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ST. THOMAS MORE IN THE THICKETS OF THE LAW

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When Thomas More was victimized by English law in his famous case against King Henry VIII, something in addition to More began to fall: the tradition of the subordination of positive to Divine law. According to Fr. Edward Berbusse, S.J., More's case illustrates an early triumph of positivism—the notion that the legitimacy of law depends on the will of a human legislator. This point of view adds new significance to a story which is fascinating enough because of the Saint at its center.



WHEN DESIDERIUS ERASMUS ARRANGED FOR THE PRINTING OF HIS *MORLAE ENCOMIUM* (The Praise of Folly) in Paris in 1511, he had in mind a tribute to Thomas More whose life and virtues were opposite to folly. It was long in the composing and a source of delight to More who enjoyed the play on his name, as Erasmus must have read it to him. His satire on man stretched from the Stoic Seneca who “sets up a stony semblance of a man, void of all sense and common feeling of humanity” to the lawyers whose profession “most men laugh at as the ass of philosophy.” Yet, says Erasmus, “there’s scarce any business, either so great or so small, but is managed by these asses.” To those who criticized the *Moriae Encomium*, More responded that the *Moriae* had “delighted many scholars and was decried only by the disgruntled theologians whom the cap fitted.”¹

SECULARIZATION OF THE LAW

It was an age of Renaissance, with new discoveries in science and geography, with an unearthing of renewed enthusiasm for the classical glories of Greece and Rome. Even before the fall of the Byzantine Empire to the Turks, in 1453, the scholars of the East had invaded the Italian universities, bringing the principles of the ancient Roman Law, such as “Quod principi placet, legis habet vigorem.” In the 14th century *Defensor Pacis* of Marsiglio of Padua, the divorce between political theory and theology was begun, and “modern” notions of government and sovereignty were developed. To this end he quoted Aristotle’s *Politics*: “Three of the parts or offices of the state . . . the priestly, the warrior, and the judicial, are in the strict sense parts of the state.”² Marsiglio’s “extreme regalism” was condemned in a series of propositions by Pope John XXII, in 1327. Among the propositions condemned by the Pope are the following:

- All the temporal possessions of the Church are subject to the Emperor, and he can take them as his own. That it is the role of the Emperor to correct, establish remove, and punish the Pope.
- All priests, whether Pope, or archbishop, or simple priest, are by institution of Christ of equal authority and jurisdiction. But one has more authority than another by concession of the Emperor; and, as he has granted, so he can revoke.

•Neither the Pope nor the whole Church taken together can punish any man with coercive punishment, save by grant of the Emperor.

The Pope declared these teachings to be contrary to Scripture, inimical to Catholic Faith, heretical, and erroneous.³ These errors were to pass into the late 15th and early 16th centuries.

Niccolo Machiavelli (1469-1527), cynical author of the amoral book *The Prince*, inherited the new secularist tradition and mixed together liberty, power, and pessimism. He concocted a utilitarian, experiential system, with no metaphysics adequate to protect the people against the prince. He says:

At the beginning of the world, the inhabitants lived dispersed, like beasts. As the human race increased, the necessity for uniting themselves for defence ... the better to attain this object, they chose the strongest and most courageous.... Thence they began to know the good and the honest.⁴

Such positive laws knew no origin in a natural law, written by a Creator into man's nature and manifested by the inner voice of conscience. Machiavelli, contemporary of Thomas More, was adopted by Thomas Cromwell for the purposes of Henry VIII. He first read them to Cardinal Wolsey, in part:

A Prince cannot observe all those things exactly which make men be esteemed virtuous, being oftentimes obliged for the preservation of his state to do things inhuman, uncharitable, and irreligious.⁵

It was not a far step for Cromwell, after Wolsey's death, to present to the King the book of heretical Master Tyndale, entitled *The Obedience of a Christian Man*, in which he read:

The King is, in the world, without law; and may at his lust do right or wrong, and shall give accounts but to God only. . . . Let the King determine for the people what is and what is not heresy.⁶

MORE'S POSITION

Thomas More regarded such theories as contrary to the English tradition of representative government, violative of the principles of *Magna Charta* (1215), and repugnant to the Catholic theory of the State. He knew Henry of Bracton's 13th century dictum: "Rex est sub Deo et sub lege" (the King is under God and under the law). At his death in 1268, Bracton said:

Though almost all countries use statutes and written laws, England alone uses unwritten law and custom. Unwritten law is established or defined by precedent. It will not be ridiculous to accept the unwritten law of England as law, since that has the force of law which has been defined and approved by royal authority and by the advice and assent of magnates and the common consent of the realm.



St. Thomas More

He further clarified this principle of the consent of the governed with the sentence: "The king has his councillors who are his associates; he who has associates has a master."⁷ We are told that More had closely read the works of St. Thomas Aquinas, and that, on reading a contemporary controversial pamphlet, remarked:

The arguments which this villain has set forth are the objections which St. Thomas puts to himself in such and such a question and article of the *Secunda Secundae*, but the rogue keeps back the good Doctor's solutions.⁸

More's biographer, Stapleton, writing in 1588, gives us this information, adding that in esteem for Aquinas, More was joined by Erasmus who praised Aquinas' "thoroughness, soundness of mind, and solid erudition." The common Doctor defines law as a "certain ordination (quaedam ordinatio) of reason, for the common good, from him who has charge of the community and promulgated" (S.Th.I-II, Q. 90, a.4.). Aquinas then teaches that there are a variety of state governments: kingdom, aristocracy, oligarchy, and democracy, concluding that the best of governments is a combining of these: "aliquid

regimen ex istis commixtum, quod est optimum” (S.Th. I-II, Q. 95, a.4).

Loyal to his English tradition, Thomas More looked back to the 15th century statement of Chief Justice Fortescue: “The king of England cannot alter nor change the laws of the realm at his pleasure. Why? Because he governs his people by power not only royal but political,” that is, constitutionally. Here Fortescue with acknowledgment to St. Thomas “distinguishes the dominion regale from the dominium politicum et regale on the basis of the people’s consent to legislation.”⁹ One author and commentator on English constitutional history summarizes this idea: “The Christian doctrine of the equality of all men (by nature) would not tolerate any willful human superiority save the supremacy of law and by the consent of coequals.”¹⁰ Here we see the indebtedness of sound representative governance to Catholic medieval theory and history.

Of this profound historical blending of the Catholic tradition of the principle of representation and the supremacy of natural and customary law, with the entailed inheritance of the law of the land of England, Thomas More was well aware. And so he foresaw and feared the advent of absolutism in the rule of the modern Prince. It derived from both the new heresies of such English Lutherans as William Tyndale, author of a New Testament translation in 1526, and the revival of absolutist princes, fostered by Machiavellians. In a letter to Erasmus, More urged him to continue with his second volume on the discussion of Scripture, to the worsting of Luther:

Luther, I am sure, would rather have you say nothing, even though in his letter to you, he pretends to have a supreme contempt for you. ... He is fully conscious that his worthless comments, which laboriously obscure the most obvious passages of Scripture while being frigid in themselves, would become, under your criticism, a mass of sheer ice.¹¹

Within three years, on September 26, 1529, More was installed as Lord Chancellor by the King, with the assurance that “I should perceive mine own conscience would serve me, and that I should look first to God and after God unto him.” As Chancellor, he heard and adjudicated causes in the morning, leaving the afternoon free to interview petitioners, giving redress where possible and determining if any probable cause of action existed.

It was a time when equity was softening the rigors of the Common Law; and More believed that Law and equity might be administered by the same tribunal. This was accomplished in the Judicature Act of 1873. Though busy as Chancellor and as a member of the King’s Council, he found time to refute the heresies of William Tyndale.¹² By the 14th of June, 1532, More was writing to Cochlaeus that he had been obliged to retire to private life because of a persisting illness.¹³ It was on May 16, 1532, that Sir Thomas surrendered the Great Seal to the King. He did so with a heavy heart, since he had seen the separation of King Henry from Queen Catherine, and increasing pressure on the clergy. He expressed himself to Thomas Cromwell:

Master Cromwell, you are now entered into the service of a most noble, wise, and liberal prince. If you will follow my poor advice, you shall, in your counsel giving unto his Grace, ever tell him what he ought to do, but never what he is able to do.¹⁴



IN THE THICKETS OF THE LAW

On May 23, 1533, Archbishop Cranmer annulled Henry VIII’s marriage with Catherine of Aragon; his marriage to Anne Boleyn was declared valid on May 28, and in June she was proclaimed Queen. Henry determined the line of succession, and had his mandate confirmed by the first Act of Succession, passed in the January-March session, 1534, of Parliament. It has been called “a treatise on canon law, a constitutional enactment and a political manifesto.” Henry’s negation of the claims of Rome was an aboutface from his ideas expressed in 1521, when he rejected Luther’s theology of the Sacraments, and advanced an extreme position on the temporal power of the Pope over England. Henry had then said, when Thomas More raised the objection of the statute of *Praemunire*, that “Whatsoever impediment be to the contrary, we will set forth that authority to the uttermost, for we received from that See our crown imperial.” Then, in 1534, Henry was holding that a national law of England could limit the spiritual authority of the Holy See. The Act was in effect a rejection of Papal authority. It concluded with penalties for its infringement, as guilt of

high treason, punishable with death and forfeiture of all possessions. Any “malicious and obstinate publication” against the king or in slander “of the said matrimony” with the Queen Anne was adjudged misprision of treason with a penalty of “imprisonment of their bodies at the king’s will” and forfeiture of possession. Finally, there was an oath to be taken by all the “nobles of your realm spiritual and temporal, as all other of your subjects, . . . that they shall . . . observe, fulfill, maintain, defend, and keep . . . the whole effects and contents of this present Act.”¹⁵

A whole succession of acts, engineered by Thomas Cromwell, with the approval of Parliament, constituted Henry VIII the “Supreme Head in earth of the Church of England.” This imperium of England was to be expressed by statute of the King of Parliament, without any external limiting law, either of custom or Christendom. In 1529 the clergy were brought into submission by indictment of *praemunire*¹⁶ which forbade appeal from the King’s court to Rome. In 1532 an Act in restraint of appeals to Rome was passed. In 1534 all Papal powers in the Church (dispensations, appointment of bishops, and freedom from taxation) passed to the Crown. The Act of Supremacy, of November 1534, merely declared what was already achieved.¹⁷

On March 5, 1534, Thomas More wrote two letters: a brief one to the King, recalling the Sovereign’s word that in any suit with his Highness, “I should find your Highness good and gracious lord unto me”; and a lengthy one to Thomas Cromwell. The latter was most carefully reasoned, and of necessity since St. Thomas was now on the very thickets of the law. It was an appeal to the King through the King’s secretary, an explanation of More’s thought and action in respect to the nun of Canterbury (Elizabeth Barton), the “King’s matter” of his marriage, and the primacy of the Pope. The first question More handled expeditiously, asserting that in communication with the nun he had the intention of standing well “with the duty of a tender, loving subject toward his natural prince.” Of the marriage or of the Papal primacy, More hoped that the King would find no “manner of obstinate heart against his pleasure.”

Of the King’s “great matter,” the marriage, More reviewed his thoughts and actions. Before his departure for France to negotiate the Treaty of Cambrai (1529), in the embassy headed by Bishop Cuthbert Tunstal, he was aware of certain actions to prove the Bull of dispensa-

tion for Henry’s marriage to Catherine of Aragon invalid, since the prohibition of Leviticus and Deuteronomy was said to be *de jure Divino*. Besides, it was advanced that there were certain faults in the Bull rendering it inadequate. Upon return from France, said More, the King disclosed his concern: “His marriage was not only against the positive laws of the Church and the written law of God, but also in such wise against the law of nature, that it could in no wise by the Church be dispensable. “ After showing the Old Testament passages to More, the King asked his opinion, to which More responded by indicating his limited ability in the matter, but spoke his understanding. To this response King Henry was gracious, advising More to consult further with Stokesley, Bishop of London (who had written a book on the matter); with Edward Fox, the King’s Almoner; and with Dr. Nicholas de Burgo, an Italian Augustinian friar. Then, said More, he believed that the King “did well and virtuously for the acquieting of his conscience to sue and procure to have his doubt decided by judgment of the Church.”

Thereafter, from May 31 to July 23, 1529, Cardinals Campeggio and Wolsey held a legatine court; and in this More “never meddled,” for the matter was “in hand by an ordinary process of the spiritual law.”

Meanwhile, More read what the King advised and was in “diligent conference with his Grace’s councilors.” He wrote no word in impairment of the King’s part, refusing to read any book in opposition, and “never gave ear to the Pope’s proceedings in the matter.” He had done nothing “whereby His Highness might have any manner, cause, or occasion of displeasure toward me.”

As to the primacy of the Pope, More said that he did not meddle; but, rather, recalled that, in reading Henry’s book against the heresies of Martin Luther, he had advised a light touching of the matter of primacy in temporal matters. Lest it be used in a future conflict between King and Pope. Herein Thomas More added that he could not in conscience deny the primacy, because “that primacy is at the leastwise instituted by the corps of Christendom and for a great urgent cause in avoiding of schisms and corroborate by continual succession more than the space of a thousand years at the least And, therefore, since all Christendom is one corps, I cannot perceive how any member thereof may without the common assent of the body depart from the common head. “ St. Thomas then advised that it would not advance the cause of the “King’s matter,” if his Highness should “In

his own realm before, either by laws making or books putting forth, seem to derogate and deny not only the primacy of the See Apostolic, but also the authority of the general councils, too, which I verily trust his Highness intendeth not.” In this argument More saw the possibility of a Pope being deposed by a general council and another substituted, “with whom the King’s Highness may be very well content.” He concluded that he had never intended to “meddle in that matter against the King’s gracious pleasure, whatsoever mine own opinion were therein. “ He asked Cromwell to inform the King of his “faithful mind.”¹⁸

IMPRISONMENT AND TRIAL OF THOMAS MORE

On April 13, 1534, Sir Thomas More was summoned to appear before the King’s Commissioners, at Lambeth Palace, was offered the oath and refused it. Thereupon, he was handed over to the Abbot of Westminster as a prisoner, and then sent to the Tower of London. He described in a letter to Margaret Roper the proceedings. He had asked for a copy of the oath and of the Act of Successions; and, after private reading, he explained:

My purpose was not to put any fault either in the act or any man that made it, or in the oath or any man that sware it, nor to condemn the conscience of any other man. But as for myself in good faith my conscience so moved me in the matter that though I would not deny to swear to the succession, yet unto the oath ... I could not swear, without imperiling my soul to perpetual damnation.

The Archbishop of Canterbury (Cranmer) reminded More that in a case of doubt of an unsure conscience in refusing the oath, he should take the sure way in the obeying of your prince, and swear it. To this subtle argument, More told Margaret that “I could answer nothing thereto, but only that I thought myself I might not well do so.” More believed that he had not informed his conscience suddenly nor slightly but by long leisure and diligent search.... In my conscience the truth seemed on the other side.” To a subsequent charge that the great council (Parliament) of the realm was against him, More replied that he was not bound to change his conscience, since the general council of Christendom was on his side.¹⁹

Sir Thomas More was to be in prison for 15

months. During that time, his daughter, Margaret Roper, wrote to him, simulating a persuasion to take the oath in order to gain credence with Thomas Cromwell, and to be able to visit her father. In May 1534, her father replied with touching love and almost distress, while assuring her that “the matters which move my conscience ... I will disclose to no man.” He closed with an expression of his “deadly grief ...[on perceiving his family and friends] in great displeasure and danger of great harm.” As for himself, he prayed that God would bring him “into His endless bliss of Heaven.”²⁰ In a beautiful letter to Dr. Nicholas Wilson, in 1534-when both were prisoners in the Tower of London-he returned to the matter of conscience, “leaving every other man to their own conscience myself will with good grace follow mine.”

And again, “In mine own conscience I cry God mercy, I find of mine own life, matters enough to think on.” Of Wilson, he said: “I beseech Him heartily to set your heart at such rest and quiet as may be to His pleasure and eternal weal of your soul.”²¹ In a most poignant letter to Margaret in 1534, More faces death in the light of his conscience.

Very sure am I that whensoever the time shall come that may hap to come, God wot how soon, in which I should lie sick in my death bed by nature, I shall then think that God has done much for me, if He had suffered me to die before by the color of such a law. And therefore my reason showeth me that it were great folly for me to be sorry to come to that death, which I would after wish that I had died.

In another letter to Margaret, he said:

That you fear your own frailty, Margaret, nothing misliketh me. God give us both twain the grace to despair of our own self, and whole to depend and hang upon the hope and strength of God.

On June 3, 1535, More wrote again to Margaret, describing in part his trial before the Commission of the King’s Council.²² He refused the oath, and made no answer to the questions on its lawfulness. When the Council asked why he did not speak out against the statute, More replied:

I have not been a man of such holy living as I might be bold to offer myself to death, lest God for my presumption might suffer me to fail, and therefore I put not myself forward, but draw back. Howbeit if God draw me to it Himself, then trust

I in His great mercy, that He shall not fail to give me grace and strength.²³

On July 5, 1535, the eve of his execution, More wrote in charcoal a last letter to Margaret, in which he noted that it was the eve of the Feast of the translation of the relics of St. Thomas of Canterbury (Becket), and the Octave of the Feast of St. Peter. He recalled to her how she had embraced him on the Tower Wharf, after his return from conviction and sentence: “I never liked your manner toward me better than when you kissed me last for I love when daughterly love and dear charity hath no leisure to look to worldly courtesy.”²⁴

The trial of St. Thomas More was on July 1, 1535, under an Act of Attainder,²⁵ instead of under the Acts of Succession. Why? There was no trial, no necessity for legal proof of guilt. In a word, it avoided awkward questions. The penalty was imprisonment for life, and reduction to penury. According to tradition, it was Anne Boleyn who urged execution, since their living on seemed a reproach to her. St. Thomas was interrogated by the Council four times in May and June of 1535. In a conversation with Richard Rich, there was an attempt to get More to pronounce the fatal words, “The King cannot be Supreme Head of the Church in England.” Only through the perjury of Rich was he condemned and sentenced to death. The procedures in the trial, at the time of Thomas More, assumed that anyone accused of treason was guilty. He was not given the indictment beforehand, nor allowed counsel, nor could his witnesses be heard on oath. The testimony of one person was sufficient; and the jury was expected to bring in a verdict in accord with the wishes of the bench. When in the trial of the Carthusians the jury was hesitant to bring in a verdict of guilty, Thomas Cromwell bullied them.²⁷

The King and Cromwell wanted spoken assent, not only to the annulment pronounced by Archbishop Cranmer, but also to the pronouncement by clergy and Parliament that Henry was the Supreme Head of the English Church. It was this assent that More refused; and for his silence, said he, “neither your law nor any law in the world is able justly and rightly to punish me, unless you may besides lay to my charge either some word or some fact in deed.” More was determined to dispute neither the King’s titles nor the Pope’s, but to keep silence. When the Attorney-General, Sir Christopher Hales, charged More’s silence with being “a sure token and demonstration of a corrupt and perverse nature,” he

replied:

If the rule and maxim of the civil law be good, allowable, and sufficient that Qui tacet consentire videtur, this my silence implieth and importeth rather a ratification and confirmation than any condemnation of your Statute.

Then, to the assertion that every good subject is obliged to answer, More responded: “In things touching conscience, every true and good subject is more bound to have respect to his said conscience and to his soul than to any other thing in all the world.” This, said More, is especially so where “the person giveth no occasion of slander, of tumult and sedition against his Prince, as it is with me.”²⁸ More saw the Act of Supremacy as an invasion of the liberty of conscience, and a violation of the English tradition in which all justice and peace must be grounded on the law of God, the law of Nature, and the law of the land.

In the second and third counts of the Indictment, More was charged with violation of the statute by correspondence with Bishop John Fisher urging non-conformity to its provisions. This More denied, saying that he had written: “I had informed and settled my conscience, and that he should inform and settle his.” As to the charge that he held the Statute to be a two-edged sword, with observance bringing loss of one’s soul and nonobservance loss of body, More said that he did not know the kind of answer of the Bishop of Rochester. As to his own words More corrected their version, stating that his response had been conditional, that is “in case the Statute were like a double-edged sword, he could not tell in the world how a man should demean and order himself but that he should fall into one of the dangers.”²⁹ Sir Thomas mentioned that Bishop Fisher had written about the words, *maliciously*, used in the Statute, believing that a “man speaking nothing of malice, did not offend the statute. “To this More replied that in this he would not meddle, “lest he should give the Council occasion to think that there was some confederacy between them both.”³⁰

The fourth count against More was raised on the basis of testimony given by Richard Rich, the King’s Solicitor. He said that in coming to More’s cell, on June 12, 1535, to remove his books, he engaged in conversation with More in which he denied that Parliament could make the King Supreme Head of the Church. To this

More replied that in this he would not meddle, “lest he should give the Council occasion to think that there was some confederacy between them both.”³⁰

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Master Rich, I am sorrier for your perjury than for mine own peril. And you shall understand that neither I, nor any man else to my knowledge, ever took you to be a man of such credit as in any matter of importance I, or any other, would at any time vouchsafe to communicate with you.

More reminded Rich that he had long known

him, and that “you were esteemed very light of your tongue, a common liar, a great dicer, and of no commendable fame.” He then turned to their Lordships, his judges, and asked them if it were likely, in so weighty a case, to trust Master Rich, that “I would unto him utter the secrets of my conscience touching the King’s supremacy.” And, said More, even if he had spoken the alleged words, they could not be construed as malicious in such circumstances. To be malicious was to bear ill will, and More had never so behaved toward a King who had favorably regarded and trusted him; and who had finally “given me licence ... to bestow the residue of my life for the provision of my soul in the service of God.” Seeing himself so disproved, Rich called two witnesses, Sir Richard Southwell and Master Palmer, to support his allegations. Both said that, being employed in the packing and carrying off of the books of Sir Thomas, they heeded not the conversation.³¹



NOTES

1E. E. Reynolds, *The Field Is Won* (Milwaukee: Bruce, 1969), pp. 65-68.

2“Erasmus on the Follies of His Age,” in D. Weinstein (ed.), *The Renaissance and the Reformation* (New York: Macmillan, 1965), p. 54.

3Denzinger-Schonmetzer, *Enchiridion Symbolorum*, 3rd ed. (Rome: Herder, 1965), Nos. 941-46.

4Weinstein, p. 164.

5Charles A. Brady, *Stage of Fools* (New York: Image, 1961), p. 95.

6Ibid., pp. 169-170.

7Joseph F. Costanzo, S.J., “Juridic Origins of Representation,” II, in *Political and Legal Studies*, Vol. II (West Hanover, Massachusetts: Christopher Publication, 1982), p. 204.

8Reynolds, *The Field*, p. 32.

9Costanzo, op. cit., p. 215.

10Ibid.

11Elizabeth F. Rogers (ed.), *St. Thomas More: Selected Letters* (New Haven, Connecticut: Yale University Press, 1967), p. 164.

12Reynolds, *The Field*, pp. 225, 233-34.

13Rogers, *Selected Letters*, p. 177.

14Reynolds, *The Field*, pp. 253-54.

15E. E. Reynolds, *The Trial of St. Thomas More* (Montreal: Christian Classics, 1964), pp. 33-40.

16Fourteenth century acts of Parliament designed to prevent such appeals; the original scope was limited and largely inoperative. The Tudor interpretation was unjustified; it became a power meaning whatever the king wanted it to mean.

17Reynolds, *The Trial*, pp. 54-56.

18Rogers, *Selected Letters*, pp. 202-15.

19Ibid., pp. 216-22.

20Ibid., pp. 225-26.

21Ibid., pp. 227, 233.

22Archbishop Cranmer; Sir Thomas Audley; Charles Brandon, Duke of Suffolk; Thomas Boleyn, Earl of Wiltshire; Ormonde, the Lord Privy Seal; and Thomas Cromwell, the King's principal Secretary.

23Rogers, *Selected Letters*, pp. 238, 241, 251.

24Ibid., p. 256.

25Attainder-special acts of the legislature inflicting capital punishment for such high offenses as treason, without any conviction in the ordinary course of judicial proceedings.

26Reynolds, *The Trial*, pp. 62-64.

27Ibid., pp. 70-71.

28Ibid., pp. 84-87.

29Ibid., pp. 93-94.

30Ibid. p. 102.

31Ibid., pp. 108-117.

32Ibid., pp. 118-121.

