

## Law & Tyranny in More's *History of King Richard III*: An Examination of the Sanctuary Debate

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Tell me, tell me some, some pitying angel,  
Tell quickly, quickly, quickly say,  
Where, where does my soul's sweet darling stray,  
In tiger's or more cruel, more cruel, cruel Herod's way?  
Ah, ah rather, rather let his little, little footsteps press  
Unregarded through the wilderness,  
Where milder, milder, where milder savages resort,  
The desert's safer, the desert's safer than a tyrant's court.

Nahum Tate, *The Blessed Virgin's Espostulation*

### I. Introduction

In this lawyers' panel, we ask whether practicing judges and attorneys have any special insight into Sir Thomas More's *History of King Richard The Third* (the *History*),<sup>1</sup> as well as into the central themes of More's *History*—the relationship of law to politics and, specifically, whether law is powerless in the face of tyranny. More did not write the *History* especially for legal professionals, but legal arguments and the counselors who advance them figure importantly in the work, and More devotes a large section of the *History* to a detailed legal debate about whether Queen

Elizabeth is justified in keeping her son, the young Prince Richard, in sanctuary. In this paper, I will try to show how More's presentation of technical, lawyerly details figures into these broader concerns.

As a humanist, More sought to use literature to help foster classical and Christian virtues across the spectrum of the statesmen, scholars, clergy, merchants, and educators who would be his readers. His Richard III is as much classical Roman tyrant as son of York. While it would be a very naïve reader who understood the *History* as an attempt to preserve a factual record of Richard's ascension to the crown, it would be equally mistaken to read his work as an academic update on his Roman models. Rather, the *History* stands as a chilling indictment of tyranny, with the clear implication that classical models offer important insights into a timeless political disease.

As Professor Gerry Wegemer wrote in his invitation to lawyers for this conference, the *History* tends to show the weakness of law, rather than its effectiveness. And the person most articulate about the rights and protections of law—Queen Elizabeth—seems the biggest loser, despite her persuasive appeal to English common law and privileges. The careful reader, regardless of any legal training, will get the strong sense that legal arguments have no inherent power to enforce existing rights, but function as tools used cynically by the powerful to achieve their ends. We see that Richard the tyrant cares deeply about cloaking his evil actions in legal rectitude.<sup>2</sup> He doesn't seek, as modern tyrants, to change the current paradigm or language of justice to fit his ambitions. Rather, Richard accepts the traditional legal and moral framework on the surface, while subverting it to achieve his ends.

As the *History* unfolds and Richard's duplicity becomes more transparent, More illustrates how such a cynical manipulation of legal concepts and traditions will devalue them on all levels of society. By the time Richard declares that he wants to be crowned at the Court of the King's Bench at Westminster Hall because, "he considered that it was the chiefest duty of a king to minister the laws" (95), not only will his readers know that Richard's declaration was meant in bad faith and to deceive, but More intimates that his subjects were not taken in, for More places this declaration directly after the scene in which Richard and Buckingham enacted the charade of Richard's having the crown forced upon him after repeated denials. There, More related how the commoners perceived these actions as "kings' games, as it were stage plays, and for the more part played upon scaffolds" (95).

So, is More's view of law and lawyers entirely negative? I do not think that legal training is the key to answering that question. The key is an understanding of More's humanistic literary approach with specific attention to his reliance on irony, as seen in his own *Utopia* and in his great friend Erasmus's *Praise of Folly*. In the *History*, More portrays successive failures of law to check a tyrant—and, by implication, his readers see how it could have been otherwise if Richard's adversaries had challenged the legality of the tyrant's actions, as well as if members of Richard's party had put honor and principle ahead of private gain. One does not need a law degree to see that the queen was the clear winner of the sanctuary

<sup>1</sup> Thomas More, *The History of King Richard The Third, A Reading Edition*, Ed. George M. Logan (Indiana Univ. Press 2005). All further citations to the *History* shall be taken from the Logan edition.

<sup>2</sup> See G.M. Logan, *Humanist More*, at p. 21 (Nov. 5, 2005) ("Dissimulation, More decided, was Richard's ruling trait . . .").

debate—a debate More structures to enable the general reader to discern the good arguments from the bad ones, revealing the tyrant's duplicity and hypocrisy. In More's *History*, the characters who participate in, or listen to, the various legal debates can usually distinguish the good from the bad arguments. Power nevertheless triumphs due to the failure of individuals to stand up for the law and against the tyrant. This leads not to the simplistic conclusion that power beats law, but points to a more complex and intriguing understanding in which respect for law as a requirement for true justice remains for the readers a transcendent value, even when thwarted.

## II. *Background To The Sanctuary Debate: King Edward's Dying Speech*

King Edward's dying speech sets the *History* in motion and offers a paradigm of justice that the canny tyrant will subvert his own ends. The king's speech is filled with many of More's favorite rhetorical devices—rhythmical phrases filled with alliteration, rhyme, and antitheses used to punctuate or balance complex sentences. The crux of King Edward's plea is that the opposing factions should shed their longstanding animosities and join in friendship around his heirs—for the good of the kingdom.

More ironically undercuts the king's plea for simplicity and artlessness—"plain and faithful advice" and "good plain ways"—by voicing it in highly wrought rhetoric: "For it sufficeth not that all you love them, if each of you hate the other." Power must be exercised in concord. "For where each laboreth to break that the other maketh, and, for hatred of each of other's person, impugnech each other's counsel, there must it needs be long ere any good conclusion go forward. And also while either party laboreth to be chief, flattery shall have more place than plain and faithful advice." That path will lead to ruin, whereas if "grace turn to wisdom," then "good plain ways prosper" (15). Thus, More, a careful reader of *The City of God*, presents through the dying king St. Augustine's impossible-to-achieve-on-earth ideal of political friendship, where rulers and citizens act with humility and benevolence for the common good. However, More proceed to have this idealized vision systematically undercut.

Following the king's speech, More introduces another important theme—the false appearance of benignity designed to cloak malignant motives. The lords, seeking to comfort and reassure the king "with as good words as they could, and answering, for the time, as they thought to stand with his pleasure—there in his presence (as by their words appeared) each forgave other and joined their hand together, when (as it after appeared by their deeds) their hearts were far asunder" (17).<sup>3</sup>

Upon King Edward's death, Queen Elizabeth's eldest son, Prince Edward, leaves Wales for his coronation in London, heavily guarded by lords of the queen's party. Richard works to revive the old party animosities, while speaking publicly in support of King Edward's dying declaration. It is a very sophisticated argument: From what we know about the members of Queen Elizabeth's party, in order to

preserve the fragile peace, we must be skeptical of her parties' motives—implying, of course, that Richard's motives are beyond reproach. Richard's speech concludes with an amazing sentence in which More uses earthy, bodily metaphors to convey the realistic, commonsense view of human nature that will help Richard thrive in the face of so many disadvantages: "Nor none of us, I believe, is so unwise oversoon to trust a new friend made of an old foe, or to think that an hovery kindness, suddenly contract in one hour, continued yet scant a fortnight, should be deeper settled in their stomachs than a long-accustomed malice many years rooted" (20). Of course, this is the counter-argument to King Edward's speech. It is also diametrically opposed in its rhetoric—where the king appealed to grace and altruism, Richard appeals to the man's basest motives.

Next, More describes the argument Richard uses to fatally persuade the queen to withdraw the main force protecting Prince Edward on his journey to London. Richard appeals to the king's dying speech and charges the queen with violating her husband's directive: To surround the prince with a partisan army makes the implicit point that the old factions are alive and well, contrary to the peace made in the king's presence. What do her actions say, but that those in Richard's party cannot be trusted?

Richard places the queen in check by this maneuver. He isolates her brothers and trusted lords, imprisons them, and prepares them for summary execution. This leads to another key point I mentioned at the outset. In his rise to power, Richard the tyrant does not overtly seek to overturn the legal order. Rather, he repeatedly appeals to contemporary legal standards and argues that his actions are proper. For instance, when Lord Hastings—then in league with Richard against the queen's party—seeks to justify Richard's actions to the commons and allay their suspicions about the imprisonment of the lords in the queen's party, Hastings assures them that those imprisoned would receive due process in the form of an impartial hearing before the proper deliberative body (28).

Richard has neutralized the lords in the queen's party, allied himself with the powerful Lord Buckingham, and brought the Prince of Wales, unprotected, into his control. The prince's coronation is about to take place, but Richard knows that there is one person he must capture before he can assure himself of the crown—the prince's younger brother, Prince Richard.

## III. *Richard and Buckingham's Arguments Against Sanctuary*

The queen, realizing what the protector is up to, and perceiving herself and her son, Richard, to be in mortal danger, has retreated to the sanctuary of Westminster Abby. The protector addresses the lords and commons with his first argument against the queen's invocation of the sanctuary privilege on behalf of the young prince. His address builds on his prior argument against having a large force accompany the Prince of Wales to his coronation: By claiming sanctuary, the queen is implicitly making the malicious charge that the protector and his counselors cannot be trusted. Next, he posits that it is unnatural to keep the King-to-be from his closest friend and playmate—his younger brother. No one would stay in sanctuary without a reason (and one would naturally suppose that two young brothers should be together), so the queen's reason must be that she is perversely

<sup>3</sup> We'll see this again, for instance, when Richard bears himself before the prince upon his entry into London "with all semblance of lowliness." (29)

trying to subvert the new order by her “malice, forwardness, or folly” (32). By focusing on a somewhat minor or homely justification—the separation of brothers and playmates—Richard seeks to portray his own motives as commonsensical and natural, while casting doubts on the queen’s motives. Of course, the queen—having fallen for Richard’s tricks before—does not trust the protector and is seeking to protect her family’s bloodline and preserve her sons’ claim on the throne.

Richard proposes sending the cardinal<sup>4</sup> as an emissary to persuade the queen to release the young prince and, if that fails, to have him forcibly removed from sanctuary. He asks the lords’ opinion on his proposal, stating that he’s open to being persuaded by their “better advices” (32). All voice their agreement, but the cardinal makes a strong stand against violating sanctuary, should the queen not release the prince. He argues that sanctuary is an institution and privilege of longstanding authority, established by Saint Peter’s successor, having lasted 500 years, and respected by popes and kings. In essence, the cleric argues that the privilege derives from a spiritual authority, binding on earthly rulers as a protection against tyranny: “God forbid that any man should, for anything earthly, enterprise to break the immunity and liberty of that sacred sanctuary, that hath been the safeguard of so many a good man’s life” (33).

Lord Buckingham steps into the debate, effectively as Richard’s lawyer. His rhetoric is impressive and persuasive, at least on its surface. His first paragraph uses alliteration and antitheses impressively and in much the same way as King Edward’s deathbed speech. In attacking the queen’s motives, Buckingham plays on “honor,” “dishonor,” “wealth” (meaning “well being”), “will,” “wit,” “God,” and “good”:

Whose honor if she as much desired as our dishonor, and as much regard took to his [the prince’s] wealth as to her own will, she would be as loath to suffer him from the king as any of us be. For if she have any wit [intelligence] (as would God she had as good will as she hath shrewd wit), she reckoneth herself no wiser than she thinketh some that be here, of whose faithful mind she nothing doubteth, but verily believeth that they would be as sorry of his harm as herself, and yet would have him from her if she bide there. And we all, I think, content that both be with her, if she come thence and bide in such place where they may with their honor be. (33-34)

Buckingham not only asserts that the queen must be mistrusted because she could have her family together simply by leaving sanctuary, but he goes on to assert that if the queen imagines Richard and the lords in London are so dangerous to her son, then she will make every effort to send him out of the country.

This argument is a highly wrought, artificial attack on the queen’s motives. But the sense comes to this: Once you accept the premise that “we”—Richard, Buckingham, and the lords present—all have the new king’s and the young prince’s

best interests at heart and lack any evil designs, it follows that the queen is either being silly, imagining threats, or maliciously impugning “our” motives. But More has already informed “us” the readers that Richard’s motives are malignant. So we know the premise is false and the arguments are misguided at best. Although the extent of Buckingham’s loyalty to Richard is not yet clear, we know that he is driven by his hatred to wards the queen’s party.

Through More’s use of irony—one of the tropes most highly prized by the Renaissance Humanists in general and More and Erasmus in particular—the *History* instructs us to be wary of rhetorically impressive legal arguments. The lesson for the practicing lawyer and judge is clear: No matter how appealing an argument sounds, we must identify the its premise and test its accuracy, taking special care to factor the client’s interests and biases into the equation.

So with the reader put on guard, More has Buckingham make his detailed legal argument. Building on what came before, he asserts that if the queen imagines the protector and the lords are so dangerous to her son, then she will make every effort to send him out of the country, which would give them a good and blameless reason to fetch the prince out of sanctuary. Nevertheless, Buckingham protests, far be it for him to break the sanctuary privilege, given that it is such a longstanding institution.

The next step of his argument is critical. He makes the very modern-sounding assertion that in terms of reasonableness, tradition provides little or no support for the privilege as it now exists. If he were to start from a clean slate as a lawgiver, he would not institute the kind of sanctuary currently recognized. Like a judicious reformer, Buckingham identifies what he considers to be the two legitimate and narrow bases for sanctuary: (1) a “deed of pity” for innocent debtors to maintain a place of liberty from their cruel creditors; and (2) for those on the losing side of a contest for the crown. Of course, it is the second basis that fits the queen’s situation most closely, but it immediately disappears from Buckingham’s argument. For Buckingham’s purposes, that justification is inapplicable since his starting point is that the protector has no such evil designs against the queen’s party; and, even if Richard harbored such designs, they would not apply to the prince, who, after all, is the king’s brother.

So we get a detailed, pragmatic explanation of how sanctuary is being abused by persons who do not fit those two categories and who are merely availing themselves of the privilege to commit crimes with impunity. Buckingham tries to paint the cardinal’s reliance on tradition and religion as superstitious and naïve. The cleric had appealed to St. Peter and his relics as a justification. In a rhetorical turn worthy of More’s best, Buckingham points to the privilege abusers as making God and Saint Peter the “patrons of ungracious living” (36).

Buckingham paints a very effective, if one-sided, picture: “Men’s wives run thither with their husband’s plate, and say they dare not abide with their husbands for beating. Thieves bring thither their stolen goods and there live thereon. There devise they new robberies, nightly they steal out, they rob and rieve and kill, and come in again—as though those places gave them not only a safeguard for the harm they have done but a license also to do more” (36). Buckingham therefore asserts that a reasonable sanctuary privilege should be tailored to exclude such abusers from its protection.

<sup>4</sup> As Professor Logan explains in his edition, More confuses the cardinal and the Archbishop of York in the *History*. (*History*, at 32 fn. 16.) For consistency, I will refer to the cardinal, rather than the archbishop.

While that argument is persuasive, it is obviously highly partisan. (To the contemporary reader, one can't help but think that sanctuary provided one of the rare protections against an abusive husband.) No one can deny that a sanctuary law that serves mainly to foster and protect lawbreakers is deserving of serious reform. Like Hythloday's criticism of the harshness of English penal law in *Utopia*, this criticism has the ring of truth. But the fact that it is made by a person with dubious motives requires that the reader maintain some ironic distance.

The next step in Buckingham's argument is to show that the prince falls outside the scope of those properly seeking sanctuary. The main purpose of sanctuary is to protect those against whom the law has a *legitimate* claim: Those who are being pursued illegally have no need of the privilege because the crown by definition will aid those with law on their side. For them, Buckingham asserts, every place is a sanctuary (37). Once again, it would be impolitic to make the obvious rejoinder: What if the crown is not concerned about justice? What if it's acting unjustly itself? I think More wants the reader to think of this kind of objection and wonder why no one makes it.

Buckingham then argues that it is only the person in peril by lawful means who needs sanctuary. Since the prince is recognized as innocent by all, what claim can he have to sanctuary? Only one who believes the prince is guilty of some crime could believe him a proper candidate for the privilege. Why is his mother the queen invoking the privilege on his behalf? It is not like baptism, where original sin prompts the minor's guardian to seek the sacrament. So, by invoking sanctuary, the queen is implicitly accusing the prince of having a guilty conscience. We know that the prince would not countenance that, argues Buckingham, so what is really going on is that the *queen* needs sanctuary and she's keeping the prince there against his true interests. As such, her actions are no different than those of a thief who seeks to keep his stolen goods with him in sanctuary—something the church agrees would be improper (37).

It follows that if the prince has no reason to invoke sanctuary, one could hardly violate the privilege by removing him. Buckingham's final sentence makes it clear that his argument is premised on the supposed good faith of those in his own party: "And he that taketh one out of sanctuary to do him good, I say plainly that he breaketh no sanctuary" (38). The problem with this line of argument is obvious. Not only do we readers know that the protector's motives are malicious, but sanctuary would be a hollow haven if it could be breached by anyone who professed benevolent intent.

It should also be noted that from the perspective of basic appellate advocacy, there is another problem with Buckingham's case on behalf of Richard. As previously mentioned, Buckingham skips over the justification that actually applies—protection of members of the disfavored party in a contest for the crown. Finally, the fact that sanctuary is in need of reform does not respond to the real issues, which must be determined on the currently existing state of the law—whether the prince is entitled to sanctuary and whether the queen is entitled to invoke the privilege on her son's behalf. Thus, without any special knowledge in the applicable law, the general reader sees that Buckingham's argument is dubious at best.

Which leads to the next question: Does the *History* accurately reflect the law of sanctuary at the time of Richard III? Recent scholarship shows that More's portrayal was fair and well informed. A 2004 article by Trisha Olson<sup>5</sup> surveys the history of sanctuary law and demonstrates that the privilege derived not only from the concept of a sacred and inviolable place, but also from the belief that a holy person (typically, the bishop) was duty-bound to intercede on a wrongdoer's behalf—a fleeing sinner, who had prostrated himself at the church's altar and accepted the assigned penance. Sanctuary served as a mode of reconciliation between the offender and the polity or between feuding parties. In a time when private revenge was a primary mode of justice, sanctuary provided a means of controlling blood feud and preventing violence. For St. Augustine, a bishop was justified in "giving refuge to the fleeing wrongdoer in any and all circumstance" (*Olson* 479). In contrast, as Olson explains, "Roman jurists conceived of sanctuary as protection for those unjustly accused of a wrong or for the oppressed," rather than "a safe haven for the otherwise guilty wrongdoer.... [A]sylum offered only a momentary respite until formal inquisition could be made and a judgment rendered." (*Olson* 479-80).

As early as the 10th and 11th centuries, the English crown imposed limits on sanctuary, denying it to public thieves, and to those deemed guilty of murder by lying-in-wait and of breaching the king's peace. (*Olson* 490-491.) By the late 12th century, canon lawyers themselves began to see the need to limit the privilege in response to an acceptance of criminal law's retributive and deterrent functions. (*Id.* at 535.) "Canonists were uniformly troubled about allowing refuge to the professional outlaw." (*Id.* at 537.) "From the twelfth century onward, the canon law, augmented by various papal grants, was moving toward increasing restriction about who may seek refuge." (*Id.* at 538.) "In late thirteenth century England, Edward I mandated that the goods and property of debtors who had taken sanctuary could nonetheless be seized. A century later, justices argued that sanctuary should only be granted to those who if punished risked the loss of life or limb. And by the fifteenth century the House of Commons, speaking for a disgruntled citizenry who saw sanctuary as 'providing refuge...for bandits' began its attack to modify sanctuary further." (*Id.* at 539, footnotes omitted.) When King Henry VII complained about sanctuary abuse, Pope Innocent III instituted three reforms—sanctuary could not be invoked by repeated offenders, sanctuary would not extinguish creditors' rights, and custodians could be appointed to ensure that sanctuary-seekers did not escape. (*Id.* at 538.)

Olson twice refers to More's *History* as accurately portraying the sanctuary debate—first, when Buckingham describes how repeat offenders use sanctuary as a safe haven,<sup>6</sup> and then when the cardinal traces the origins of sanctuary at Westminster Abby to Saint Peter. (*Olson*, at 540-541.) This second point is the one that Buckingham ridiculed as being superstitious. However, as Olson explains, the concept of sanctuary as holy ground had become the church's main justification for the privilege, as the idea of sanctuary as an alternative means of punishment and social reconciliation passed into desuetude.

<sup>5</sup>T. Olson, *Of The Worshipful Warrior: Sanctuary and Punishment in The Middle Ages*, 16 St. Thomas L. Rev. 473 (2004) [hereinafter, *Olson*].

<sup>6</sup>Olson mistakenly attributes Buckingham's statement to the cardinal/archbishop. (*Olson*, at 540.)

Similarly, in a very recent essay, the legal historian R.H. Helmholz counters the accepted understanding that More was largely ignorant of and uninterested in Roman and canon law.<sup>7</sup> Helmholz points out that at the time More wrote the *History*, “the law of sanctuary, which allowed persons to escape justice by taking refuge inside a church, stood badly in need of reform” (*Helmholz* 18). Contrary to modern notions, the church was not a bitter opponent to reform. Rather, its approach was far more balanced than that of English common law. “[C]anon law held that asylum should be confined to those most in need” (*Ibid.*). Much of Buckingham’s argument in favor of reform to eliminate abuse was consistent with canon law, which limited asylum for murderers only to those who killed inadvertently. “Those who used sanctuaries to sally forth, commit crimes, and then return to church were likewise excluded under the canon law...” (*Ibid.*). Similarly, Buckingham’s assertion that stolen property taken into sanctuary should always be returned to the victim was in accord with canon law, but not the common law (*Ibid.*). In the *History*, More has the churchmen agree “that by the law of God and of the church the goods of a sanctuary man should be delivered in payment of his debts, and stolen goods to the owner”—although More says that it was a portion of the clergy who agreed and that More was not sure whether they were speaking to please Buckingham or as they actually thought (37-38).

I think this tends to show that More intended that Buckingham voice a very sophisticated legal argument. Buckingham needed to win over the clergy to help Richard’s cause, so he appealed to fact that canon law was in the vanguard of sanctuary reform and that it had recognized greater limitations than in the common law.

Finally, More loaded Buckingham’s attack on sanctuary abuse with more than legal precedent. He also had Richard’s “lawyer” speak in terms that echoed Biblical prophecy. This is from Chapter 7 of Jeremiah, which is part of the Church’s daily readings:

Stand in the gate of the Lord’s house, and proclaim there this word, and say, Hear the word of the Lord, all you people of Judah, you that enter these gates to worship the Lord. Thus says the Lord of hosts, the God of Israel: Amend your ways and your doings, and let me dwell with you in this place. Do not trust in these deceptive words: ‘This is the temple of the Lord, the temple of the Lord, the temple of the Lord.’

\*\*\*\* [check Chicago Style]\*

Here you are, trusting in deceptive words to no avail. Will you steal, murder, commit adultery, swear falsely, make offerings to Baal, and go after other gods that you have not known, and then come and stand before me in this house, which is called by my name, and say, ‘We are safe!’—only to go on doing all these abominations? Has this house, which is called by my name, become a den of robbers in your sight? You know, I too am watching, says the Lord. (*Jeremiah* 7:1-11.)

<sup>7</sup> R.H. Helmholz, “Thomas More and the Canon Law,” Address to the Nicholson Center Workshop (Feb. 20, 2006) [hereinafter, “*Helmholz*”].

Of course, More, the consummate ironist, makes Buckingham speak on behalf of the arch-deceiver Richard at the very same time he invokes Jeremiah’s prophesy.

Clearly, then, More wants his readers to pay careful attention to the context in which arguments are made, and to distinguish between the quality of the arguments and the motives of the person making the argument. The fact is that Buckingham’s criticism of sanctuary abuse is consistent with the prophet’s. And we should note that the queen, although she had good reason to flee to Westminster, does not fit the image of the fleeing penitent for whom the privilege was originally established. Rather, her motives seem entirely human and political—to save her skin, preserve her blood line, and live to fight another day. More did not leave out the unsavory details of her flight, which included her frantic moving of furniture and belongings into the cathedral buildings, even smashing down walls to cram her goods inside.

#### IV. *The Queen’s Response*

The cardinal, in the company of a number of lords, arrives and presents her with a summary of the protector and council’s reasons for demanding that the prince leave sanctuary, concluding with the argument that the king’s brother should have the company of his natural playmate. The queen’s response is a masterstroke: She tells them that she’d like nothing more than to have them playing together, but the prince has only just begun to recover from a serious illness and, given the very real danger of a relapse, there was no safer, more natural place for him to be than with his mother as caregiver (40).

After the queen easily parries the cardinal’s lame reply that she had no problem in letting her eldest son live away from her care in Wales (she points out the Prince of Wales was healthy), the cardinal makes another misstep. Picking up on her comment that she does not intend to place herself or the young prince in the same kind of jeopardy facing her friends, the cardinal asks if she knows any reason that her friends are in danger. Her response is swift; she knows they have been imprisoned. Once again, we see the kind of effective rhetoric employed by King Edward and Lord Buckingham, but this time used without the cloying artificiality of the former or the misleading intent of the latter: The queen asks why she should trust that her friends would “do well enough” when their case is examined?

“In that I am guiltless? As though they were guilty. In that I am with their enemies better beloved than they? When they hate them for my sake! In that I am so near of kin to the king? And how far be they off? [fn.]—if that would help, as God send grace it hurt not.” (43)

At that point, the cardinal points out that the protector and council do not believe that the prince is entitled to sanctuary or that she can invoke the privilege on his behalf. As such, they would feel justified in removing him forcibly should she refuse to deliver him peaceably. Once again, the queen’s counterargument is masterful, rhetorically and legally. She first exclaims that by forcibly removing a sick child from sanctuary and the care of his mother, the protector would be violating God’s law and acting as a “tyrant” (44). The queen is the first person to use that term for Richard. Next, she belittles as a “goodly gloss” the legal argument

that she cannot invoke the privilege for her minor son. The queen tells the cardinal that she has been informed by her “learned counsel” that English common law makes her the guardian of the prince. In that capacity, she has full right to invoke the privilege for him. That is, contrary to Buckingham’s position, it would be erroneous to consider the prince as an independent subject who must personally invoke the privilege, much less as the queen’s property, which could be taken from her possession.<sup>8</sup> As Professor Logan explains in his notes, the queen’s position was “firmly grounded in English common law”—because the prince’s status was not the product of feudal service owed to the crown, he was not an independent vassal, but the queen’s ward (44n34).

After explaining how she and her sons have been protected by the sanctuary privilege in the past, the queen draws on the justification that Buckingham tried to gloss over in his arguments—the protection of those on the wrong side of a contest for the crown. Had there been no sanctuary privilege for her in the past, her son the new king might not have survived. At this point, the queen gives voice directly to the reason why her son needs and deserves sanctuary: The protector cannot be trusted because of his past actions and present ambitions. It is in the protector’s interest to depose the king and dispose of the prince. Her words, though artful, sound refreshingly candid and heartfelt:

God’s law privilegeth the sanctuary, and the sanctuary my son—sith I fear to put him in the protector’s hands, that hath his brother already, and were, if both failed inheritor to the crown. The cause of my fear hath no man to do to examine. And yet fear I no further than the law feareth, which, as learned men tell me, forbiddith every man the custody of them by whose death he may inherit less[fn.] land than a kingdom. (45-46)

Once again, having been accurately instructed by legal counsel, she explains how England’s common law supports her position (46n43).

#### V. *The Queen’s Capitulation*

Having laid bare the legal fallacies and the moral failures that drove Richard and Buckingham’s arguments, the queen nevertheless concedes and gives up her son to the protector. Is this a clear demonstration that tyranny triumphs over law? I don’t think so. The demonstrable fact that tyranny can and often does succeed, despite the legal restrictions that should have hindered the tyrant, does not prove that tyranny must always triumph or that the rule of law can never be an effective restraint on the incipient tyrant.

The queen had strong, prudential reasons to capitulate. Her action cannot be viewed simply as a lack of courage. She is not convinced by the protector and

<sup>8</sup> For a contemporary example of a tendentious misuse of legal classifications to support a preordained ideological result, see J. Goldberg, *Involuntary Servitudes: A Property-Based Notion of Abortion-Choice*, 38 UCLA L. Rev. 1597, 1657 (1991) (arguing that a “property-based” theory of a woman’s “bodily autonomy” entails a licensee status for the “embryo/fetus” that supports a “woman’s right to exclude the embryo/fetus” from her body).

Buckingham’s arguments, but by the cardinal’s heartfelt avowals of good faith: “he durst lay his own body and soul both in pledge, not only for [the prince’s] surety for also for his estate.[fn]” (46). The queen doubts and fears Richard’s motives, but she does not appreciate the full enormity of his ruthlessness. And, of course, she recognizes the implicit threat that Richard’s men will forcibly remove the prince if she insists on the sanctuary privilege—indeed, as Professor Logan notes, “neither Richard’s father nor Edward IV had declined, in earlier exigencies, to remove noble enemies from sanctuary by force” (47n50). On balance, the queen hopes that the prince will be better protected by the cardinal and others if she accedes to the council’s demands.

Nevertheless, her capitulation demonstrates one of More’s major themes: Law can serve as a check on tyranny only if those charged with applying and enforcing it act with energy and courage, rather than passivity and self-interest. The queen capitulates mainly because she has no effective power to protect her rights and those of the prince because Richard has already captured her allies. As the *History* unfolds, More will show the readers how the lords and commoners quail or remain silent when presented with Richard’s empty dramatic displays. Standing up to tyranny is far from easy, and when the lords and clergy shirk their responsibilities, the commoners see the prospect as especially dismal.

The importance More places on having disinterested statesmen and lawyers who are committed to the law, rather than to their self-interest is illustrated by the “personnel” choices Richard makes. Once again, More leaves it to his readers to imagine the ideal, by depicting the negative image only. Richard employs Sir Richard Ratcliffe to execute the queen’s lords in Pomfret. Ratcliffe is a longtime collaborator in the protector’s lawless enterprises, “having experience of the world and a shrewd wit, short and rude in speech, rough and boistous of behavior, bold in mischief, as far from pity as from al fear of God” (67). This is hardly a portrait of virtue. As More demonstrates, such a man will not stick at the niceties of due process. At the lords’ execution, Sir Richard prevents the victims from speaking, since that might have “inclined men to pity them and to hate the protector and his part” (*Ibid.*). Instead, he “caused them hastily, without judgment, process, or manner of order, to be beheaded, and without other earthly guilt but only that they were good men, too true to the king and too nigh to the queen” (67-68).<sup>9</sup>

The protector then chooses another knight, Edmund Shaa, Mayor of London, to be his agent in London. Again, More’s character portrait of Shaa illustrates the kind of statesman a tyrant needs if he is to overcome the legal impediments to his advancement: Shaa was highly ambitious and proud of heart. For his agent on the spiritual side, Richard chooses Shaa’s brother John, who had a reputation for learning, but was lacking in conscience and virtue. These are not statesmen in the classic sense—persons who exercise their skills impartially for the good of the polis, without regard to their own advancement. But they are just the sort of person the tyrant will enlist to “help frame the city to their appetite” (68). Once again, More implies the ideal type of lawyer/statesman by depicting its opposite.

<sup>9</sup> In this description, the reader will notice a chilling echo to the queen’s response to the cardinal in which she explained why she should distrust the protector: “In that I am so near of kin to the king? And how far be they[fn.]” (43)

VI. *Conclusion*

Thus, the *History* tells the story of how the abuse and neglect of law is a major force in the rise of tyranny. More does not make Richard's rise seem inevitable, much less providential. In the *History*, the lords and lawyers as well as the commoners generally distinguish the good from the bad arguments, but power wins out because no one has the courage to stand up for the law and against the tyrant. Thus, by irony, or negative implication, we are left to imagine what might have happened if individuals gave law the strength to impede the tyrant's rise. More not only instructs readers on how to recognize incipient tyrants, but illustrates the tragic consequences of allowing tyranny to grow. We see over and over how Richard's adversaries underestimate his capacity for ruthless action.

What would a true lawyer/statesman look like? Erasmus's *The Education of a Christian Prince*, published in 1516—about the same time as More was writing the *History*—sets out the positive characteristics as an ideal. His section on "Magistrates and Their Duties" draws on Aristotle for the "important and judicious observation that it is useless to establish good laws if there is no one who will labour to uphold what has been so well established; indeed, it sometimes happens that the best established laws are turned to the total ruin of the state through the fault of the magistrates".<sup>10</sup>

Erasmus did not "name names" either positive or negative in his discussion, but contemporary Chinese history gives us vivid illustrations of heroic, virtuous lawyers. One is Chen Guangcheng, a 34-year-old, self-taught lawyer who attracted international attention for exposing forced abortions and sterilizations in eastern China. This August, according to state media reports, he was sentenced to four years and three months in prison on charges that he damaged property and disturbed traffic.<sup>11</sup> As Joseph Kahn reported for the *New York Times*, the Chinese leadership had been "eager to create the impression that it is building an impartial legal system" and "[t]he ruling party has encouraged the idea that people have legal rights as a way of checking petty corruption, improving efficiency and channeling social grievances into the party-controlled judicial system."<sup>12</sup>

Mr. Chen took those reforms seriously, and brought lawsuits to organize a class-action suit last year on behalf of residents of the city of Linyi who had been forced to undergo abortions or sterilization in a campaign to meet population control quotas. The result was a government backlash against Mr. Chen, as well as against other human rights lawyers in China. Local Communist Party officials retaliated against Mr. Chen by putting him "under house arrest and later charging him with destroying property and blocking traffic. His supporters say the charges are concoctions and that Mr. Chen was under police guard at the time the crimes were said to have occurred."<sup>13</sup> A few weeks later, the guilty verdict against him was

entered after a closed-door trial at which he had been deprived of his defense team.<sup>14</sup>

That was where my essay ended back in September. On November 1, 2006, however, the *New York Times* reported that a Chinese appellate court reversed Mr. Chen's conviction and ordered a retrial.<sup>15</sup> Such reversals are rare in China:

"It is unclear why an appeals court in Linyi, which is the same urban area where local officials ordered the crackdown on Mr. Chen, would decide to overturn the verdict against him. [¶] It is possible that higher authorities told the court to do so. But it is also possible that the maneuver was intended to prevent having the case appealed to a higher court that does not answer to local authorities."<sup>16</sup>

The *Los Angeles Times* reported that the appellate decision was likely reflected politics, not law: "Human-rights activists and legal experts said this did not appear to represent a legal check on official abuses or a strengthening of rule of law as much as it reflected Beijing's desire to blunt damage to its international reputation."<sup>17</sup> But, to me, whenever a higher court reverses a decision recognized as a travesty, the rule of law is strengthened.<sup>18</sup>

In any event, Mr. Chen's courageous actions stand as the embodiment of lawyerly opposition to tyranny. As More well understood, there is no guarantee that law will triumph over power, but by exposing injustice and opposing tyranny, the lawyer/statesman fulfills his highest calling.

<sup>14</sup> Fan, *loc. cit.*

<sup>15</sup> Joseph Kahn, "Rights Advocate Wins a Retrial, A Rarity in the Chinese Courts," *New York Times* (Nov. 1, 2006).

<sup>16</sup> *Ibid.*

<sup>17</sup> Mark Magnier, "Court Invalidates Rights Activist's Conviction," *Los Angeles Times* (Nov. 2, 2006).

<sup>18</sup> Subsequent events have given little cause for optimism. Mr. Chen's retrial ended in a conviction. "The retrial has been marred by apparent official efforts at intimidation." ("China Again Convicts Rights Advocate," *New York Times* (Dec. 1, 2006); see also Joseph Kahn, "Rights Group Urges China to End Curbs on Lawyers," *New York Times* (Dec. 11, 2006) ["Rules requiring Chinese lawyers to submit to government supervision when representing clients in politically delicate cases have dealt a serious blow to the country's legal system and should be rescinded, Human Rights Watch said in a report to be issued on Monday."].)

<sup>10</sup> *The Erasmus Reader*, p. 271 (E. Rummel, ed. 1996).

<sup>11</sup> Maureen Fan, *Washington Post* (8/24/06)

<sup>12</sup> Kahn, "Chinese Crackdown on Rights Lawyers Signals Effort to Deter Increasing Legal Challenges," *New York Times* (Aug. 19, 2006).

<sup>13</sup> *Ibid.*