

“Interrogating Thomas More” — Questions and Discussion

with Fr. Joseph Koterski and Steven D. Smith, Esq.

Fr. Joseph Koterski: Thank you so much. I don't want to speak long, because I'd rather get into conversation with the audience. I would like to make just two brief points, though, and see if we can aid the conversation in this regard. One is that, in trying to parcel out these conundrums, I think it's very, very important to continue to focus on two key distinctions: first, the distinction between subjectivity and objectivity; secondly, the distinction between the modern sense of toleration of difference and the sense of toleration that I think More was dealing with, which I think is a more authentic sense of the meaning of toleration.

With regard to “subjective and objective,” I think all the conundrums that you've explained to us are so crucial for us to ponder in trying to understand More, because the objective consideration deals with especially truth and the subjective consideration deals especially with sincerity and honesty, and so the way in which I think that this is pertinent is that Thomas More feels that he can never say anything that he knows to be untrue. There would be something insincere about that. He would be failing at the subjective level if he were himself to admit or somehow to grant what he considers to be something morally false or something morally destructive. And so there's a situation in which he has to constantly keep those balls in the air: what are the objective truths about matters of morality? Subjectively, how can he himself be sincere with regard to that? And how can he even leave room for another person, perhaps even one of the Protestants whom he needed to persecute while an officer? They might subjectively hold such a position, even which he regarded as objectively false. So that will need to be continued to be brought into the consideration in debating it.

Secondly, though, the other distinction I think is crucial is this difference between the sense of toleration of difference that he would have expected, and the sense of toleration of difference that we now hold with respect, for instance, to modern civil law or modern political theory. As near as I can tell, in the medieval and the renaissance view—the views that Thomas More would have himself subscribed to—I don't think that he was interested in tolerance of difference as such. But I think that what he was interested in was the toleration of certain things that were different and that he regarded, in fact, as evil—things that he thought, for instance, were departures from the truth about religious matters, or things that he thought were

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departures from political good order. But that sometimes—Thomas Aquinas would have argued this, and I think More also argues it—sometimes one tolerates those positions, not as though they're equally entertainable as opinions, but that to root them out would cause yet much more grave difficulty—would upset the common good—than would be allowing them. In that sense, I think there is a difference for Thomas More, and part of the conundrums that we get to, because while he is in office, he is charged with dealing with the power that is at the disposal of authority, and the power that is at the disposal of authority has to go and correct some evils, but has to prudently allow other evils to be tolerated, and you've got to constantly make that judgment. He's in a different position when he is no longer in power, and there, when he is not now in a position of authority, and hence bound by the rules that govern the ways in which authority may use its power; now he must instead be very, very focused in on the subjective aspects. That is, himself trying to continue to be sincere, never embracing a falsehood, and subjectively continuing with the duty that I think he found by virtue of his respect for the common good, and his concerns with the conscience of the king. How can he possibly make some progress? To disclose all of his own points of view might not be the way in which he can effectively be a teacher for the king, but finding the indirect ways in which he can proceed might be the way in which it is possible for him to make that further progress.

When I'm trying to sort out the admitted conundrums that Professor Smith has proposed for us, I find myself very mindful of the guidance that Yves Simon provides. There's a wonderful book called *Practical Knowledge*, and in that book, Simon urges that there will be differences of opinion on how one comes to deciding those questions, but if one is really trained so that one has the virtues of subjectivity, the personal virtues of truthfulness, one will be able to parcel out and even come to very different prudential decisions, and both be right—be right with respect to what he tells his family and right with respect to what he doesn't tell his family—and that *they* might be right in wanting and wishing that he told a little bit more, precisely because it's not possible to get that level of objectivity in those questions.

I think you have very formidable thoughts for us, and I thank you.

Russel K. Osgood: So, I will grab the floor as a member of the audience and poke at both the panelists very quickly. First to Father Koterski, I would just say, and I know Father Koterski knows this, that very smart people are not necessarily very well organized thinkers in what they do in life, and so, that there might be a little dissonance in Sir Thomas More's assertion of conscience and what he did, which is essentially what Professor Smith said, would not surprise me or anybody, because people are not totalistic in what they do and how they act on what they believe.

And for Professor Smith, I would just say that I think he has an impoverished idea of the dynamics of conscience, at least from my point of view. I think that conscience is something that is a dynamic moral faculty that in Sir Thomas's case was informed by what Fr. Koterski says, but that asserts itself in light of changed circumstances, and is not necessarily to be looked at in a very clean way. And I'll use an example: Professor Smith implicitly says, of course, that Sir Thomas, by not bringing his family, and by not telling him what they did, maybe somehow wasn't fully acting in conformity with his beliefs. But let's say I believe that global warming was horrible, just morally bad—it's not something I believe, but let's say I did believe it. And so I'm driving down Braniff Drive one day, and it wells up in me, so I decide to block the intersection with my car, and I do this as a moral act because I say, “You people

are terrible, you're polluting, you're adding to global warming." I think that's a perfectly appropriate exercise of conscience, by the way, because, based on a totality of life circumstances and my knowledge at that moment, I decide to do it. But I don't have to tell my wife to do that, nor would I expect her to do it, nor do I have to decide to do that at any moment. Conscience is something that asserts itself at a particular moment, and in Sir Thomas's case, I think the fact that he was the Lord Chancellor was relevant in the decision to assert his right not to swear that oath in way that he would not feel obligated to tell his wife not to do it, or his daughter, or to even explain it to them. So those are just some thoughts.

Kevin McCarthy (lawyer): I don't find it difficult in myself to understand his decisions. I do find his conscience to be extremely clean and, from what I know of the man, constantly informed by the Word of God. But he had a complex situation, which I think is easier for lawyers to understand than professors. He had this situation of a special relationship of trust to a client, and this wasn't just any old client, this client was the supreme ruler of the realm. He also had a history in his life of telling the truth or acting in truth and getting himself and his family in trouble with the previous king. So when that happens, I think one decides to pick one's battles in light of the fact that sometimes they are to inform their family and bring them along in an evangelical sense, and sometimes it's a deeply personal situation where really it's none of the family's business, quite frankly—some of the complications between the king and the counselor. So he's in a very, very personal situation driven by things he has to calculate, but I see him as a man, from what I understand, who was constantly calculating this for years, so when he wrote these books, this was just ten years after his daddy got thrown in prison and had to pay some fine to get out for getting into it with another king. This is a man whose family is central to his life, and so I see him not in a sense sheltering his family in an immoral way, but I'm seeing him, in a certain amount of humility, saying I'm not going to draw my family into this unnecessarily.

Steven D. Smith: I guess I agree with that and also with Russell Osgood's statement to an extent. I myself, in my essay, didn't offer anything about the epistemology of conscience; I realize that it may be contextual and personal, and it doesn't require gross, crude, flat-across-the-board judgments and so forth. One small point, though: at the time he refuses to take the oath, he's not the Lord Chancellor. A couple of you referred to that fact, but, in case it matters, he's not the Lord Chancellor at that point (**Osgood:** "Well, he advises."), but he's a father of a family.

I don't mean to subscribe to an impoverished, categorical view of morality, but I don't think it's so easy to get out of: if you think truth is really important, *really* important, and you think you have an obligation to instruct your family, and it's important for them as well as for you, and you're in a situation where it's not just global warming or something where you might have an occasional, incidental contact with an issue, but it's not your central cause and you don't really need to proselytize for it—this is the core thing that is at the center of your life and the kingdom and your family's life—I'm not quite sure that granting all the personal and contextual nature of conscience dissolves some sort of puzzle about why someone wouldn't in that context say more to those for whom he's responsible about why this is wrong.

Matthew Mehan: You wrote in your paper about that question—why does he hold off in the beliefs he's teaching his family?—but if this is the man we've been

talking about, who writes the *Utopia*, who knows that this is going to be great; then he knows that when he writes something that good, it's going to be talked about five hundred or a thousand years later. I think we can agree that most great books were written by very self-conscious writers. They knew that they were writing very important, long-lasting things. I think that he also knew that as an actor, and, I think, if he studied hagiography, he'd see that most saints who were approaching a methodical martyrdom had a pretty good sense that they were going to be teaching for many, many years beyond the moment they're in.

Regarding the example of the global warming: this example is flawed for More, because there's a desperation in the man who stops traffic, whereas More doesn't have that urgency or that immediacy. Because, quite frankly, as a Catholic saint on the way to martyrdom, he doesn't think that he's the only teacher: there's the Holy Spirit, there's God, there's Providence, there's his witness and example, there's the Church to carry on the message years beyond him. There's this idea of witness, in much the way that Christ wasn't necessarily grabbing the collar of each apostle, saying, "You've got to get this, man!" You know: "Well, here're some parables, here's this, here's that, but I still have to just do the thing I have to do, and then the Spirit will take care of the rest after I've gone to the Father"—that sort of idea. I think that's very much at play in his reticence or, I'd say, his lack of desperation to get the point across to everyone. He is not desperate to do it in the way that someone who does not have that wider vision of conscience of teaching would be.

Nathan Schlueter: There are two important distinctions here that I think are not being made. One of them is that the analogy is not correct with this global warming or civil resistance example. A better analogy would be, if your friend or child said "I'm going to murder so-and-so," and you say "well, if I don't tell them that it's wrong, then they won't be guilty of it." Or, if you know somebody's going to steal something or fornicate or whatever—in that case, it seems to me that you do have a duty, in conscience, to inform them about the wrongness of that act. So I don't think that conundrum has been resolved by anything I've heard here. This is not a situation in which it is a general moral wrong and one can prettily decide how to respond to it. There is a positive duty by the State being placed on someone which I think is contrary to the moral law, at least from within the Christian framework, and then one must respond in some fashion. That is, I take it for granted that to take that oath as required by law was an immoral act, and he did have a duty, as he expressed it in the earlier letters, to let his family know. So I'm not satisfied by anything I've heard, and I think that's a real conundrum.

Another distinction: More's claim is to silence, and my memory is that he relies upon a kind of principle of precedent in civil law, that, according to the common law of his time, silence could not lead to a presumption for disagreement or dissent; that in the precedent of the common law, silence presumes assent. So if the law was to follow the precedent, they could not convict him for remaining silent—I think there's something to that, but even if there isn't, it seems to me that in the Christian tradition, at least as taught by St. Thomas, the conscientious actions that were to be tolerated—in other words, one did have a duty to follow one's conscience and it didn't follow that the State had an obligation to accept your assessment of conscience—you just took the law as you should in obedience to your conscience. But again, here's a silence again: it's not someone doing immoral actions contrary to the common good; it is someone simply remaining silent, and I think that we're extrapolating too much from that private remark and so I would just add that

caveat—my conscience telling me to remain silent needs to be respected just as everyone else’s should be. I wonder if both of those distinctions need to be in play.

Osgood: I’ll just say one thing: that actually, in common law, silence means nothing. That’s why, if you refuse to plead in common law, you can be pressed to death because they can’t draw either a positive or a negative inference. He was wrong about that—silence means nothing.

Smith: At his trial, I think, that accusation was made that “you say you’re remaining silent, but everybody knows your silence means you don’t agree with this,” and he made the clever, lawyerly argument that “silence is presumed to connote assent, and so you cannot legally draw the opposite conclusion,” so I think he *did* make that argument.

Louis Karlin (lawyer): I want to follow up on that. I think there are two things going on here: one, that More did have a respect for the law, and that his silence was a fortuitous mechanism that meant he could serve God without betraying his king. So he did not have to speak out positively against the king. He knew he couldn’t *take* the oath, but he couldn’t speak because he would have to lie or speak out against the king. He could preserve his silence as heretics could preserve their silence under the law. Now, is that a perfect solution? No, but it’s a legal one. That would account, I think, to a large degree for More’s silence.

But I think Professor Smith makes a really important point: that, if it is immoral to swear the oath and possibly damning—I think this Professor Smith’s position—don’t you have a moral obligation to prevent someone you love from making an immoral choice or becoming damned? I think that’s the real conundrum, and a possible solution to that is similar to the preserved ignorance, but it’s a little different—it’s that More’s whole life up to that point had made very clear and very public what he believed. His swearing the oath is a lot different from someone who never had an opinion or never voiced one. This is the writer of *Confutation of Tyndale*, among other things. And he was a public figure even though he wasn’t in office at the time, and so I think his taking the oath would be a different thing from his wife or his children taking it.

It’s not a perfect solution but, finally I’d also say that silence has another meaning that scholars have brought out so beautifully. It’s that, in the genres in which More worked, especially with regard to irony, silence teaches. You look at people’s voices and you look at silences and they’re profoundly instructive—they force a person back to examine his own conscience.

Smith: I just want to say that I thought there were a number of excellent points in that comment and things to think about that might go some way toward solving what for me is the conundrum. Here’s a statement of one of the things you said with just one small reservation, though. One might say: Well, because More did, as I think you correctly said, believe that there was a duty to obey the law and the king and so forth, he might well have thought not just that “silence is a way of trying to save my skin,” but “silence is actually a way (as you said) of complying with the law, which I have a duty to do. If that duty is in conflict with my duty to my family...”—and maybe add in your point about “I’ve taught them over the years and at some point they have to draw their own conclusions, and maybe that warrants silence as a way of complying with my duty to the king.” So all that might make sense, but the one reservation is: after the sentence is pronounced on him and he’s condemned, then he does come out and fully say “the king cannot be head of the Church; this is contrary

to the divine law.” I think that undermines a little bit the idea that he thought, “well, because of my duty to obey the law, I’m just going to stay silent all the way through,” because once his fate was determined, he apparently didn’t see the need to do that.

Fr. Roch Kereszty: I would like to ask those who know more about Thomas More than I do, would you agree with Bernard Basset’s conclusion in his work on friendship? He says that the silence of More was precisely religiously motivated, at least partially—so, not just saving his family, but also religiously motivated because he did not want to become a martyr on his own. In other words, he tried to avoid martyrdom as much as possible to make sure that, if he becomes a martyr, it is really God’s gift and not of his own provocation, because he did not think that he was worthy of it. So, all his life, according to Basset, for him martyrdom was the greatest gift that God could give someone and therefore he did not want, actually, to acquire it. He wanted to avoid it to make sure that, if he receives that gift of martyrdom, that it’s really from God. And that’s why he seems to be so much at peace. That would explain, for me, the tremendous joy or kind of humor—the way he was facing death—because now he realizes that actually his life is coming to fruition, that actually it is God’s gift rather than what he tried to do by himself. So is there any evidence for this? I don’t remember details—I just remember his conclusion.

Gerard Wegemer: Clarence is the expert on this.

Clarence Miller: The evidence is in *De Tristitia Christi*, his last meditation in the Tower, where he is very much concerned about the contrast between the eager martyr and the reluctant martyr, and he makes precisely the point that it is much safer to be a reluctant martyr, because if you then must face martyrdom, you know that you will have God’s help. He can’t deny the eager martyrs—there are too many of them around in the golden legends. Then the other question is this, and it’s also in the *De Tristitia*: there are certain people who have a responsibility to do this kind of thing, namely the bishops. And talks about the sleeping apostles as being like bishops who sleep when they *should* speak, only Fisher *did*, of course, but More knew that, and he expected the people who have the responsibility of the pastoral duty to speak. He was not a pastor. He did not have the pastoral duty.

A little footnote: that silence denotes consent is from canon law. I looked for it for ever and ever and ever, but Henry Ansgar Kelly has found it, and so we know now.

Osgood: Just one historical episode which is sort of the obverse of Sir Thomas’s: when Cranmer gets sent to be burned to death at the stake, after recanting—he was the opposite of Sir Thomas, switching his story depending on whoever the monarch was—and they send him to the stake and he’s about to be burned, and he puts his hand forward into the flame and says that “my hand should burn first because it was the hand that signed the recantation of what I really believe.” So, in a way he ends the same way as, say, Thomas, but he gets there through a very different path.

Koterski: And the lesson is, we may need more bishop martyrs? (laughter)

Paul Hunker (lawyer): I wonder if this is a response to Nate Schlueter’s question and something you said, Professor Smith: there’s a distinction between moral acts

here—it’s hard to imagine Thomas More ever letting his daughter Meg do something that was a clear and moral evil. Let’s say the family were in modern-day China and the authorities say, “Meg, you have to abort your pregnancy.” It’s hard to imagine he’d ever be silent on that—he’d tell Meg not to do it. But when you’re talking about assenting to an oath, there’s a good subjectivity there. How you understand the oath can vary, and perhaps he wasn’t willing to impose his understanding of the oath on everyone else in England. Do you think that has some merit?

Smith: Well, actually, yes, I think it might, and in fact—and I don’t know enough about this to be very confident—it does seem to me that he may well have thought, and I think he said at one point, that he would have taken the oath if he thought it was only affirming the succession—he could accept that. But what he presumably really couldn’t accept: maybe it was the divorce, but maybe it was also the fact of it making Henry the head of the Church. You’d think that would be the thing that would trouble him most. But that, I think, wasn’t explicit in the oath, so it might be for him not just a matter of letting other people act on false religious assumptions so long as they’re innocent about those, but letting them act on their understanding of the legal purport of this document, which, as a lawyer who had studied the matter, he thought was incorrect—that would go also some way towards dissolving this conundrum. They don’t even know what they’re *affirming*, much less that what they’re affirming is wrong.

Osgood: I think the oath he had to affirm was that the king was the supreme governor of the Church in England. It’s pretty hard to get around those words.

Smith: Well, others will know that, when he gets taken to Lambeth Palace, he has to have the act brought, because he says that, before he decides, he really wants to read it all over. Now, others here will know, but the secondary sources I’ve read indicate that at that point the Supremacy Act had not been passed, but the Succession Act has been passed, so at that point he infers that, “if you ascribe to this, you are by inference accepting Henry as the head of the Church,” but I’m not sure whether that was explicit in the oath that they had to take at that time. But I could just be wrong about that.

Joseph Meister (lawyer): Yes, I think this is a fantastic panel and I’ve enjoyed this discussion, and I think it may be the perfect panel for this question. Thomas More is, after all, the patron saint of lawyers, and we are at a very interesting time in our country with the senate confirmation proceedings about to begin. And also, there are more than just a few Catholic lawyers who are members of the United States Senate that, while they are personally opposed to abortion, say they cannot impose that belief on others. What would Thomas More say to that position, and what action would he take if he were a sitting member of the judiciary committee? (Laughter.)

Smith: Well, a week and a half ago, I was on a panel sort of like this one on a totally different topic and so forth at Catholic University, where Justice Scalia was the one sitting right at my elbow at this point, and someone started asking him those kinds of questions. He’s written *some* on those kinds of questions. I don’t know if this makes sense or not: on capital punishment, which he has written about, he said that he believed, if the Church taught and had taught over the centuries that capital

punishment was deeply immoral, then he would probably have to resign his position because there are so many cases involving capital punishment. He’s, I think, written about this, and he doesn’t think that recent Church teachings are correct as an interpretation of the Christian tradition, but he did say that if he thought they were, he would probably have to resign. But he made a distinction for abortion, (**Judge Latta:** “because there’s a lack of state action: no one’s compelled to undergo an abortion, but state action’s necessary for an execution. So that’s the distinction.”). Yeah, that was it, so he didn’t think that that put him in this kind of compromised position. He obviously doesn’t agree with the Court’s abortion decisions, but he didn’t think that they put him in the same moral predicament that capital punishment would.

Judge Jennie Latta: But his question’s about Catholic legislators, which is a different question from the question about Catholic judges, because Catholic legislators are those that are in a position to decide what the law would be. So it’s a different question. (**Meister:** “Yes, that *is* the question.”—laughter.)

Smith: Well, but I don’t quite see the same dilemma there. Why would Catholic legislators feel any compunction about asking that kind of question and taking that into account in whether they wanted to support that nominee?

Latta: Because it’s a question of political expediency and prudence. As I understand it, some of the documents out of the Vatican have talked about proportionality and what can reasonably be accomplished. So if every Catholic politician said, “No matter what the context, I will have to vote against any law that would permit abortion in any form,” then no Catholic politician would ever be elected, and so that voice would never be heard. And I think the Vatican has acknowledged some ability for us to at least engage in the public debate. I’m a judge, so I get to sit back and say, “Haha, we don’t do that.” (laughter.)

Koterski: I think the relevant passage from recent Church documents is paragraph #78 of *Evangelium Vitae*, and the issue in 78 has to do with Catholic legislators, particularly on questions like abortion or infanticide or euthanasia, as opposed to questions of capital punishment—for precisely the reason you’ve articulated. And what it does is to suggest that their own opposition to it must be firm and clear and publicly known. So the excuse that was posed in the question, namely that “I’m personally opposed to it, but I have no intention of having a legislative program here” won’t work. One has to have made known that one does have such a legislative program, and now the question addressed in *Evangelium* 78 has to do with how you vote on any particular piece of legislation. And it suggests that a Catholic legislator faced with those positions may vote for a piece of legislation that still legalizes abortion, if that piece of legislation in some way or other restricts the scope of the permissibility of abortion. And hence what you’re doing is, in fact, reducing the scope of it. You’re not voting *for* the permissibility of abortion. Hence, what I think they’re doing, even though they don’t use the words in #78, is making the traditional distinction between material cooperation and formal cooperation with evil—you’re not formally cooperating with it because that’s not in any way part of your intention, even though you *are* cooperating with it materially in a way that’s much too close for your comfort level. And hence the issue is not comfort level—that is, one could very well allow that one would have to collaborate here, but one

has to be formally clear about what one's intention is in so collaborating. It's an effort to try to sort that out, but boy, it's still real hard.

McCarthy: Well *Evangelium Vitae* 78 is very clear also that that involves a very, very gruesome, grave determination by the legislator that that's the only way to limit abortions. He can't sit back and say, "Well, my personal opinion is this, but my constituency says that they'll accept the rape exception." And 78 is constantly misused for that. It *means* that if he doesn't vote for the one with the rape exception, then by a hundred votes wide-open abortion is going to pass, then that's easy: he votes for the rape exception.

Gabriel Bartlett: What did More see in King Henry's new positions on marriage, supremacy, etc., that caused him to give up his earlier vision of Lockean toleration, which can be found in Roper's *Life*, respecting religious pluralism. Is he a modern or a medieval on the issue of freedom of conscience?

Smith: That *is* the difficulty that I have. The invocation of conscience *seems* like a harbinger of this religious pluralism, but it doesn't seem that he welcomed that prospect.

Bartlett: What I meant by combining the two concerns—royal supremacy on the one hand and wishy-washy toleration on the other—did he perhaps fear that the end result for the Christian religion would be the same in both cases?

Wegemer: As Lord Chancellor, More's job was defined as "Conscience of the King," and that meant that More needed to know all the laws of the realm and help the king apply them to particular circumstances. So always it was a question of applying the law. For instance, heresy: he is Lord Chancellor when he has to prosecute heretics, but it's always for seditious heresy, that is public pronouncements endangering the state. And this is a clear and present danger because in 1525, a famous summer, 60,000-100,000 people were slaughtered in Germany. There was a grave danger at that time of sedition. So he's applying the law for seditious heresy.

And the issue of keeping silence: Fisher himself suggested that the bishops approve Henry as Head of the Church when Henry first forces them to do so, but with this proviso, "as far as the law of God allows." And we know that More's daughter took the oath with that same proviso, so it is a question of "what was the law and what did it mean, and could it actually be executed?" And what was at stake was essentially the first article of the Magna Carta, "the Church shall be free," that Church and State should each respect each other's laws.

Smith: I wonder if I could say one thing in connecting with what Professor Wegemer just said with respect to the original question here. Gerry actually mentioned this sedition point to me in an email as a possible answer to my second question, why did More persecute Protestants? From the limited knowledge that I have, that is surely true to a point—More surely did think that Protestant doctrines were seditious, that they were subversive, that they were likely to undermine the civil order, and so forth. And that surely is part of his reason for wanting to prosecute them. But I wonder whether that's the full story: that suggests that More believes in conscience, but he has to prosecute these particular people because their particular heresies are likely to threaten anarchy or be subversive of the civil order. If

he could foresee then that doctrines of predestination and so forth don't actually tend to make their adherents particularly disorderly—indeed, paradoxical though it may be, Puritans and so forth seem to be *more* orderly than other people—so, if he can foresee the future and perceive that you can have religious pluralism and still have an orderly state, would he say, "OK, knowing that now, I have no more reason to prosecute Protestants?" And I think the answer to that is probably "no," based in part on indications that religious pluralism would have been horrible to him whether or not it was possible to have an orderly society with religious pluralism. So I guess I think, in other words, that that is part of the truth, but it seems to me that it's probably not the full story on that particular question.

Wegemer: But he does clearly foresee the possibility of religious pluralism. And also, this is not just a question of differing opinions of doctrine: this is a completely different conception of human nature and the role of the State. The idea that is being proposed is that Christians are elect: that real Christians don't have to obey human laws. They can do what they want and there's no free will. Those views of human nature undercut our whole system of justice, and this is why More was never silent, and why he had to be executed, because he articulated so well what was at stake—through many books, which were persuading parliament of what they should not let Henry do.

Lawyer A: Professor Smith, in your article you mentioned that Thomas More, a saint of the Church, waffled in his objection to what the king was doing. You said that he made the case for the king's annulment in the house of parliament, even though he tried to avoid his own personal opinion. Isn't that same position that President Kennedy took when he talked to the Baptist ministers, and that Mario Cuomo took when he was governor of New York, and that these politicians are taking now, which these bishops are trying to withhold communion from? Isn't that the very same position?

Smith: Well, I'm not sure I'd go that far. I think, as a lawyer, he did go down and, representing the king, lay out the case. That's my understanding. And he tried to avoid saying whether he believed in it. Is that the same as an across-the-board, I've-got-my-personal-view-but-etc. type thing? I think more highly of him than to associate him with those particular people. (laughter.)

Koterski: And just to reflect the same distinction that the judge made a few moments ago, the one is a court procedure, and the other is a legislative matter. So in a court procedure, we're presuming an adversarial system and the king has to have his person defending his interests, and making the case for whether or not this point of law—was this a valid marriage or was this *not* a valid marriage? And I think that a good lawyer is able to articulate that, and More was the counsel to the king; whereas to be working in the legislative arena, I don't think you can be taking the other person's point of view and arguing it. In a legislative arena, what you've got to be doing is saying what in fact you think is the case, and what you think the law ought to be. (**Lawyer A:** "So those politicians have an affirmative duty not to remain silent?") Correct. ("And Thomas More didn't?") That is, if he's acting as legislator, he has a requirement that he speak, and so when he's acting as speaker of parliament, when he's acting even as a king's representative about what the law should be and how we should bind the king and keep him from going off in the wrong direction here,

especially in an order where we've got Christendom and where we don't have a secular state. I mean, the obligation of a king's representative in a legislature within Christendom is to continue to have the civil order reflect Christian values. We now tend to think of the legislative order not as within Christendom, but within the secular sphere, and our legislators have to both try to say what they think is the matter, but also try to articulate what the law ought to be, because the law shouldn't necessarily reflect all the things that we think are necessarily the truth of the matter. That is, a legislator within a secular state is in a different situation than a Christian legislator within Christendom.

Smith: Just one very small point too. I believe that at the end of these sessions, More was asked directly, "Do you believe the case that you have just made?" To which he responded, "I have made my case to the king myself, and I don't need to say it here." Now this is one where silence pretty clearly indicated what his view was on this.

Lawyer B: I cast my vote with Professor McCutcheon on the difficulties in trying to find positivism in negations of negatives: When Anne Bolyne was crowned, More was given money to attend the coronation to buy a nice, new garment. He took the money and didn't go. His absence caused a big stir. Again, when the parliament that passed his death sentence says that "if the indictment is not insufficient, then we find this matter proven." We find all these beginnings of assertions, but there is not much positive to draw on, particularly when you look at his biography, or what he actually did and said. The principles themselves may lead to some sort of positive framings, but when we try and tie them to the biography of him, it's a very slippery slope. So all of his evasions about his works that he writes are cloaked. If you take some of the later works, the translation from the Hungarian into French into English. These are shifting grounds we have, so I think it's always difficult.

Charles LiMandri (lawyer): I don't think More's record is ambiguous when looked at in the total context. He wrote over a million words in defense of the Church. When the bishops caved in to Henry VIII, as Lord Chancellor, he resigned. It was a very loud and definitive public statement. He won't go to the wedding. Now when his enemies like Cromwell try to lay clever traps for him by devising this oath, is he supposed to just take it and fall into their hands? Everybody knew how he thought. This was not some esoteric theological or political issue. The king was making himself head of the Church of England. For fifteen hundred years everybody had acknowledged it was the pope. Henry himself had written in *Defense of the Seven Sacraments*, recognizing the pope as head of the Church of all of Christendom. Everybody being asked to take the oath knew how Thomas More stood. His silence was supposedly his protection under the law. The maxim was *Qui tacit consentire*: Silence implies consent, whether it's canon law or not. They had to show he was acting maliciously in order to find him treasonous. It's very hard to do that when he's silent. That was a technical legal defense he raised at his trial. And finally, when he was convicted on perjury of testimony, that divulgence of conscience was also a brilliant legal maneuver. Under English law, it's called a "motion in arrest of judgment," where you challenge the constitutionality of the very law under which you've been convicted. Under American law, we call it a "motion for judgment notwithstanding the verdict." But he divulged his conscience: I don't think anybody was surprised when he said the king can't make himself head of the Church in England. For Pete's sake, everybody knew that, including his family. And so this

thing about his silence and ambiguities: I'm sorry, I'm having a hard time with it. More just didn't want to make it easy for them to kill him because of his beliefs, but everybody knew what those beliefs were, and he could not have been more clear and conspicuous in stating them in the million words he published.

Osgood: I think we're out of time.