

Lawyers' Perspectives? Questions and Discussion

With lawyers Louis Karlin, Barbara Panza, and David Oakley

David Oakley: I have one question, and this is really just for Lou. The thrust of the argument is that Richard cloaks his tyrannical actions in legal rectitude, and what immediately springs to my mind is, "well then, what do you make of the execution of the Queen's allies, Lord Rivers and company?" That's a total absence of any process. It couldn't be any more explicit: the text says "no process." They weren't even allowed to talk before their execution. How do you want to sort that out?

Louis Karlin: Well, I think that, from the first talk—Professor Logan's talk—we learned that tyrants have two ways of acting: one of them is to play the role, and one is to use the fist—the iron fist. I would say that this might be more the iron fist. I think it's also a way to interpret the strawberry scene, where he's not trying to be judicious or anything; he's just testing whether he has the power to make the lords quail. It's absurd, but they're terrified of him. At that point, he knows he can go forward: he's got the lords.

For the execution scene, I think that it doesn't fit with the idea that he's trying to show that everything he does is legal, but it really plays into the theme of tyranny in a different way, which is, "how do you prosper as a tyrant?" Well, you hire people like the executioner. In each case where he makes his personnel choices, we see the kind of people you need if you want to have a thriving tyranny. So there's Richard Radcliffe; and he says that Radcliffe was a longtime collaborator in the Protector's lawful enterprises, "having experience of the world and a shrewd wit, short and rude in speech, rough and boisterous of behavior, bold in mischief, as far from pity as all fear of God." And so obviously this is far from a portrait of virtue, and he doesn't stick at any of the niceties of due process, so I think that what he's showing is, again, these are the kind of people you want to carry out your purposes. It doesn't fit with that aspect of his role—acting, but it gets at the other side of his tyrannical actions.

Oakley: Well, let me just pose one question to Barbara before we open it up. When I was listening to you, I thought of this line from one of the worst scripts in Hollywood ever made for movies—*Star Trek*—and I think that the line is "resistance is futile." And I was thinking that the queen's predicament is precisely that:

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"resistance is futile." She's in an incredibly bad spot: it's not so much a question of weighing arguments as risking death. If not death, then social upheaval, which should give anyone, especially a queen, some pause. And so, I'm wondering how you would respond to the following: tyranny is a juggernaut, and she's faced with a situation that would not fall into one of Fr. Koterski's non-negotiable things—you said it better, Fr. Joe—so when it comes to reducing her contingent around Edward V, and it comes to releasing the other boy out of sanctuary, she's persuaded. But it's interesting to note that she is only persuaded after she makes the best possible effort you could under the law—she, of all people—she's not trained, she's not a counselor, she's not a lawyer, but she makes the best argument, and in the end she realizes that this is not going to work. It's a prudential judgment, not a non-negotiable sort of thing. She may be a person who's persuaded poorly, or easily persuaded, but can we condemn her? Isn't this all about tyranny, and not about her lack of virtue?

Barbara Panza: Well, is "resistance futile?" We know that she says the cardinal seems more ready to depart, which might suggest that there's some wavering on his part. She never pushes him to a decision—"are you going to enforce this law of sanctuary, or aren't you?" She lets him find a way out, which is "oh, you'll protect my son? OK." So, I don't know that resistance is futile, because we don't know what he would have done. We also don't know what would have happened if she had barred the doors, hid the child under her skirt, and said "come and get him," for everybody to see. So that's why I said that she waves her argument. She has a solid legal argument in support of the law, but she gives up. She gives up too soon. And we would say of a lawyer, if he didn't pursue it to a judge's ruling, then he gave up too soon. You can object, and the judge can say "oh, that's a good point," and if you don't get him to say "sustained" or "overruled," then it's gone. And I think she never pushes the cardinal to that point, so I don't know that resistance is futile.

Audience: Is this a case in which the cardinal is both a judge and an advocate, and that that's part of the reason why this doesn't work? If you're arguing against the advocate, and the advocate also gets to make the decision on whether or not there's going to be sanctuary, does that soften the position in terms of weighing or pressing the argument?

Panza: I think it's a very good point, and I hadn't thought about it that way, and of course that could also be an idea that the judge needs to be impartial, because he's certainly not demonstrating that he's impartial.

Audience (previous speaker): Because it seems like a sham, hearing her trial, and that's what you get at the end when she realizes that force may be used as opposed to argument.

Panza: On the other hand, you could say that the judge interprets the law, and I would say that she's looking in a way for him to enforce it. So it depends on how you want to see his role, and of course, if it's both, then that's problematic.

Gerard Wegemer: I want to go to another good point that Barbara made: Queen

Elizabeth never acts like a mother in this scene. The Queen never says, "Over my dead body." She doesn't strongly resist, or ask for the law's protection. She never even thinks about the law in her deliberations—perhaps because she has lived her life according to privilege. She has, for example, gone around the law, putting her sons in positions of authority and doing other things based on privilege and not law. I wonder if that would be another factor in considering why the Queen does not insist that the cardinal obey the law.

Karlin: I would add to that that, where you don't have a strong commitment to the rule of law, it makes a lot more sense to get what you want through privilege than by availing yourself of the law. So if you know that, in some area of administrative law, everything's really squishy, or that a certain agency will do whatever they want, or that a certain court tends to rule in one way, or that the courts can't be trusted, then you're not going to entrust yourself to the courts. And certainly, in More's England at this time, you've got a lot of competing jurisdictions, and the rule of law really hadn't taken hold as strongly as More would have liked. I think he did see it as a protection for the individual, but it was a protection that hadn't taken hold yet, so the notion that you could just make your legal argument and win, I think, would probably be naïve. I agree that More leaves open the possibility that she really should have pushed it, and it might have been better prudentially, and for a lot of other reasons, but at the same time, she was in a real predicament, and the cardinal comes in with the guys behind him. It's the implicit threat. And certainly, as the history develops, we see that the starting point of rational argument and rhetoric becomes more and more of a joke—literally a joke, as Professor Smith showed—and all you have left is force. So, in that kind of a world, it makes much more sense to avail yourself of someone who pledges himself rather than trusting in the law.

Panza: And to add to that: of course we've discussed that there were competing factions, and I think one of the interesting things is that, although we sense that some don't want to go along with Richard, there's no real show of leadership. And I think that, at some point, she could have taken that role. More certainly gives her the opportunity with that legal argument, and leaves you wondering, "would some of these people been willing to follow her if she had been willing to take that leadership role?" Perhaps sometimes people are waiting for someone to say it first, or to take the action first.

Matthew Mehan: To follow up on that question: what good is she securing by allowing for this calm and decorous way of letting go of her son, as opposed to a "come and get him" way? To that point, you either have to accept that all of the very excellent arguments that you were granting that she was making according to common law—either she doesn't believe them as she's making them, so when she comes to deliberation those arguments have no anchor in her deliberation, or there is something else driving the choice—that she's not actually interested in justice, as Dr. Wegemer was implying. Because I don't think you can have it both ways.

Karlin: I think it's very similar. You can certainly read it. The reading of failure of courage is certainly a very strong one. I think there's another reading too, though,

which is that her action is in a way very similar to that of the common people, which is to respond with silence. She systematically and accurately refutes the legal arguments, so when she makes her choice, it's very clear to everyone in that room, and to the readers, that it's not because she was convinced. "You didn't prove to me that Prince Richard is incapable of invoking sanctuary. You didn't prove that I'm using it for the wrong purposes. Not one of those things is driving my decision. I'm making the decision based on something entirely different, which is that you, cardinal, have put up your own life as a pledge." So I think that's a different way to read it, and, I think, a powerful one.

Mehan: But isn't that undercut by the observation of the force, that the cardinal's brought the enemies as well? That his pledge surely has to seem false to someone with such intellect as the queen, when she sees he's standing there with the goons?

Karlin: Well, you do have the cardinal, who is, at least theoretically, another person of authority, who could have influence on the Protector.

Panza: If I could just add: you were asking "what good did the queen achieve?" and now that I've bashed her, I'll defend her and say that you could say that she did achieve something: although she sacrificed her sons, she saved her daughters, and we know that one of her daughters went on to marry the next king, so in some way she did preserve the dynasty.

Don Stevenson (lawyer): I'm a lawyer too, but I'm a corporate lawyer, and so to me, this isn't a trial—this is a negotiation. She learns early on that the fix is in on this: she is not going to win with legal arguments, so now it's time to make a deal. She looks around her, and he goes through in great detail: the Protector is ready outside; she looks around at the goons, as you call them; because she wasn't ready for this—and this might be imprudence—she doesn't have anyone to help her; she has no plans to get the boys or the family out of there. She has to make a deal right then, and she's wise enough—and I think very prudent in this sense—to see that when the cardinal, in an age of faith, here's a man of God and, as cynical as we now know he is, she's there at the moment. He pledges his body and soul. She knows there's got to be some goodwill somewhere—there may be something deep down. And the mother says, "I've got to put Moses into the reed basket and set him loose, and I think it truly is the best deal she's going to get. And it says: she thought she could make them more warily to look to him, all the more circumspect to see to his safety if she with her own hands gave him to them of trust." So part of the reason this story is so poignant all these years later for us is that they just so brutally violated that trust. But I think it was the best shot she had.

Karlin: I think that's an excellent observation. One way for a lawyer to look at this is as competing appellate arguments with the reader meant to be the judge, in a sense. But certainly, the more practical way is that this is much more like high-powered settlement negotiations. I think that's exactly it, because so much of what lawyers do is miles from the courthouse. Most litigators wouldn't know how to try a case if their lives depended upon it. What they do is manage lawsuits and disputes, and so a lot of what's going on is guesswork as to what the court would ultimately

decide, factoring in the cost of litigation and the mounting cost of actually going into a trial. So there is bluffing, there is maneuvering, where you don't really know what the court would do if this thing actually were to go to trial, with the knowledge of the lawyers on both sides that the trial something way, way beyond that we'll probably never get to. So the virtue of a lawyer, either of prudence or otherwise, is to try and make a case for what you think would happen if this were actually to go to trial, and to back it up by saying, "you know, but it might not go that way, and it's going to cost you at least \$150,000 between now and next may to find out, so do you want to take a risk, or do you want to make the deal now?"

Audience: Just to piggyback on that question: can we surmise what would have happened to her if they did force the child's being taken?

George M. Logan: I think that she would have been in pretty much the same position. What would have happened would have been exactly what did happen, that is, that the child disappeared with his older brother into the Tower of London and was never seen again. It's not in Richard's interest to tar and feather the queen, or to pretend otherwise than that she is still the queen, whom he greatly respects, and whose children he greatly respects as well.

And I think that this recent analysis is exactly right: I think she took her best shot under very difficult circumstances.

Wegemer: She takes her best shot as a negotiator, as someone interested in the crown, because she doesn't do it as a mother. So here is another way this history shows that politicizing marriage and the family isn't good for either the family or the country. Because in her deliberations she never thinks, "This is my son who's sick," or "this is my son who will die if I don't take care of him." What, then, is on her mind? What motivates her? She actually comes up on top in this deal: she becomes the new dynasty's queen mother, and so that's the problem—she's treating her son as a pawn in political negotiation; she's calculating; she's not really prudent.

Logan: Gerry, you're always so harsh on her. Aren't you affected by that very last moment in the scene where she weeps and the child weeps, and she turns and kisses him one last time, and so on? I think she takes, quite reasonably, what she thinks is the best possibility of keeping her child alive, too, apart from anything else. And it was, I think, her best shot. If those guys, the aristocrats and the prelates, had exercised the power that collectively they had, then the child would have stayed alive. But of course she by no means thinks that this is definitely going to be the outcome. She doesn't question their *truth*; she questions their *wit*—"are you guys smart enough, really, to see through this guy?" And of course they weren't, and of course the reason why she suspected that they weren't smart enough is that she herself had not been smart enough. It's funny: if we took the story outside More's book and looked at just the historical record, then I'd probably come closer to agreeing with you, Gerry, because in real life the queen was not a nice type at all, and what happened at the sudden, unanticipated, premature death of the king was that we had these two powerful, ambitious, ruthless people contending for position; that is, the queen and Richard. And it's the most impressive thing about

Richard: he just instantly blew her out of the water. It was all over—and it may not even have been her decision, and it may just have been the royal council's decision, and the case for doing it this way was made by Richard's ally Hastings—but once the entourage of the young prince was reduced to something smaller than the entourage that Richard and Buckingham could muster, it was over. And of course, the queen is sort of, "fool me once, shame on you; fool me twice, shame on me"—she doesn't make the same mistake again: as soon as she hears what has happened at Northampton, she immediately goes into desperation mode and goes into sanctuary, but it's already too late. She doesn't get a second chance. Gerry *thinks* she has a second chance, but I don't think she *does*. She makes the best possible, or the least bad, choice in a difficult situation. She takes her best shot without thinking that it's a very *good* shot.

Oakley: Gerry, your critique is that it's really not so much a moral failure as a systemic failure. In other words, your critique really goes to something horribly and profoundly wrong with dynastic monarchy, and I don't think it's fair to characterize it in terms of moral failure, because what you're seeing is behavior which is canalized by a certain culture. And this culture invites this sort of behavior. And I don't think it's a fair judgment to expect her to do otherwise. I think she played her part pretty well. She got along. And More makes that pretty clear in a lot of other places. As long as you can get along without hitting up against something non-negotiable....

Wegemer: You articulate very well what Sallust's criticism is of monarchy: that when politics works on privilege rather than on law and justice, it has a very bad effect on your citizens, because when you get citizens to think in terms of self-interest, rather than benevolence and self-sacrifice even unto death—that "I'm willing to die" (and the queen is never willing to die for her son)—then that seems to me to be both a corruption of the family and the state.

Fr. Joseph Koterski: Well, I hesitate to disagree with Dr. Wegemer and Dr. Logan at the same time (Laughter), but I'd offer a third point of view: that she's right in principle, but that she didn't take her best shot. That is, it seems to me that she was acting as a mother, and that's why she took them into sanctuary, and that she there found herself perplexed by whether she holds to the sanctuary or whether she yields to the thing. And so I took it that she is honoring the principle that she needs to preserve her son, so she's got the two options of either "come and get him" or "I'll give him to the cardinal because he's going to offer us protection." So I would say that she's acting on principle and that she's got her son's best interests at heart, but I think she makes the wrong bet with regard to what's the best possibility. And when I think about human relations—let's just come away from *Richard III* for a minute and come at it more from the point of view of how people make decisions in crisis—one of the things that I've found most interesting in my own life, thinking about that, is one of the rules for the Spiritual Exercises of St. Ignatius. He's got these two sets of rules for how to interpret spirits that are moving: the first week, Rule 12, has to do with when somebody is confronted with the evil spirit in front of you, and the idea that is basically suggested in Rule 12 is that, in front of something that's passive, a show of strength will dominate,

whereas, in the presence of something that's really strong, one will simply cower. So it seems to me that, if we were trying to apply something like that to the queen, if she had shown more strength, and not just said simply, "come and get me," but really raised a fuss, I would have thought that that would have been her best shot, trying to elicit some of the people who were nearby to come to her aid—that is, force a division of the house at this point. And that would have exposed whether or not, with the cardinal and the goons, there was an ulterior motive other than what they were suggesting, or not. But then, instead, when she yields—maybe on a corporate model—it's precisely what happens with any corporate model, but not when she makes her best shot, but her worst shot, because in a way, she doesn't realize what the strength of raising a fuss, standing on principle, and trying really to serve her own motherly interest motherly care would have done. Sorry to disagree with both.

Hilary Brink: I was just looking in the text at a later example, and the figure of Sir Robert Brackenbury comes to mind. He's the constable of the Tower who refuses to put the two children to death, and it's interesting that the figure who's before him is Our Lady, an alternative queen, who's only mentioned once. If I could just read a quotation from the text: it says that Sir Robert Brackenbury, after he has been asked to murder the princes, "kneeling before a statue of Our Lady in the Tower, he proclaimed the answer that he could never put them to death, even if he should have to die" and I think that that illuminates the ultimate detachment that you have to have in order to stay consonant to the right law.

Mehan: Imagine a mother who goes to a principal because gang members are beating up on her kid at school in the classroom constantly. She comes in with the rulebook, the city code, state law, the rules of the school, and says, "Look, here's the case: enforce it; take care of it." And he answers, "Ughh." And she answers, "Well, OK, but can he go to your house after school where he can be safe?" That is, if she can't trust him to enforce the rules that are at the school, any reasonable mother wouldn't think that he'd be able to stand courageously and alone, as an individual without any rules or institutions to bolster or buttress him, against those gang members. She has to know, since she doesn't press the issue, that she doesn't trust him—or you could buy the "womanish fear" argument, which I don't see because she's so reasonable. So, because she doesn't press her case with him, she doesn't trust him, so there's some other reason than the oath reason. "Well, I'm going to trust him anyway"—that's the excuse maybe, but it doesn't seem sufficient.

Panza: I agree with that. That's my point, and, bringing up the corporate negotiation analogy, you want some level of transparency, so you'd want to force this out into the open. And he's not really making a decision, he's not making a call, and she's not really forcing him to commit one way or another. She's giving him a sort of third option: "Oh, OK, you protect him then." And they're in sanctuary: this is not in public, not for all to see—this is a select few of the lords and the cardinal. So I think that she should have gone kicking and screaming and made this public, and exactly: Why should she trust him? If he won't uphold his office, and he has a duty to uphold and enforce this law, then why does she think he's going to

stand up to Richard later on?

Gerald Malsbary: The Latin might be a little clearer here than the English: "...prestare censuit / sponte ut illum tradere quam invita videretur..." [Kinney trans: "she thought it would be better if she seemed to be giving him up freely instead of unwillingly"]. She makes this choice, thinking that the others would do a better job watching out for the boy, yet she made a show of willingness rather than being forced. It's that "sponte" [freely] rather than "invita" [unwilling]. These are legal terms. It's kind of manipulating in a way, because she's saying that she hopes her show of willingness is going to stir up their motivation to take care of the boy.

Audience: Another question is, if the queen doesn't have confidence that the cardinal's going to enforce the law of sanctuary, I wonder what motive she has to think that he'll protect the young prince any better once they've left?