent among the great scholars of his time . . . It is well for the world when such men as Sir Thomas More are found to direct, and, in a measure, fix the taste of an age. If he labored for the *beau ideal* in politics, and our experience has never found his republic, yet he left thoughts that are imperishable, embalmed in words of taste and beauty.⁶¹

Francis Lieber was a German émigré scholar who published a number of important books on law and politics, was a correspondent with some of the best known jurists of the day, including Joseph Story, was, at the request of President Lincoln, the author of General Orders 100 of 1863, the first modern work on the law of armed conflict, and was one of the first professors at the reformed Columbia law school under the leadership of Theodore Dwight.⁶² He, too, discussed and praised More's *Utopia* in his *Political Ethics* first published in 1838–39:

Many questions of the highest importance to the citizen are discussed in a spirit far in advance of his time. He recommended as early as under Henry VIII perfect freedom of conscience, which was a thing absolutely unknown then and for centuries afterward.⁶³

Indeed, while Knapp mentions his contemporaries' inability to realize More's utopian republic on earth, and Lieber reflects upon how More's political vision was far in advance of his time, there were a number of men and women at the time who subscribed to various versions of utopianism and attempted to put their ideas into practice in antebellum America. Utopian communities sprang up throughout the United States. Groups like the Shakers and communities like New Harmony, Indiana, Oneida, New York, and Icaria, Louisiana all attempted to create an earthly utopia.⁶⁴ Surely, many of those who joined such communities were aware of More's work, even if they hadn't read it. Indeed, there is evidence

60. SAMUEL L. KNAPP, *ADVICE IN THE PURSUITS OF LITERATURE* 28–29 (1837).

61. *Id.* It is worth noting that Knapp's volume is dedicated to "Members of the Mercantile Library Association."

62. *See generally* Frank Friedel, *FRANCIS LIEBER, NINETEENTH CENTURY LIBERAL* (1947).

63. FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 345 (1838).

64. *See* CHRIS JENNINGS, *PARADISE NOW, THE STORY OF AMERICAN UTOPIANISM* 7–9 (2016).

that the founders of these communities had read and been influenced by More's *Utopia*. William Owen, the founder of the utopian community at New Harmony, Indiana published a lithograph of his proposed utopian village and stated that the design was "founded upon the principle, commended by Plato, Lord Bacon, Sir T. More, and R. Owen."⁶⁵ Etienne Cabet, one of the founders of Icaria, a utopian community in Louisiana, studied More's *Utopia* at the British Museum while living in exile in London prior to founding his community and, according to Chris Jennings, based his own book, *Voyage en Icarie* on More's work.⁶⁶

With all of this as background we may now, at last, turn to look at antebellum lawyers' interest in More's *Utopia*. As with general interest, it seems to have been mixed. A number of lawyers and judges had copies of the *Utopia* in their libraries. References to the *Utopia* also appear, on occasion, in law-related texts, but virtually not at all in case decisions. But, again, this is not truly surprising. *Utopia* is not a legal text. Further, many of the passages and ideas in *Utopia* that appealed to American colonial readers and the Founding Fathers, such as those on freedom to worship as one will, would no longer have been necessary or strongly persuasive forensic sources after 1800. By this point, lawyers had available the Constitution, statutes, and cases that all dealt directly with these issues from the legal perspective. These ideas were no longer simply the political aspirations of a group of revolutionaries; they had the law of the land. Further, *Utopia* was certainly harsh on the legal profession and the profession at the beginning of the nineteenth century was a profession committed to legitimizing itself and raising the social and economic status of its members. The anti-lawyer sentiments of More's *Utopia* were directly antithetical to this professional movement and, no doubt, dissuaded some lawyers from owning or referring to the work.

One other factor may have militated against some antebellum lawyers' ownership or readership of *Utopia*. As I have noted, *Utopia* was not considered a law book. Instead it was generally characterized either as a work on politics or as a novel. We are able to know this because many antebellum library catalogues were organized by type of book and *Utopia* tends to be included under the heading of politics or novels. Being characterized as a book on politics would not have been a barrier to finding readers, but being characterized as being a work of fiction might well have dissuaded ambitious young lawyers from obtaining or reading the work. Young ambitious men, lawyers, doctors, clerks, were warned constantly that they needed to use their time carefully and that when they were not at work they should engage primarily in educational and edifying pursuits. Many commentators saw novels as frivolous and time spent reading novels as a distraction from more serious endeavors. Reading poetry was seen as a useful activity because it helped young men improve their literary style. Biographies

65. *Id.* at note 120.

66. *Id.* at 248–49.

were seen as particularly appropriate reading for young men because from these they could learn life skills through imitation. But novels, in the minds of many, had little to commend them. George Brewster, the Principal of the Cleveland Academy, devoted a whole section of his 1833 *Lectures on Education* to the dangers of reading fiction.⁶⁷ According to Brewster, the moral effect of novel reading was “doubtless bad” and destroyed “the harmonious and equal actions of the various passions, faculties, and feelings of the mind and the heart.”⁶⁸ David Hoffman, in his 1846 *Course of Legal Study*, recognized that law students could not spend all of their time in studying the law. He noted that “even the most diligent require some relaxation of employment.”⁶⁹ But he did not suggest fiction as such a relaxation. Instead he suggested, “whatever may be the temptations of other and more pleasing literary pursuits [i.e. other than the law] . . . this [legal study] should be a permanent object from which his attention should never long be diverted”⁷⁰

In spite of all this, as I have said, a number of prominent antebellum lawyers and judges owned copies of More’s works and, especially *Utopia*. Rufus Choate, one of the greatest lawyers of the period and a distinguished scholar, owned a copy of the London 1838 edition of *Utopia*.⁷¹ The 1847 catalogue of the Boston auction of the library of Judge John Davis lists a 1684 London edition of *Utopia*.⁷² James Wynne’s description of the library of the N.Y. lawyer and politician William Curtis Noyes includes a reference to a “beautiful copy of Sir Thomas More’s *Utopia* of the edition of Dibdin.”⁷³ Peter DuPonceau, Philadelphia lawyer, linguist, and one of the founders of the American Philosophical Society, owned a copy of the 1796 London edition of Burnet’s translation of *Utopia*.⁷⁴ Although South Carolina legislator, chemist, and college president Thomas Cooper’s 1833 library catalogue does not list a copy of More’s *Utopia*, it does have an entry for an intriguing volume with, at least, an echo of More’s work. This is Ezekial Sandford’s novel *The Humours of Eutopia*, published in Philadelphia in 1828 in which the author is characterized as a “Eutopian.”⁷⁵

Obviously I have not done a systematic search of all antebellum lawyers’ library catalogues looking for copies of More’s works. Such a search is not

67. GEORGE BREWSTER, LECTURE IX INFLUENCE OF NOVEL READING IN LECTURES ON EDUCATION, 334, 334 (1833).

68. *Id.*

69. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 38 (1846).

70. *Id.*

71. CATALOGUE OF THE LIBRARY OF THE LATE HONORABLE RUFUS CHOATE 102 (1859).

72. CATALOGUE OF THE PRIVATE LIBRARY OF THE LATE JUDGE DAVIS 57 (1847) (the name of Sir Thomas is misspelled as “Moore”).

73. JAMES WYNNE, PRIVATE LIBRARIES OF NEW YORK 359 (1860).

74. Catalogue of Valuable Law and Miscellaneous Books, from the Library of the Late Peter S. Du Ponceau, L.L.D. 54 (1844).

75. CATALOGUE OF BOOKS IN DR. COOPERS LIBRARY 53 (1838) (MS. In Caroliniana Collection, Univ. of South Carolina Library).

possible given the paucity of source material (library and auction catalogues). Nevertheless, the unsystematic search that I did shows that copies of More's *Utopia* were certainly available to these men and a number owned it. On the other hand, many did not. I was unable to find a copy of *Utopia* listed Justice Joseph Story's library auction catalogue although Justice Story referred to the *Utopia* at least once in his 1834 "Lecture on the Science of Government."⁷⁶ I was also unable to find a reference to the book in the auction catalogue of Hugh Swinton Legare's library.⁷⁷ While James Wynne highlighted the copy of *Utopia* owned by William Curtis Noyes, in his description of Chancellor James Kent's library he makes no mention of a similar volume. I think that the most we can say in these circumstances is that More's *Utopia* was not a volume that every antebellum lawyer felt that he had to own. Indeed, even in terms of ownership of novels, copies of the English translation of Santillane's *Gil Blas* are more frequently listed in the lawyers' library catalogues I have examined than are copies of the *Utopia*.⁷⁸

Although references to More's *Utopia* in antebellum legal documents are rare, they are not completely absent. In 1832 a dispute was heard in the Court of Chancery of New Jersey over the ownership of property in an educational fund that had been established by Quakers. Unfortunately, at this time Quakers in the United States were deeply divided on theological issues between followers of Elias Hicks ("Hicksites") and more traditional Quakers ("Orthodox").⁷⁹ As a result of this division, a dispute over which group owned this fund that had been established in new Jersey went to court—much against the Quaker tradition of trying to avoid litigation.⁸⁰ Counsel for the Plaintiffs, George Wood presented a remarkably learned argument to the court about religious liberty with citations to Christian theology, the works of Edmund Burke, Kent's *Commentaries*, early English Chancery cases, and Thomas More's *Utopia*:

Even the early reformers, who were anxious for liberty of thought, were for stopping short at the point to which their ideas of reformation in religious doctrine and discipline carried them. Philosophers in those times, often dreamt of a greater latitude of sentiment and action, but they were only the day-dreams of philosophical speculation. If Sir Thomas

76. See generally THE 1846 AUCTION CATALOGUE OF JOSEPH STORY'S LIBRARY (M.H. Hoefflich & K. Beck eds., 2004).

77. See generally CATALOGUE OF THE LIBRARY OF THE HONORABLE HUGH S. LEGARE (1843); see also CATALOGUE OF THE RARE AND VALUABLE PRIVATE LIBRARY OF THE LATE H.S. LEGARE (1848).

78. CATALOGUE OF THE LIBRARY OF THE HON. HUGH S. LEGARE (1843), and CATALOGUE OF THE RARE AND VALUABLE PRIVATE LIBRARY OF THE LATE H.S. LEGARE (1848).

79. See THE ARGUMENTS OF THE COUNSEL OF JOSEPH HENDRICKSON IN A CAUSE DECIDED BY THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY BETWEEN THOMAS L. SHOTWELL, COMPLAINANT, AND JOSEPH HENDRICKSON AND STACY DECOW, DEFENDANTS 30 (1833).

80. *Id.*

More, in his *Utopia*, was for allowing the utmost breadth of religious freedom, he departed very essentially from his principles⁸¹

Although Wood cited the *Utopia* in a positive light as regards freedom of conscience, he was also obviously aware that Thomas More had, in fact, burned Protestants as heretics when he served as Chancellor.

Robert Rantoul, lawyer, Congressman, Senator, and law pupil of John Pickering, and strong proponent of codification as an antidote to the complexity and inequity of the Common law, also cited the *Utopia* in a speech he delivered in 1836 on capital punishment. Rantoul was an early proponent of limiting capital punishment.⁸² In support of this he cites the first chapter of *Utopia*:

The celebrated Thomas More, chancellor of England more than three hundred years ago expressed a decided opinion against the punishment of death for crimes against property⁸³

The *Utopia* was again cited in the *Report and Bills Relating to the Abolition of Capital Punishment* prepared by a committee of the Massachusetts House of Representatives composed of Rantoul, Jerome Van Crowninshield Smith, and Thomas Whittemore in 1837:

‘God has commanded us not to kill,’ says Sir Thomas More, ‘and shall we kill so easily for a little money?’ Yes, answers the law of Massachusetts, regarding the smallest coin in the rich man’s purse as more sacred than his person.⁸⁴

If we look at all of the evidence about the extent to which copies of More’s *Utopia* were owned and read by Americans and American lawyers in particular before the start of the Civil War, we can reach several tentative conclusions. The book was popular and was reasonably widely held in the period before the Revolution. It continued to be popular, if not as popular, in the early Republic. More’s ideas influenced a number of the Founding Fathers. It was particularly influential as a source for proponents of freedom of conscience and individual choice of worship and opponents of the imposition of capital punishment for crimes against property. It was also, at the very least, a source both for antebellum utopian movements and for popular sentiment against the legal profession and the complexity of the Common law system. And *Utopia* was prized not just for its progressive ideas, but also for its style in its English translations. Thus, we can fairly say, in conclusion, that the legacy of Sir Thomas

81. *Id.* at 32–33.

82. MEMOIRS, SPEECHES AND WRITINGS OF ROBERT RANTOUL 425 (Luther Hamilton ed., 1854).

83. *Id.* at 472.

84. MASSACHUSETTS GENERAL COURT, HOUSE OF REPRESENTATIVES, REPORT AND BILLS RELATING TO THE ABOLITION OF CAPITAL PUNISHMENT 16 (Jan.13, 1837).

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More is part of the history of the United States and of the American legal profession during the period before the Civil War.