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LAW, MORALITY, AND THOMAS MORE†

HONORABLE ROBERT H. BORK*

The 450th anniversary of the death of Thomas More, which we remember this year, has produced a flood of scholarship and reflections. Anyone who imagines he can say anything in the slightest degree new in an after-dinner talk is certainly foolhardy, not to say worse. When he is addressing a group most of whose members know more about Sir Thomas than he does, I cannot think of words sufficient to describe his presumption. Nevertheless, you see such a person before you tonight.

I shall not dwell upon the details of Sir Thomas' career, because they are well known and also because some of them make me distinctly uncomfortable. More was, for example, a superbly accomplished lawyer, but before the lawyers among us preen too much over that fact, we ought to recall what Erasmus reported of More's view: "The study of . . . law is as far removed as can be from true learning More's mind, fitted for better things, naturally dreaded these studies . . ." That puts a more favorable light, perhaps, on some of our law school transcripts. We may explain our grades on the ground that our minds were fitted for better things.

Nor would it be discreet of me to rehearse More's career as Lord Chancellor. One of his biographers tells us that when he took over the post some cases had been pending there for a dozen years, but

he now applied to the legal business of Chancery that peculiarly rapid mind which in earlier days had enabled him to grasp the meaning of a Greek sentence with a quickness which astonished his humanist colleagues.

His day of triumph came when, having taken his seat and settled a case, he called for the next, and was told that there was no man or matter to be heard.

Now that accomplishment is a matter of no small annoyance to a federal judge, at least to this one. On the other hand, if Sir Thomas had had some of the regulatory cases that are our standard fare, he wouldn't have

† Based upon a speech before the Thomas More Society of America.

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needed a hair shirt.

What I do intend to talk about, oddly enough, is the subject disclosed by the title of these remarks—the thoughts raised by Thomas More's life, and the manner of his death, upon the issues of law and morality, issues that remain vital today.

The first thing to be observed is that, contrary to some impressions, for Thomas More, in a real sense, law *was* morality. It is equally true that for More morality was superior to law and was the standard by which law is judged. If that seems a paradox, I do not think it is a true one.

It is a great irony that Thomas More has come to be seen as a hero of civil disobedience, a man who refused to obey immoral law. Perhaps it is a sign of the distemper of our age that he should be so misunderstood.

Ours is an age that glorifies, practically deifies, the individual conscience. It was not always so. It must have been well into this century before one began to hear words such as civil disobedience or heresy used as terms of approbation. What would Thomas More have thought of that? What would he have thought of those who disobey law in the name of moral imperatives? His life, particularly his public life, gives a tolerably clear answer.

More not only lived under but served a sovereign, many of whose policies he believed to be immoral or profoundly unwise. From the beginning, More was under no illusions about that. When William Roper, his son-in-law, rejoiced at how friendly Henry was to More, More replied, "I have no cause to be proud thereof, for if my head could win him a castle in France it should not fail to go."

Yet he did not disobey; he might give contrary advice; but, the policy or the law once decided upon, he complied. For example, he completely disapproved of Henry's ruinous war with France but, as Speaker, he asked Parliament for extraordinary and unpopular taxes to support that war. Later, when More was Lord Chancellor, and it was proposed to put Parliament in control of the Church, Marius tells us

More was sick at heart at the prospect . . . [but] he could not control events. Worse, he was a respectable figurehead, kept by the government to lend it whatever authority his reputation gave him, serving by his very presence in the post of Lord Chancellor a cause which was to him abominable.

He wanted to resign. "Yet he could not resign, for to do so would have been to run the risk of making his opposition to the king public."

Again, Henry commanded More to speak in the House of Lords to say that Henry was pursuing his divorce from Catherine as a matter of religious scruple and not for love of any other woman. In doing so, More pointed out that various universities agreed that the first marriage had been unlawful. Someone asked More's opinion on the matter and he replied that he had given it to the king, and he said no more.

As R.W. Chambers put it, "respect for authority . . . was the foundation of the political thinking . . . of More." And so it was. He consented to present the king's case to the House of Lords but would not go an inch further than required.

This was his attitude toward law and the duty of a judge. He once said, "[I]f the parties will at my hands call for justice, then, all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right."

In this, Robert Bolt's *A Man For All Seasons* got the man remarkably right. (I was somewhat surprised to discover this since I had assumed that Bolt, like many writers of historical dramas, had taken liberties to make his subject more interesting or appealing.) In one scene, More, then the Lord Chancellor, argues with his family who are urging him to arrest Richard Rich. His daughter, Margaret, says, "Father, that man's bad." More answers, "There is no law against that." His son-in-law, Roper: "There is! God's law!" More: "Then God can arrest him The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester."

Why, then, this obedience to constituted authority and to law, even when he regarded them as immoral? It was, in part, fear of the alternative to law. An Elizabethan play, that may have been written by Shakespeare, has More quell rioters against aliens in London with this speech:

MORE: Grant them removed, and grant that this your noise
Hath chid down all the majesty of England.
Imagine . . .
That you sit as kings in our desires
Authority quite silenced by your brawl
And you in ruff of your opinions clothed,
What had you got? I'll tell you. You had taught
How insolence and strong hand should prevail,
How order should be quelled; and by this pattern
Not one of you should live an aged man;
For other ruffians, as their fancies wrought
With self same hand, self reasons and self right
Would shark on you; and men like ravenous fishes
Would feed on one another.

And Bolt, in a much quoted passage, has More say when assailed with the charge that he would give the Devil the benefit of law:

MORE: Yes. What would you do? Cut a great road through the law after the Devil?
ROPER: I'd cut down every law in England to do that!
MORE: Oh? . . . And when the last law was down, and the Devil turned

round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.

But there is more than the fear of lawlessness and tumult. There is the thought that he is not sure about morality, he may be wrong. When Roper says to him, "the law's your god," More replies, "Oh, Roper you're a fool, God's my god. . . . But I find him rather too subtle. . . . I don't know where he is nor what he wants."

And again he says: "God made the *angels* to show him splendor—as he made animals for innocence and plants for their simplicity. But Man he made to serve him wittily, in the tangle of his mind." Not in the pride and certainty of the individual conscience, you will note, but in the tangle of his mind.

The recalcitrance that brought More to the scaffold—his refusal to take the oath that Henry's second marriage was valid and that Henry was the Supreme Head of the Church in England—that recalcitrance may be seen, as it usually is, as More's one great act of disobedience. Bolt writes that More became to him a man with an adamant sense of his own self. He knew where he began and left off, what areas of himself he could yield to the encroachments of his enemies, and what to the encroachments of those he loved. It was a substantial area in both cases, for he had a proper sense of fear and was a busy lover. Since he was a clever man and a great lawyer he was able to retire from those areas in wonderfully good order, but at length he was asked to retreat from that final area where he located his self. And there is this supple, humorous, unassuming and sophisticated person set like metal, who was overtaken by an absolutely primitive rigor, and could no more be budged than a cliff.

It is this behavior that causes Bolt to refer to More as a "hero of selfhood." Indeed it was extraordinary behavior: More was the only person, not a member of the clergy, who refused the oath and thus chose martyrdom.

Yet the refusal to take the oath need not, of course, be viewed as disobedience at all. There was a law higher than Henry's, and More knew that the oath violated that law. As to this ultimate thing, he, at last, knew where God was and what he wanted. At this extremity, God was no longer too subtle for him, and More obeyed God's law and went to his death. This was not disobedience but obedience, a thought he expressed in his last words as he lay down before the headsman: "I die the King's servant, but God's first."

For More, then, until law changed, it was to be obeyed, and that injunction he applied as much to the judge on the bench as to rioters in the

street. We all recognize rioters or draft resisters as civil disobedients but we are less likely to recognize that the judge who ignores law or who creates constitutional law out of his own conscience is equally civilly disobedient. I had not thought of it that way until Alexander Bickel, in his wonderful book, *The Morality of Consent*, recounted the recent American experience with the phenomenon in the streets and then said, "The assault upon the legal order by moral imperatives was not only or perhaps even most effectively an assault from the outside." He argued that it came as well from a court that cut through law to do what it considered "right" and "good." The theoretical justification for that peculiarly corrupting form of civil disobedience is now being constructed by many of the most prominent constitutional scholars in our law schools. It is the philosophy that judges should create and enforce as constitutional law individual rights that are not to be found in the Constitution.

More would have had none of that. As Bickel noted, civil disobedience, no matter by whom or in what cause, is always "a decision in favor of self, in favor of the idea of self." That is why, in the law, it encourages moral relativism, which is a leading feature of modern constitutional adjudication. But More was a communitarian. As Chambers notes, "From [his book] *Utopia* to the scaffold, More stands for the common cause, as against the private commodity of the single man. . . ." It is for that reason I say that obedience to constituted authority and to established law was a major part of More's morality. If that was his view in the reign of Henry VIII, how much more would it have been his view when law and policy are democratically made, when they are, in the realest sense they can be, the will of the community.

For More, morality was superior to the will of the sovereign and to law in the sense that it might be brought to bear to shape or to alter that will and that law, though not to justify disobedience. This clearly appears in *Utopia* where he showed himself arguing that it was a man's duty to enter public life despite the evil he thought that necessarily entailed, saying, "That which you cannot turn to good, so to order it that it be not very bad."

And after More had resigned as Lord Chancellor he spoke to Cromwell, who still served the king:

Master Cromwell, . . .
 If you will follow
 My poor advice, you shall, in your
 Counsel-giving unto his Grace, ever tell
 Him what he ought to do . . . For if a lion knew
 His own strength, hard were it for any
 Man to rule him.

In a word, try to make law as moral as you can, but when it is made,

whatever it is, morality lies in obedience to the law. If disobedience is ever justified, it is only when the issue is of transcendent importance and when you are absolutely sure of the right and wrong of the matter. In a democratic polity there can be such occasions, but they will be very few.

If some find the lesson More taught too austere for comfort, they ought at least reflect on the question of how much glorification of the individual conscience any legal order can tolerate and remain a legal order. They ought also to ask how much privatization of morality the moral order can tolerate and remain a moral order. These are not easy questions. Whether or not we accept More's answers completely, there is surely much in what he said.

In my brief acquaintance with Sir Thomas—an acquaintance prompted by this Society, and for which I thank you—I have learned a good deal. Erasmus it was who called him "A Man For All Seasons." He may be. But what astounds and impresses me is that across four and one-half centuries, he still speaks to us.