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Equity, Conscience and the Art of Judgment as Ius Aequi et Boni

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Abstract
One morning in 1630, Henry Sherfield, barrister and recorder of the city of Salisbury, entered St. Edmund's Church and, with a pike-staff, smashed a painted window depicting God creating the universe. 1 For a man like Sherfield there was no discord of conscience with public duty, nor ultimately between conscience and the law. To him, his conscience and public life were interwoven without conflict between genuine moral convictions and external authority. Indeed, a year earlier, when speaking to a sessions jury, he had declared: "For no man can have true peace with God unless he shall profess to fear God and to make a good conscience the rule of his actions..." (Slack 1993:151). In his defence of the crime, Sherfield argued that the 'idol' had troubled him for over twenty years -- his being unable to enter the church without seeing it -- and that his display of private conscience in the public domain had been entirely appropriate (Cobbett 1809: 524). Yet lacking episcopal sanction or the support of secular law, his act of vandalism brought his downfall. Sherfield was prosecuted in the Star Chamber in 1633 and, with twenty-two privy councillors in attendance, stripped of his office, heavily fined and professionally destroyed; the trial bringing disgrace to the city and ruin to himself. He died, a debtor, the following year.

Law & The Sacred: Equity, Conscience and the Art of Judgment as Ius Aequi et Boni

Maria Drakopoulou

Introduction

If once we come to... pretend conscience against law, who knows what inconveniency may follow? -- Selden (1927: 35)

One morning in 1630, Henry Sherfield, barrister and recorder of the city of Salisbury, entered St. Edmund's Church and, with a pike-staff, smashed a painted window depicting God creating the universe.1 For a man like Sherfield there was no discord of conscience with public duty, nor ultimately between conscience and the law. To him, his conscience and public life were interwoven without conflict between genuine moral convictions and external authority. Indeed, a year earlier, when speaking to a sessions jury, he had declared: "For no man can have true peace with God unless he shall profess to fear God and to make a good conscience the rule of his actions..." (Slack 1993:151). In his defence of the crime, Sherfield argued that the 'idol' had troubled him for over twenty years -- his being unable to enter the church without seeing it -- and that his display of private conscience in the public domain had been entirely appropriate (Cobbett 1809: 524). Yet lacking episcopal sanction or the support of secular law, his act of vandalism brought his downfall. Sherfield was prosecuted in the Star Chamber in 1633 and, with twenty-two privy councillors in attendance, stripped of his office, heavily fined and professionally destroyed; the trial bringing disgrace to the city and ruin to himself. He died, a debtor, the following year.

Sherfield's objection to the painting was not that it was an image, but that it was a false one in that it did not faithfully concur with the Biblical account of the creation. As such, he insisted, the window confused more than it instructed and his conscience had resolved it be destroyed. His punishment however appertained neither to his having acted in conscience, a mistaken conscience on his part, nor to an endorsement of the false image by those judging him. In fact, Sir Robert Heath, the then Lord Chief Justice of the Common Pleas, agreed with Sherfield's assertion that the image was idolatrous, declaring to "dare judge no man's conscience". Justice Heath thought there good reason for Sherfield to be grieved and his conscience offended, but that this was no excuse for offending against the Bishop's authority (Cobbett 1809: 542-3). Any image, he argued, was to be defended if it were within the proper jurisdiction of the church and authorized by the Bishop (Cobbett 1809: 549-510). Sherfield's crime was not therefore that of an iconoclast, but a blow against episcopal authority and the Crown: "he is accused to be an opposer of his majesty's government and of the reverend bishops" claimed the Solicitor General, although adding "he did it not to arrogate to himself authority, but as bound to do what he did to preserve a good conscience" (Cobbett 1809: 524).

What was at issue in Sherfield's trial was neither the act of desecration nor the righteousness of his conscience. His judges refrained from passing judgement on Sherfield's conscience, agreeing it to be immaterial to the case and therefore no justification for his act. It was the encroachment upon authority that mattered, particularly since the perpetrator was a man of such great wisdom, a man of the bench and a parliamentarian who had given much good advice to so many. Since Sherfield's conscience could not be set against the law, it was his crime against authority which was punished; for: "it is not for a divine to meddle with 'Littleton's Tenures' nor a Lawyer with Divinity, to govern matters of the Church" (Lord Wentworth in Cobbett 1809:553).

Today the quote from Selden, together with the story of Sherfield's conscience, survive as historical anecdotes. The law is undoubtedly and solidly secular, and considered to be sharply separated from the sphere of morals and religion to which conscience belongs. Indeed, many see this separation as the mark of a truly democratic and just legal system. A picture of mutual respect between conscience and law has developed, with the authority of each clearly and precisely defined. Conscience, a moral and theological concept, belongs to the private world of the individual, performing as the secret arbiter of his or her private actions, omissions (even thoughts), and is in turn, respected and protected by law. Law, by contrast, we are encouraged to believe, regulates the civic arena, demanding citizens act in a responsible manner and respect the rights and duties of their fellows. However, though this image sets law and religion/morality poles apart, conscience actually remains firmly situated within that realm of

English law belonging to equity. It is as if liberal jurisprudence, in enshrouding law in a single drape, either forgot or was unable to remove all the undesirable traces of those past elements deemed wholly inappropriate for its new apparel.

Conscience remains part of equitable jurisprudence albeit, according to textbook tradition, a rather unimportant one. Yet however large the label of obsolescence, there is hardly a volume dealing with the law of equity which fails to credit it some contemporary relevance. Equity, we are reminded, was originally employed to remedy defects of the common law 'on grounds of conscience and natural justice', with an ecclesiastic chancellor acting as 'Keeper of the King's Conscience', and equitable rules designed to prevent unconscionable conduct or the unconscionable application of those of common law. Since it was never a complete body of law in the way common law was, it is routinely held that this lack of fixed principles and precedent precipitated equity's eventual reduction to a mere function of the chancellor's personal sense of right and wrong, his individual conscience.2 The literature also maintains that from the eighteenth century, when chancellors were no longer ecclesiastics but men of law, equity became increasingly anchored in Chancery reports and citations and that thereafter conscience was superseded by precedent (Winder 1941: 247). Despite the vestigial character formally accorded the place of conscience in equity, the contemporary view is fairly abstruse. Conscience remains variously regarded as historically specific, profoundly doctrinal, obsolete or essential, and consequently appears as a continuous source of irritation somewhat akin to a grit of sand in an oyster's shell.

The purpose of this paper is not to write a history of the relationship between conscience and equity. Neither is it to provide causative explanations for, nor a comprehensive understanding of, the contemporary place of equity or conscience. Instead it offers a genealogical inquiry into the origins of the relationship of equity and conscience which highlights unsuspected doctrinal affiliations, contingent associations of events and unrecovered memories. By focusing upon elements hitherto deemed unessential, insignificant or seemingly irrelevant, the aim is to confront that which has always been part of existing knowledge yet whose presence has been negated, and to thereby disturb that which is presently accepted and valued.3

In embracing the search for the origins and configurations of the descent of equity and conscience, this paper is divided in three parts. The first focuses upon the non-legal, tracing the meaning of conscience in selected texts leading up to the Reformation. The second considers the formal incorporation of the concept of conscience into equity's canonical texts, most notably St. German's *Doctor and Student*, which occurred when the foundations of modern equity were being laid. Finally, the third part attempts to recover the repressed discursive relationship between theology and law, and between law and ethics -- that which endures within the jurisprudence of equity -- and explore the questions about English law that this recovery poses. Modern equity has been ascribed some relatively comfortable roles, performing as a canon of interpretation of common law, as its help-mate, or as the mitigator of its strictness. Questioning the ambivalent presence of conscience, examining its role as an irritant, may reveal how its presence can result in 'pearls of wisdom'. But most importantly a genealogical exploration of the equitable doctrine of conscience will serve to critically interrogate the certainties associated with existing equitable jurisprudence.

Conscience in the Medieval Theological and Ethical Discourses

[See Greek text in original]

Justice, with unbroken conscience,
requiting good deeds with pure thoughts,
always breaks the conscience of those who refuse her yolk
(Orphic Hymn lxiii 3 f (ex 43))

The word 'conscience' derives from the Latin *conscientia* which means 'sharing the same knowledge with somebody else' or 'knowledge in oneself'. Both concept and meanings are Greek in origin, with *conscientia* deemed an exact transliteration of the word (*syneidisis*) (see Davies 1962: 672),4 whose root (*syneida*) means 'to know in common with'. Throughout Greek literature signified knowledge of the just and morally good, and was that element of human nature which when exposed to an immoral or unjust act caused great suffering within, ultimately producing: "...wounds that know no healing until it

snap the thread of that soul's pitiful and accused life".5 As such it performed as accuser, judge and chastiser, making charges as to the nature of human acts, passing judgement upon their ethical quality and, if required to do so, punishing the soul by causing pain. In short, it was that which, by providing a natural internal authority over conduct, preserved justice and hence secured social cohesion and order. Given this meaning of it is easy to see why it was so readily adopted by Christianity at an early stage of its development and how its very existence came to be considered proof of God's grace and magnanimity. In the teachings of St. Paul, where God is the embodiment of absolute good and justice, is said to have been given as a gift to mankind to enable him to know His law (Romans 1: 14-15), a means of resisting sin and preserving purity of mind and soul, maintaining the *communitas Christiana* in the same way as it had the Greek.

The first Medieval appearance of the concept of conscience is a passing reference to *conscientia* in a commentary on Jerome in Lombard's *Sentences*. In a discussion on the nature of will he reports Jerome's gloss on Ezekiel's vision of four creatures emerging from a fiery cloud, each in the form of a man with four faces: human in front, lion to the right, ox to the left and eagle to the rear:6

> Most people interpret the man, the lion and the ox as the rational, emotional and appetitive parts of the soul... And they posit a fourth part which is above and beyond these three and which the Greeks call *synteresis*: the spark of conscience which was not even extinguished in the breast of Cain after he was turned out of paradise, and by which we discern that we sin, when we are overcome by pleasures or frenzy and meanwhile are misled by an imitation of reason... (cited in Potts 1982: 689).

Syneidisis had variously embodied the stoic concept of *logos*, the orphic concept of justice, Seneca's notion of man's divine guardian (Epistles 41: 1) and, for the early Christians, a means of knowing the law of God. In Jerome's interpretation it was split in two -- *synderesis* and *conscientia* -- forming a dichotomy which, resurrected by Lombard, was adopted in all subsequent discussions. Henceforth, *synderesis* was generally seen as an innate faculty, a 'potentiality' of the soul 7 which, whether as a remnant of uncorrupted human nature or a gift from God to help mankind in the postlapsarian state, invariably pointed to the desire of the human soul to fulfil the ethical, to transcend the limits of its sinful earthly presence, and to strive for union with God. In the struggle twixt flesh and mind, *synderesis* was associated with righteousness and virtue, and standing at the side of rational understanding, that 'higher reason' essential to the apprehension of eternal truths which ultimately brought man closer to Him, appeared both unchangeable and unmistakable (Romans 7). By contrast *conscientia* was regarded as a disposition inhabiting the 'lower reason', and though rooted in *synderesis*, it was directed at everyday actions and knowledge of specific things, which meant that knowledge which informed conscience was partial and that conscience was therefore capable of being mistaken or confused.

Aquinas, whose views on conscience were the most influential amongst writers of the *via antiqua*,8 also placed *synderesis* and *conscientia* in the rational faculty, elaborating precise positions for each.9 He designated both as belonging to the "practical intellect" -- that concerned with human activity ordered towards an end and derived from man's free will, and which, like his "speculative intellect", employed general principles and axiomatic truths to arrive at conclusions through a syllogistic form of reasoning.10 The axiomatic, universal, unchangeable truths embodied in *synderesis* were none other than the precepts of natural law, that "light of reason" by which man as a rational creature shared to some degree in the "...guidance of created things on the part of God," His Eternal law (Aquinas 1970: Ia IIae q.91 a.1 and 2). *Synderesis* was thus the innate apprehension of the ordering of ends and the deliberation of means in human actions, and conscience, the judgement functioning in a practical manner to 'witness', 'bind', 'incite', 'accuse', 'torment' or 'rebuke' in relation to a specific deed -- not as the voice of an agent, but as the very act the verb portrayed. Functionally associating them in a quasi-legal syllogism, Aquinas insisted that *synderesis* embodied the precepts of natural law (the major syllogism): a factual situation called for judgement (the minor syllogism), and the judgement itself (the conclusion) was identified with conscience. Furthermore, since natural law was impeccable and *synderesis* embodied this Law, *synderesis* could not be the site of moral failure or error (Aquinas 1970: Ia q.79, ad. 8). Only conscience, subject to the contingencies of free will, time and place, could be deficient in this respect.11

However, if all that stood between *synderesis* and conscience, between law and judgement, was free will, the fulfilment of Law could become little more than an arid, mechanistic application of the moral code. This would deprive the individual not only of sharing in the Eternal Law (in God Himself) but of

maintaining a secure foundation for ethical life, and would thereby reduce correct conscience to actions governed by the fear of punishment and guilt rather than man's natural inclination and ultimate end, to perform good knowingly and willingly. It was the Christian virtue of prudence "the principal virtue of them all" (Aquinas 1970: IaIIae, q.58 a.5 and IaIIae, q.47, a.5.) defined as "right reason about things to be done" (Aquinas 1970: IaIIae, q65, a.1) that was called upon to fill this 'gap' between *synderesis* and conscience.12 By engaging the will, prudence disposed man to be drawn to right ends, to deliberate, decide and act well, and thereby inclined the individual to make correct judgements. It could therefore intervene between *synderesis* and conscience, so that whilst *synderesis* set ends in accordance with which prudence operated, prudence functioned as the guide to right conscience, and although all men possessed *synderesis*, only those with the gift of prudence were able to correctly perceive the moral precepts embodied therein and thereby posses right conscience. As *synesis*, prudence was applied in ordinary situations where, by focusing on the specificity of the case rather than the strict application of the Law, it introduced a perceptual acuteness and sensitivity to judgement. As *gnome*, it was used to guide conscience to form correct judgements by recourse to the God-given virtues of charity and mercy. In either case, its injection transformed the nature and the rationale of right judgement and introduced an understanding of the fulfilment of law which was predicated neither upon a mere application of rules, nor upon restraint, fear and punishment. Instead, fulfilment depended on principles beyond the Law, divine acts of love, charity and mercy, God's grace itself. As a result, correct conscience was considered an essentially moral act demanding judgement be sensitive to its object and have recourse to the love, mercy and charity wherein the ethical fellowship of God and man was demonstrated. Loosened from its narrow 'legalistic' constraints and enlightened by higher principles, conscience became an act of fulfilling man's proper ethical end, as well as that of law, through the exercise of reason and virtue. This emphasis on moral quality ensured that once a judgement was arrived at in conscience it was always followed, even if it were erroneous or mistaken, because acting according to conscience was always doing good and avoiding evil.

The harmonious integration of faith and reason, grace and nature embodied in this Thomistic understanding of conscience was not to endure, for a major shift occurred in the context in which conscience operated. Clearly evidenced in the works of the nominalist William Ockham and later in the writings of Biel, Gerson and other conciliarists, it was concluded in the reformation ideas of Luther and Calvin. What was essentially a return to Pauline teachings broke the fellowship between man and God in reason and virtue, and mankind abandoned itself to God's will. Now it was He and He alone who bestowed grace, forgiveness, life and justice, and deliverance from evil. They could not be abetted by works of man, and human behaviour ceased to be good because prudence and the natural light of reason guided conscience; for: "... every event which happens in the world is governed by the incomprehensible counsel of God" (Calvin 1536-59/1949: I.Xvii.2), and moral laws were reduced to unquestionable manifestations of divine omnipotence, otherwise unfathomable by man's reason and alien to his nature.

This elevation of God's will as an unequivocal principle of justice and ethical life, coupled with the belief in man's inability to share in divine reason, led to a reorientation of thinking about natural law, *synderesis*, and conscience. A theory of natural law celebrating man's dignified search for perfection through sharing in God's image became superfluous. And since the origin of natural law was no longer God's Being but His will, it was divested of its manifestation in *synderesis* and became an obligation formally enacted by God. Beyond human reason, natural law was obeyed out of fear of external sanction13 and man's duty to follow it was thus in *foro externo* than *foro conscientiae*.

> But who are you, a man to answer back to God? Will that which is moulded say to its moulder, 'Why have you made me thus?' Has the potter no right over the clay (Romans 9: 20-1).

Man's corrupted nature deprived him of any means of knowledge of God other than that revealed by His grace. The scriptures, institutions and traditions of the universal church comprised what Biel and Gerson referred to as "Eternal or Divine Law". This was the normative system from which all righteousness, justice and other laws derived (see Oberman 1963: 104-5).14 Human reason, although retaining its importance in relation to man's behaviour, now had to follow the Eternal law, wherein the precepts of natural law were also to be found. In this sense the distinction between Eternal and natural law dwindled and natural law came to be understood as right reason.15

This emphasis on submission to divine authority seriously undermined the position of *synderesis*, with some writers, including Ockham, forsaking the term altogether.16 Others defined it solely as the spark

of conscience (*scintilla conscientiae*), associating it either with the lower part of reason or the will. The young Luther even partitioned it into a *synderesis* "of the will" and a *synderesis* "of the reason".17 But reducing it to either a natural desire to do good or an intuitive pleading for what is in conformity with God's will, meant that distinguishing it from conscience became an increasingly fruitless task. Due to man's corrupt nature, *synderesis* could neither be wholly identified with reason nor will, and its cognitive or volitional ability to do good was therefore severely limited, being restricted to a vestigial witness to the grace of God:

> this tiny motion towards God, which man is naturally capable of, they fancy to be an act of loving God above everything! But look at the whole man full of concupiscence which is not obstructed by this tiny motion.18

With its soteriological potency so drastically limited, by 1519 Luther had removed the term *synderesis* altogether from his Reformation theology, and by the time Calvin's writings appeared it had been fully laid to rest19 But deprived of its direct association with divine reason through *synderesis*, conscience itself is transformed into a sign of God's grace. Its existence endows man with hope of salvation, but with its connotative significance soiled as it is by postlapsarian man's depravity, it is unable to direct correct action on its own account. It is in faith that man becomes empowered to avoid sin, such that conscience without faith is impotent (Luther 1956-67: 14.23). A good conscience therefore becomes an integral part of a pure heart that abandons itself to God in complete acknowledgement of man's corrupt nature, and is thereafter led by "faith unfeigned" (Calvin 1536-59/1949: cit. IV.x.4). In effect, faith replaces *synderesis* as the means for attaining salvation, whilst correct behaviour and conscience both become dependant on faith rather than reason.

The new understanding of conscience in reformation theology was not a celebration of human dignity, but of man's total abandonment to God in full acknowledgement of his sinful nature:

> ...not permitting them (men) to hide their sins, but bringing them as criminals before the tribunal of the judge... not suffereing man to suppress what he knows of himeself, but following him out until it bring him to conviction (Calvin 1536-59/1949: IV. x. 3).

As a pale imitation of divine judgement conscience came no more to be derived from reason and virtue but an unquestionable obedience to a single, authoritative moral code guided by faith and faith alone -- faith which in Luther's allegory of the Tabernacle resides in the Holy of Holies where man "must crawl to grace and renounce himself".20 Conscience therefore bore reference only to God and His law that bound it. Its ethical significance lay no longer in its nature as good judgement concerning human activity, but as a judgement only of those things which "are not bound to food and clothing, nor station, nor time, nor person" (Luther 1956-67: 7.799.11-15); namely those internal acts, motivations and inclinations which an individual bears before God, rather than his fellow man: "conscience have not to do with men but God alone" (Calvin 1536-59/1949: IV.x.3).

Conscience and English Equity

> Therefore... let's us observe that in man government is twofold: the one spiritual by which the conscience is trained to piety and divine worship; the other civil, by which the individual is instructed in those duties which as men and citizens we are bound to perform --Calvin (1536-59/1949: III)

The transfer of the authority of conscience from the domain of human activity to that of the soul has been heralded not only as the foundational moment of the religious freedom of conscience but as a triumph of individual freedom, and freedom of thought and expression. However, though the authority of conscience was declared unfettered before God, it remained steadfastly bound to law in its actions before the state because disrespect for authority was a sin against God, and it was therefore the duty of every Christian soul to observe human laws.21 Predicated upon a clearly drawn boundary between inner freedom and outer bondage, between the law of God and the law of man, the question of the relationship between law and the authority of conscience was materialized in a question of jurisdiction, itself part of the wider doctrinal dispute between the temporal and spiritual domains which took place in sixteenth century England.22 It was epitomized in the debate between Chancellor Thomas More and the common lawyer St. German over the limits of ecclesiastical and secular law; in effect a polemic

between pre-reformation and reformation conscience. More was horrified at the prospect of legal judgement prevailing over that of the universal *ecclesia* and its *catholica veritas*, and he passed into history as England's last great defender of the Catholic church and the last champion of the supreme authority of conscience, a privilege for which he paid the ultimate price.23

It was in attempting to solve the problems surrounding jurisdiction that St. German wrote the highly influential *Doctor and Student*, the first work to associate conscience with equity, and ever since recognised as equity's canonical text *par excellence. Doctor and Student* was until Blackstone's time, the law student's principal equity textbook.24 Yet despite being seen as a fundamental and original treatise dealing with equity, it was actually less concerned with equity than it was with the grounds of English law and how conscience related to them. In focusing on the demarcation of law and conscience rather than the setting of equity within English law, *Doctor and Student* can be regarded as primarily an apology for the authority of the common law and an instruction in jurisdictional matters, which, by leading its readers "in the internal forum, to a good and healthy conscience", was designed to serve justice in the common law courts and the conscience of common law judges (St. German 1528/1974: 3).

What was peculiar about the jurisdictional authority of conscience at the time, was that only in England did a secular court exist which judged according to conscience which 'properly speaking' was not within its domain. The authority for this jurisdiction was seen to derive neither from petitions to the king or chancellor, nor any inadequacy of common law, but from its own internal unity. This unity was supported by a reference to external authority grounded upon a claim to judge according to the Christian principle of conscience. In Chancery decisions, the profane and sacred, the rational and revelational, crime and sin, and the legal and the ethical, all consorted with one another. Although the formal qualities of judgement were those of legal method and reasoning (lent by roman law and canon law), the ontological foundation of the judgement itself was provided by ethical qualities associated with conscience.25 Judgements in Chancery did not only try to fulfil the proper end of law, they also directed human activity towards the good and the virtuous in order to satisfy man's proper end.

Whether exercised personally or by his Chancellor as 'keeper of the king's conscience', it was the ruler's Christian duty as king of righteousness and fountain of justice to preserve order, see justice done to rich and poor alike,26 and procure a good life for his subjects: "he should order those things which lead to heavenly beatitude and prohibit, as far as possible, their contraries" (Aquinas 1988: I.15). As the *imago divinitatis*, he was endowed with the virtue of equity which, forged from justice, charity and mercy, secured judgement in accord with correct conscience. Equity thus signified the necessary recourse to extra-legal principles and, like prudence under the Thomistic ethical system, secured an ethical and just decision in law by freeing its application from a narrow, legalistic approach. Enlarging conscience to resemble divine justice, it supplied the decisive element for judgement in correct conscience and set conscience against the formal constraints of law.27 The ontological foundation of a judgement in conscience was not therefore the law itself, but its ethical quality, the purpose to which the radical justice of equity was directed.28

St. German's attitude to the jurisdiction of conscience and law, is revealed when he asserts at the outset that: "a knowledge of English law and its grounds is essential for the good direction of conscience in this realm" (St. German 1528/1974: 3). His support for the doctrinal and jurisdictional priority of common law was fully in accord with the spirit of the times; the sixteenth century being the foundational period of English jurisprudence with common law reaching out to subsume all else. It is the adroit means by which he achieved his ends that were remarkable, for in claiming that common law must inform conscience he hardly drew upon the tradition of common law, neither in reference to doctrinal texts nor works of other writers.29 The concepts he did employ belonged to the medieval theological tradition, reviving Aquinas and Gerson, as well as Ockham and the reformation theologians.30 Reawakening the theological debate about conscience, St. German also engaged the same internal structure of its argument, cleverly moulding his own upon the syllogistic pattern in which conscience had been thought to operate.

Doctor and Student takes the form of a dialogue between a Doctor, the personification of scholastic authority, and a Student, a scholar of the common law. Whilst the Doctor advances the ethico-religious divisions of law as being those between Eternal Law, the Law of Reason (Natural Law), the Law of God and the Law of Man, together with definitions of *synderesis*, reason and conscience -- all alien to the

language and doctrine of English law -- the Students' task is to assimilate these categories within the system of English jurisprudence.

In this process of conceptual assimilation, the Student equates English law with the Law of Reason which, defined in the Thomistic manner, is seen as that which signifies the participation of rational creatures in the Eternal Law, in God Himself. By evidencing the partnership of man and God, English law is seen to incline the soul and reason to good, 'murmuring' as to who is guilty and innocent of an evil act; in fact, a pure embodiment of reason: "the things that are commanded or prohibited by that law are derived from reason alone, without the addition to it of any other law" (St. German 1528/1974: 33). Carefully distinguished from that other great body of law (the *Corpus Iuris Civilis*), English law, enshrined in the hearts of the people and despite its lack of codification, emerges as essentially unquestionable and unchangeable, the consummation of reason itself: "it is by the light of legal Reason the Right is discerned, and thereupon judgement given according to Law which is the Perfection of Reason".31 This English law of reason is seen to be materialized in the custom of the realm, the rules of common law, because it is from the body of the common law that the precepts of natural law are said to be distilled and wherein reason comes alive (St. German 1528/1974: 45-47). Mere knowledge of the general precepts of natural or English law is inadequate for exercising the law and hence their application cannot simply be a matter of deduction from the specific rule. According to the Student, a much wider and complete knowledge is required, knowledge of the immemorial body of law and all that it possesses, and which only those learned in the English law can boast (St. German 1528/1974: 37). Common law is therefore skilfully posited as the highest authority in the land. It is that to which the king swears allegiance at his coronation, and which no court, including that of Chancery, can challenge.

Having established the authority and priority of common law as grounded upon the law of Reason and Divine law, the Student introduces the issue of jurisdiction between conscience and common law; not however, as an issue of the jurisdiction of Chancery and common law courts, but as a doctrinal discussion of equity. This doctrinal association results from the structuring of his argument in the form of a syllogism, and his reading of this structure through the eyes of reformation theology.

In its position at the apex of St. German's hierarchy of laws, common law is elevated as the highest authority in the land, and as the embodiment of legal reason, acquires the force and omnipotence of the divine. It thus symbolically occupies the place of *synderesis*, embodying the normative rules that ought to inform correct judgement and hence judgement in conscience. The discussion between Doctor and Student which began by focusing on the question of jurisdiction ends up as an ontological question about judgement. St. German delivers a model for judgement which, though formally moulded using Thomistic materials, is of a fundamentally different quality. It parallels the Calvinist view of judgement in conscience as divine judgement predicated upon unquestionable and unchallenged belief through faith in the righteousness of the revealed rule -- now the revealed rule of common law. Judgement in conscience, therefore, is concerned not with ethical quality but is limited to the correctness of the deductive process by which the rule of common law is applied to the concrete case. It is this self-contained, syllogistic edifice, wherein St. German couches his doctrinal association of equity and conscience, which leads to the eventual displacement of conscience from the process of judgement. Whilst previously equity was seen as the divine quality of mercy and charity, residing in the King's or the Chancellor's breast,32 it now emerges as performing the role of mediator between the letter of the law, the precept of *synderesis*, and the concrete situation. For St. German, equity is the Aristotelian concept of *epieiekeia* (Aristotle 1994: V.x.2-xi). Although he does not discus it in detail, he defines it as:

> a righteousness that consider all the particular circumstances of the deed, the which also is tempered with the sweetness of the mercy. And such an equity must always be observed in every law of man and in every general rule thereof... (St German 1528/1974: 97).

Equity comes to perform the role of adapting the rule, to address the particularity of the case, and thereby endow judgement with the sensitivity and acuteness conscience demands. However, although equity inclines law towards correct judgement with an eye to specificity rather than the universality of the rule;33 it is presented as required only where law errs in its particular application as the result of its generality. Though much praised as indispensable to correct judgement, equity is more suffered by law, than enjoyed by it, and the common law emerges as neither cruel nor unjust, simply misunderstood. Any fault lies not with the rule, but in judgements which run counter to the spirit of the common law and hence to that of the law of Reason and of God with which common law is identified. Equity therefore exists to service the law rather than oppose it (St. German 1528/1974: 105), challenging neither its right

nor justice, but only the appearance of justice arising out of its incorrect application. Ontologically inseparable from law, being an expression of the essence of law as right and justice, equity is thereby limited to performing the role of facilitator of correct judgement according to the justice of the law -- in effect, providing security that the precepts of common law are fulfilled. *Doctor and Student* therefore performs a double displacement. Previously, judgement in correct conscience could only be achieved through recourse to 'higher' principles outside and beyond the legal domain. When law and conscience were incompatible, conscience prevailed.34 St. German places the jurisdiction of Chancery, as a jurisdiction on conscience, *within* common law, indeed as grounded upon it, divorcing equity from its ethical foundation in charity, mercy and justice. Identifying common law with the precepts of *synderesis* and refusing an ontological difference between equity and law, he transforms equity into one of common law's expressions, be it of its letter or spirit. The concern now moves away from right judgement derived from correct conscience, to a judgement which fulfils the law's rule, a judgement in equity. The result is that conscience is not simply directed to pay homage to common law's authority and priority, but with judgement a matter of English law, its jurisdiction is transferred to equity and in itself conscience is rendered inconsequential.

The canonical status of *Doctor and Student* stems neither from its being an apology for common law, nor in its doctrinal exposition of equity *per se*, but from the closure proposed in the argument of *Doctor and Student* which binds both conscience and equity steadfastly to the chariot of the common law. This closure, evident at both literal and symbolic levels of the text, common law embodies a different, distinct and particular model of judgement; one divested of all the ethical, theological, even poetic, elements which make law the art of *boni et aequi*. As such, St. German's text acquires its status by becoming itself an act of judgement, one predicated not upon a claim of being one amongst others, but upon a repression of all that challenged it, a repression which replaces the jurisdiction of conscience with that of equity, and subjugates the jurisdiction of equity to that of the common law.35

By the turn of the sixteenth century, St. German's position had been adopted in full. Hake's treatise on *epieiekeia*, for instance, a text about equity rather than conscience, incorporated the syllogistic structure of his argument and concluded in a like manner:

> when the Lord Chancellor ordereth his conscience in any particularity according to the lawe, for that the Common lawe therein also is according to Conscience, therefore, as to such particularity it is said that the Lord Chancellor doth order his conscience according to the lawe (Hake 1603/1953:130).

And for Lambarde, writing in 1635, the jurisdiction of conscience had been obliterated and the court of Chancery transformed into a court of equity which "so cancell and shut up the rigour of the generall Law, that it shall not breake forth to the hurt of some one singular Case and person" (Lambarde 1635/1957: 31-2).36 By now, the issue of jurisdiction of conscience and common law had been decided for good. Without doubt, had it not been for St. German, today we might still have courts of conscience instead of courts of equity.

Raising Questions about Modern Equity's 'Logic of Reference' to Conscience 37

> We ought not to think of common law and equity as two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law --Maitland (1932: 9)

Nowhere in *Equity and the Forms of Action at Common Law*, his principal piece of writing on the history of equity, does Maitland mention either St. German's *Doctor and Student* or the concept of conscience. Equity is presented as the creation of Chancery, as part of the development of the various English courts. The story of modern equity is therefore not one which deals with the repression of its ethical being, or its affiliation to conscience. It is simply a narrative of the origin of Chancery. Such fictions of institutional origin, leave the picture of common law's axiomatic prevalence and equity's equally axiomatic ontological dependence upon it, entirely undisturbed. Indeed, so vivid has this picture become, that to this day, Bentham's confident declaration is often repeated:

> Taking by itself or anywhere else than in company with the word court, equity is abracadabra; a word without meaning. To give meaning to it, you must connect it with the word court and say court of equity (Bentham 1962: 8.9.3).

Although explicit references to conscience have either vanished from the historical and doctrinal writings on equity, or have remained as keepsakes from a bygone era, they persist as pronouncements of the oracles of law in actual judgements made in equity, surfacing sporadically, unconnected and contingent, yet continuing to do so. Their presence is seldom acknowledged, let alone discussed. But the fact is, they remain, like the oyster's grit of sand. They cannot be ignored or avoided:

> [although it is said] equity's power to act as a court of conscience is now spent... it does not mean that when unconscionable situations exist in modern society... that this court just shrugs its shoulders and says that as no historical example can be pointed to as a precedent the court does not interfere. This court still continues both in private and commercial disputes to function as a court of conscience.38
>
> We are in the world of doctrine, not of neat and tidy rules... The court in the exercise of this jurisdiction is a court of conscience... Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable...39

Such judgements in equity, appearing as judgements in conscience delivered in courts of conscience, create what Legendre calls "an asymmetry" between that which makes sense in relation to the signifier of its cause (the fiction of equity's institutional origins) and that which is recognized in the very discourse of the references to conscience (see Legendre 1998: 179-82). Yet the textbooks of equity contain no chapters on conscience as jurisdiction or on unconscionability as equity's special doctrine.40 They fail to discuss conscience as a judgement of a different ethical quality transcending positivistic legal method and argument, and extending its scope beyond 'the world of neat and tidy rules' and they do not even acknowledge that misrepresentation, breach of fiduciary duty and undue influence might all comprise species of unconscionable conduct,41 or that different types of estoppel or tracing may be grounded on the single common principle of unconscionability.42

So how is one to deal with this asymmetry between, on the one hand, the manner in which textbook tradition and contemporary doctrine address law and equity and, on the other, the logic of reference to conscience? Attempts to engage, interpret or even acknowledge this asymmetry have hitherto been eschewed.43 Only by acknowledging the logic of the referential function of conscience does the present image of common law and equity emerge as problematic. Genealogical study reveals the common law as constituted in repression of the religious, the ethical and the poetic. Conscience can now be understood as that which has been repressed, excluded and denied, that which returns to haunt modern legal discourse. The continued presence of conscience points to the possibility that there is something more to law than its modern conception admits; that the jurisprudence grounded upon conscience cannot be ignored or contained by the positivized monological jurisprudence of common law; the dogged persistence of conscience, not only seriously 'wounds' the potency of 'a science of law', but remains a living invocation of a need, indeed a longing, for an ethics in law and legal judgement.

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Footnotes

1 For a discussion of iconoclasm in English Reformation see Phillips 1973.

2 Pettit 1997: 4; Pearce and Stevens 1998: 6; Hanbury and Martin 1998: 4, 7; Curzon 1993: 5; Snell 1990: 8.

3 For a discussion of genealogical study see Foucault 1977, and for its use in the study of law see Goodrich 1990: 53-110.

4 See also Potts 1980: 2-5. For a discussion of its meaning and of its use in Greek and Roman texts see Pierce 1955: 21-39 and 40-53. Pierce argues that *greek greek* is one of the few words which passed in the New Testament without Hebrew colouring.

5 Philo the Alexandrian, cited in Pierce 1955: 21-39.

6 Ezekiel I: 4-14. Jerome's interpretation of the first three faces correlates with Plato's tripartite structure of the human soul (see Plato 1999: IV. 436b-441b).

7 Medieval thinkers followed Aristotle's view on the structure of the soul and distinguished 'potentialities' as innate and inclined towards acquiring dispositions, themselves voluntarily acquired.

8 I have borrowed this term from Baylor 1977.

9 For a discussion of Aquinas concept of *synderesis* see Potts 1980: 45-55 and also Baylor 1977: 29-38.

10 For a discussion of Aquinas analysis of human soul see Copleston 1955: 151-191. For a discussion of his view on human activity and reason see McInerny 1993: 196-202.

11 For a discussion see D'Arcy 1961: 76-86.

12 Virtues were good dispositions, natural capacities and abilities which aided man to act in ways which helped humanity flourish, that is, in ways in which fulfilled man's end. They were always associated with being good and acting good. For a discussion see Davies 1993:239-249.

13 D'Entreves argues that it is as if the notion of sovereignty were being applied to the divine law-giver himself and it finds its perfect expression in Calvin's concept of God as *legibus solutus* (d'Entreves 1970: 69). For a discussion of the fortunes of the idea of natural law in medieval nominalism see Oakley 1961 and Oberman 1963: 103-119. For a discussion of voluntarist views of natural law see Gierke 1881/1960: 96-99.

14 Revelation was particularly important in the thought of Ockham, who did not accept Natural Law as immutable. He argued that without revelation man could not know that certain a behaviour, although fit for human nature and temporal life, was what God had ordered or willed for humans. In other words there was no ethical content without revelation. See also Copleston 1955: 107-9.

15 Similar to the Pauline conception, an innate power, *lex naturalis in corde scripta*.

16 For a discussion of his views see Baylor 1977: 78-91.

17 Luther (1514) in the sermon "On the proper wisdom and will" (Luther 1956-67: 1.32.1-6).

18 Luther's final explicit reference to *synderesis* is in Lectures on Romans 4: 7, cited in Baylor 1977:175.

19 For a detailed discussion of the fate of the concept in Luther, see Baylor 1977: 173-208 and Ozment 1969: 139-45.

20 Luther (1956-67: 7.799, 11-15) used the allegory of Tabernacle in his 'Sermon of the Threefold Good Life to Instruct the Conscience', associating the court with external acts, the sanctuary, with the internal life of man (the place inhabited by conscience), and the Holy of Holies, the place in which faith resides and secures correct judgement.

21 See Luther's debate with Erasmus about the freedom of will (Luther 1956-67: 18.624, 14-18. Also see Calvin 1536-59/1949 IV.xx; Hooker 1593-7/1989: 8.6.9. Such views were a commonplace in the manuals of conscience and casuistry in sixteenth and seventeenth century. See for example Perkins 1606/1966; Ames 1639/1975:107.

22 For a discussion of the jurisdictional limits of the authority of conscience in casuistic manuals of late sixteenth and seventeenth century in England see Thomas 1993 and Crawford 1993. For the difference between catholic and protestant approaches to casuistry see Jonsen and Toulmin 1988: 159-164.

23 More wrote his *Apology* against St. German's *Treatise Concerning the Division of Spirituality and Temporality*.

24 Holdsworth 1966: 95; Milsom 1981: 80; Plucknett 1956: 673.

25 Not only the Chancellors were ecclesiastics, educated both in civil and canon law, but the procedures in Chancery were also analogous to those of ecclesiastical courts. For a discussion of the influence of canon law in both the procedure and the jurisprudence of the Chancery. See Vinogradoff 1908 and Coing 1955.

26 The procedural origins of the jurisdiction 'on conscience' lie in the King's council, the *Curia Regis*. It was by an order of Edward the III in 1349, that the Chancellor in the king's name hitherto served the demands of good conscience. For a discussion of the procedural origins of the jurisdiction of conscience see Pike 1885, Holdsworth 1915 and Adams 1916. Also for a discussion of the role of the king as protector of the common good and as safeguarding law and justice in the kingdom see Kern 1948 and Ullmann 1946: 50-8.

27 This analogy between divine justice and justice in conscience found its way to the early morality plays where God as the king dispensed divine justice predicated upon mercy, charity and equity. See McCutchean 1958 and Knight 1972. For a discussion of the exercise of the equitable powers of interference with law in the interest of the justice of the law see Ullmann 1946: 38-44.

28 Although the Aristotelian term epieiekeia is not used in Chancery, but rather the term derived from the latin *aequitas*, its operation as radical or superior justice tempered by mercy and charity are conceptually very similar with Aristotle's epieiekeia as melior justice "justice and equity are therefore the same thing, and both are good, though equity is better" (Aristotle 1994: V.x.-2).

29 With the single exception of Fortescue's *De Laudibus Legum Angliae*.

30 For a discussion of the intellectual influences upon the work of St. German see Rueger 1982, Burns 1983 and Schoeck 1985.

31 Coke commenting in the first Institute on Littleton, cited in Little 1969: 177.

32 See the discussion in Hake 1603/1953: 121-3, in which he compares the equity of the chancery with that of the common law.

33 Equity is by no means the only medium for correct application of the rule. St. German assigns the same function to the special statutes, local customs, principles and maxims of common law.

34 Hence it was often argued that what was debated in Chancery was conscience and not the law. For a discussion of the judgement in equity or conscience as opposing the judgement in law; see Hake 1603/1953: 120-3.

35 For a theoretical discussion of the repression of bodies of legal knowledge during the seventeenth century see Goodrich 1996: 9-28.

36 For an intresting persepctive on this definition of chancery see Vismann 1996.

37 The expression is borrowed from Legendre 1998: 181.

38 per Young J. in *Lincoln Hunt Australia Pty.Ltd. v. Willesee* (1986) 4 N.S.W.R. 457 at 463. More recently, in *Credit Lyonnais Bank Netherland NV v. Burch* (1997) All ER 144, both Nourse LJ and Millet LJ refer to conscience and unconscionable behaviour in their judgements, even though such arguments were not put forward by the plaintiff.

39 per Lord Scarman in *National Westminster Bank PLC v. Morgan* (1985) 2 WLR 588 at 602.

40 One exception is the Australian textbook by Meagher, Gummow and Lehane (3d ed) 1993.

41 per Mason J. in *Commercial Bank of Australia v. Amadio* (1983) 151 C.L.R. 447 at 461.

42 For a discussion of estoppel and unconscionability see Halliwell 1994 and for tracing and unconscionability see Millet 1991.

43 Although an attempt has been made recently to account for the references to conscience as a means to disguise its functioning in the service of economic efficiency. See Duggna 1997.