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BOOK REVIEW

PARLIAMENT AND THE SUPREME HEADSHIP: CHURCH-STATE RELATIONS ACCORDING TO THOMAS MORE

C.M.A. Mc Cauliff

PETER ACKROYD, THE LIFE OF THOMAS MORE (Nan A. Talese, Doubleday 1998)

Thomas More inspired his contemporaries long before news of his execution echoed throughout Europe. Across the centuries we continue to be drawn to studying More's life and its meaning for our own times, even when the state of the sources did not allow us a full appreciation. As one author explained, "the best that was available for More studies before 1935 was the 1557 Workes instead of a modern edition, plus the biography of More by [Fr. Thomas E.] Bridgett, and a rather small scattering of studies." This changed in 1935, with R.W. Chambers's biography that "covered the life and career of Thomas More more thoroughly than previous lives; it was far better documented and subsumed much original ar-

*Samuel I. Golieb Fellow in Legal History at New York University School of Law, 1998-99; Professor of Law, Seton Hall University School of Law, A.B. Bryn Mawr College, M.A., Ph.D. University of Toronto, J.D. University of Chicago. The author wishes to thank John Baker, Downing Professor of Law at Cambridge University, for wonderful conversations about the legal developments and records in this period; Diarmaid N.J. MacCulloch, Professor of Theology at Oxford University, for his careful reading of this article and generous exchange of ideas; Gerald Aylmer, Professor Emeritus of History at Oxford University, for applying his clear logic and keen historical sense to a reading of this review; Matthew C. Mirow, Director of Legal Research and Writing at St. Louis University School of Law for his careful reading; Dean Daniel J. Morrissey of St. Thomas University School of Law for his discussion of Utopia; and Angela Carmella, Professor of Law at Seton Hall, for her insights on church and state. This review is written in memory of my father, George A. Mc Cauliff, who first sparked my interest in Thomas More.

1. Richard J. Schoeck, Moreans from Chambers to Marc'hadour: Some Recollections and Reflections, in MISCELLANEA MOREANA: ESSAYS FOR GERMAIN MARC'HADOUR 539, 540 (Clare M. Murphy et al. eds., 1989) (referring to T.E. BRIDGETr., LIFE AND WRITINGS OF SIR THOMAS MORE (1891)).
chival research." Chambers and his circle in London produced editions of the early life of More by Roper, Harpsfield and Ro.Ba. Since the 1930s, many monographs by scholars from different countries have been written about Tudor politics, theology and English law and society, to say nothing of works about English literature and editions of works by (and about) More himself. These works have rounded out our picture of those early Tudor times, fraught with danger and stirred by radical change, in which More made his life and death decisions. Much about those times is also very foreign to us now, especially because the Christian religion, whether in its Protestant Reformed or post counter-Reformation Roman Catholic guise, has itself undergone many changes since More's day. In the twentieth century, Second Vatican Council ushered in an age of greater tolerance and ecumenism without approaching the unity of early sixteenth-century western Christianity, and jettisoned Corpus Christi processions, Tenebrae services in Holy Week, fasting during Advent and Lent, remembrance of the dead in the ancient Requiem, the Latin liturgy, and many other observances that were so much a part of the fabric of More's life, punctuated by the annual rituals and observances of the church calendar. Today, it is necessary to recall the context in which More lived his life and to understand his willingness to die for a universal western Christian church. Enter the biographer and nov-

2. Id. at 541 (referring to R.W. Chambers, Thomas More (1935)).


4. See Schoeck, supra note 1, at 540. The 1930s saw the beginning of the English scholarship, which focused on studying More in the context of his contribution to English language and literature.

elist, Peter Ackroyd, and his new biography of Thomas More, famous European author, commercial lawyer, politician, diplomat, Lord Chancellor of England and canonized saint of the Roman Catholic Church. Ackroyd has a tall order to fill and he wisely touches only lightly on technical legal learning, but for lawyers he provides a perhaps more valuable service because he paints a picture of that world we have lost and More's considerable place in that world. This makes The Life of Thomas More an admirable choice for a place on the syllabus of an English Legal History course or on any lawyer's personal reading list.

I. ACKROYD'S BIOGRAPHY: AN ENIGMATIC PORTRAIT?

In his chapter entitled 'Milk and Honey,' Ackroyd shows More with great hopes for England and for himself at the start of Henry VIII's reign in 1509. By that time More was in his early thirties, already called to the bar of Lincoln's Inn and perfecting his piety and spiritual devotion by reading Walter Hilton's Scale of Perfection and meditating on Thomas à Kempis' Imitatio Christi (The Imitation of Christ) as well as finding a model for himself in Count Giovanni Pico della Mirandola (whose biography More translated). Pico was a witty, studious classics scholar, interested in reconciling pagan and Christian learning, who died tragically young of fever in Florence in 1494. During this same early period, More was also a Reader at one of the Inns of Chancery for three years, was nominated as a London alderman, and was associated with the Mercers guild whose mercantile business abroad and at home required expert lawyering.

More's father, John, sent his young son Thomas to live in the household of Archbishop John Morton (later Lord Chancellor and Cardinal), to work as a page and to study in Morton's household for two years be-

6. Peter Ackroyd, The Life of Thomas More (1998). Diarmaid N.J. MacCulloch noted that "Europe is a culture with an ancient wound, a faultline which has divided it since the sixteenth century Reformation." Diarmaid MacCulloch, Maybe It's Because He Was a Loner, Lit. Rev. March, 1998 (reviewing Peter Ackroyd, The Life of Thomas More (1998)), available at <http://www.users.dircon.uk/~litrev/199803/MacCulloch_on_ACKROYD.html>. More was young during "the last golden season of a society unified in a single Western Church, where jokes cracked by gentle scholars and urbane politicians could circulate from Cork to Cadiz or Cracow in the universal language of Latin." I would like to thank Professor MacCulloch for alerting me to Ackroyd's book before its publication here and for providing me with a copy of his review when I failed to obtain it elsewhere.

7. See Ackroyd, supra note 6, at 129-36.

8. See id. at 101-04. More was born on February 7, 1477 or 1478. See id. at 6.

9. See id. at 106.
fore going up to Oxford. Thus, More grew up comfortable in the society of those who attained the highest legal and political positions as he focused early on his vocation of law, administration, diplomacy and politics as a youth. In this, he reminds us of the adolescent Michelangelo in the household of Lorenzo the Magnificent, learning philosophy and practicing his art.

Ackroyd’s ‘Milk and Honey’ paints a picture of More’s wide range of interests and activities from education and children to city affairs, from social reform to religious renewal. For example, he was a member of a party ‘to see and viewe the comen grounde whereupon the Master of seint bartholomus hath biled’. This was the area where he had disputed as a schoolboy; now he was one of London’s guardians. It is also likely that he played some part, at the end of 1509, in negotiations to create ‘an unity’ between the Merchant Adventurers and the Merchants of the Staple. It was the kind of task which he had been trained all his life to fulfil.

Ackroyd notes that More always attempted to negotiate a settlement in order to avoid suits, having “been preoccupied with the maintenance of harmony and good order.”

Ackroyd describes many of More’s other activities. In December of 1509, he was elected as a burgess for London, one of 300 members of parliament to sit in the House of Commons in January, 1510. In addition, More was a commissioner for the London sewers, responsible for avoiding floods and dealing with questions of public health. In true Renaissance fashion, he was interested in herbs and medicine and numbered doctors among his extended family and friends.

Ackroyd also acquaints us with More as a Londoner, seated in a “spacious, well-timbered and modern,” large red-brick Tudor house in Chelsea (near the King’s Road, the Thames River and Old Church Street), looking at the skyline of London across the Thames “with the steeple of St Paul’s rising above the roof-tops.” We are told about the gardens, with the “mulberry tree, because its name is morus, as well as rosemary and lilies, gillyflowers [London pink small carnations] and sweet cabbage roses. There was an orchard with its apple trees and pear trees, plums
and apricots and spreading vines." We hear about More’s family, duties, obligations and routines, his chapel, library, and the separate poorhouse his daughter Margaret managed for seniors and infirm people, as well as his “pettis,” including, among other species, a sick monkey, a weasel, and rabbits in their wooden cage. We are treated to rich and exquisite details about health, travel conditions, guildhall life, religious and secular pageants and shows, academic and school life, business, the royal court, and society. In that sense, Ackroyd’s The Life of Thomas More is as fully engaging as A Year in Provence, only we are traveling back in time to a different world yet one as complex, reasonable, and irrational as our own.

It was not too long before More became “Wholly a Courtier." During this time, he was clearly over-extended or, in his own word, “distracted." Ackroyd details More’s establishment of a large commercial practice, as sophisticated as anything associated with the much later burgeoning commercial practices of Lord Mansfield in the mid-eighteenth century. More juggled his commercial and busy governmental practice with writing, to say nothing of his unusually deep involvement with the education of his children and engagement with the major scholars, writers and publishers of his day. In Ackroyd’s vivid description, More’s continual attendance with the council in the Star Chamber meant that, according to Erasmus, he was being carried away by the tempest of public service. But he was also still under-sheriff of London, while at the same time pursuing cases for private clients. He was asked by the Mercers for his “advice and counsel” on legal matters, for example, and it is reported by his first biographer that he acted on behalf of the papal interest when one of the Pope’s ships was seized at Southampton. He was also asked to adjudicate in a boundary dispute between the parishioners of St Vedast and the Saddlers’ Guild, who had adjacent premises in Forsters Lane, and in the same year he was sitting on commissions variously concerned with park lands, lands, and apricots and spreading vines.”

14. Id. at 253.
15. See id. at 261-62. Ackroyd relates that the monkey watched the weasel, which tried to get the rabbits, finally opening the rabbit hutch at the back: “all at once the monkey ran over to it and, climbing upon a plank, managed to restore it to its former safe position.” Id. With his menagerie, More, the Renaissance man for whom the whole of knowledge was his province, provided the occasion for Erasmus’s noting “primatial compassion” in his Colloquies. See id. at 262.
17. See Ackroyd, supra note 6, at 180 (Chapter XVII).
18. Id. at 185 (describing his various responsibilities).
enclosures and the maintenance of yeomen.\textsuperscript{19}

No wonder that the "hard grind" of public life and "legal disputes" left him no time for learning. Nevertheless, he pressed on with duty, in due course being named Chancellor of England.

Apart from his dogmatism with respect to orthodox theology, More is often presented as an enigmatic figure in part because he set great store by the maxim handed down from Roman law that \textit{qui tacet consentire videtur}, silence is deemed consent, and made a great show of not telling anyone, including his family, his private thoughts to protect them from interrogation in the King’s Council. Furthermore, his ambiguous stance is said to be symbolized by his extensive use of the dialogue format in his writings in order to accommodate different points of view without the necessity to choose one as valid or even preferable to another position.

In the dust jacket of Ackroyd’s \textit{The Life of Thomas More}, Ackroyd’s publishers suggest that portrayal of More as enigmatic not only fits our current proclivities, but also explains More as he was.\textsuperscript{20} To be fair, Ackroyd goes a long way toward explaining the consistencies behind More’s enigmatic surface. But in a book of 447 pages we are still left with the impression that More was so private, complex and enigmatic that we cannot fully comprehend him or what he was about.\textsuperscript{21} While it would be presumptuous to think we can totally comprehend another person, it is nevertheless possible to draw connections between what More said when he gave up his famous silence to speak after the verdict and what he wrote just before, during, and after he was Lord Chancellor of England. More set forth his general principles in his writings but deliberately never applied them to the divorce or the Succession Act (which required his imprisonment in April, 1534, due to his failure to take the oath in the terms it was presented to him).\textsuperscript{22} Nor did he ever speak his reasons to anyone, including his family. That was his great silence.

Therefore, the trial assumes great importance for the study of More’s

\begin{footnotes}
\footnote{19. Id. (footnotes omitted).}
\footnote{20. “Peter Ackroyd reveals a man more troubled and more perplexing than that of any previous account.” The dust jacket further claims that \textit{THE LIFE OF THOMAS MORE} “brings us closer to a man who has remained an enigma for 500 years.”}
\footnote{21. See MacCulloch, \textit{supra} note 6 (describing More as “a temperamentally private and circumspect man who defended his privacy with literary fireworks and cynical wit, yet who at last was forced to abandon his cynicism and proclaim his seriousness. As a consequence, More exchanged his privacy for the loneliness of a prison cell . . .”).}
\footnote{22. See GUY, \textit{PUBLIC CAREER}, \textit{supra} note 5, at 203 (stating that More’s “brilliant career in law and politics . . . ensured that his morality would soon become his executioner”); see also ACKROYD, \textit{supra} note 6, at 363.}
\end{footnotes}
life and thought, because it gives a coherent coordination between his works, such as the *Debellation [Destruction] of Salem and Bizance*, and the principles by which he lived his life and for which he gave his life. At the trial, Sir Richard Rich, appearing as a witness against More, used hypotheticals from a conversation with More about the legislative powers of parliament and broke the conventions of the profession to say More had declared his personal opinion. Rich's perjured testimony convicted More. More himself had been Speaker of the House of Commons in 1523; as Lord Chancellor of England More was *de officio* president of the House of Lords in 1531 when he had to set forth the King's position on his desired divorce from Queen Catherine. Correlation of More's writings (from the time when King Henry VIII commissioned scholars to collect supporting papers for his divorce from Queen Catherine) with More's speech after the jury's verdict against him for treason shows the spiritual core, the clarity, and the continuities in More's position as part of the complex character of a very great mind. The purpose of this review essay is to draw these connections back from his post-trial speech to these earlier writings consistent with his speech before the court.

II. CHURCH AND STATE: HERESY AND ORTHODOXY

More was young when the heresy of the Lollards (a group of English merchants and artisans who wanted, among other reforms, to use the Bible translated into English in the 1380s) and anticlericalism (a philosophy recognizing the continuous need for reform in all human institutions) were endemic. Indeed, More himself advocated reform in the church just as the common lawyers, ever jealous of their jurisdiction, pointed out all the wrongs in ecclesiastical courts (when the same conditions obtained in common law courts), in order to increase their own opportunities for business.

For a while, neither of these conditions was by itself beyond control


24. See id. at 392-93; Ridley, *supra* note 5, at 280; see also notes 59 and 108 infra and accompanying text.

because the King was orthodox in his religion. Before becoming focused on obtaining a divorce from Queen Catherine, Henry VIII had published a book under his own name asserting orthodox views in the face of Martin Luther's heresies and even earning the gratitude of the Pope for his efforts.  

Similarly, what changed More's attitude towards the church was not just the popularity of Luther's ideas but the knowledge that Henry VIII in his quest for a divorce from Queen Catherine was willing to align himself if necessary with the Lutheran princes. By doing so, Henry was able both to threaten the Pope in order to get what he wished and to protect himself in case the Pope made political alliances against him, for example, by encouraging Henry's foreign enemies to invade England. More, an experienced diplomat from having served as an ambassador, was aware of Henry's determination to prevail from his service as a royal councilor. These forces combined to make More apprehensive of the old dissenting heretical and anticlerical elements becoming members of the mainstream establishment due to the king's support for them. More's fear did not stem from Henry's backing of these groups, but rather from their ability to help the King obtain his divorce by lending their political support. If this occurred, Henry VIII would be obliged to reward them for their support, and the old religion and the old orthodoxy would be shunted aside.

More, a Christian humanist and heir to the conciliarist tradition, had not been a strong supporter of papal primacy in the 1520s. According to More, the primacy of the Pope, as More found in a decade of study, was agreed on by all the church fathers "from St. Ignatius [of Antioch], disciple to St. John the Evangelist, unto our own days both Latins and Greeks so consonant and agreeing in that point, and the thing by such general councils so confirmed also . . . ." More felt that no advantage

26. See ACKROYD, supra note 6, at 226-37. Henry's book, Assertio septem Sacramentorum adversus Martinum Lutherum, [Defense of the Seven Sacraments], was written in 1521 and presented to Pope Leo X who rewarded the King with the papal title of Fidei defensor, defender of the faith. See id.

27. See FOX & GUY, supra note 5, at 167-98.

28. See E.E. REYNOLDS, THE FIELD IS WON: THE LIFE AND DEATH OF SAINT THOMAS MORE 308 (1968) [hereinafter THE FIELD IS WON] (discussing the history of weak popes after 1305); see also ACKROYD, supra note 6, at 234 (discussing the decline of late medieval Catholicism).

29. ST. THOMAS MORE: SELECTED LETTERS 205, 212 (Letter #53 [#199] (footnote omitted)). The bracketed number [#199] indicating that this letter of 5 March 1534 to Cromwell is in THE CORRESPONDENCE OF SIR THOMAS MORE (Elizabeth Frances Rogers ed., 1961), an original compilation of letters. Hereinafter in this Book Review, I will note the bracketed number along with the citation to ST. THOMAS MORE: SELECTED
could come from denying the Pope's primacy:

[For that primacy is at the leastwise instituted by the corps of Christendom and for a great urgent cause in avoiding of schisms and corroborate[d] by continual succession more than the space of a thousand year at the least, for there are passed almost a thousand year sith the time of holy St. Gregory.]

During this time, the Pope, besides being the Bishop of Rome, was also a secular prince "in league with all other Christian princes." Nevertheless, the conciliar tradition did not abhor papal jurisdiction, which Henry VIII came to do as proclaimed in the preamble to the Succession Act of March 30, 1534. More wished to protect both the liberties of the church in England and England's ecclesiastical connection to the rest of western Christendom, which he felt were severely endangered by the new legislation. The unity of Christians was particularly important to More, and schism held a special terror for him.

Historian Diarmaid MacCulloch warned that those of us who are Christians might read Ackroyd's book from the perspective of whatever side of the Christian divide we are on. Much later in the sixteenth century John Foxe, chronicling the martyrs of the reform, criticized More heavily for having taken a very strong stand against heretics. More stood against heresy in part, because it led to disunity in the church (anticipating the polemicism of Foxe) and in part, because theological truth was deemed to require assent without choice. How to treat those with whom one disagreed on matters of religion proved to be a great problem during the sixteenth century. The balance was often struck in favor of the government and established religion, which trumped conscience. Each side was ready to condemn the other, both starting from the same premise that one's own position, founded on absolute truth, rendered those not of like mind heretics needing correction. If "correction" failed,

LETTERS.

30. St. Thomas More: Selected Letters, supra note 29, at 212-13 (Letter #53 [#199] (footnote omitted)).

31. William Roper, The Life of Sir Thomas More, in Two Early Tudor Lives 235 (Richard S. Sylvester & Davis P. Harding eds., 1962). Roper wrote that his father-in-law advised Henry VIII to tone down his maintenance of the Pope's authority: "I think it best, therefore, that that place be amended and his authority more slenderly touched." Id. Ironically, the king refused because "[w]e are so much bounden [sic] unto the See of Rome that we cannot do too much honor unto it." Id.

32. See MacCulloch, supra note 6 ("Our judgment [on the reformation] will probably reflect where we stand on either side of the faultline: and we will judge Thomas More with the same resonances in mind.").

recantation, imprisonment, or burning (prefiguring on earth the heretic's presumed eternal judgment of consignment to the fires of hell) was implemented. For three hundred years before the Reformation, heretics were punished and burned to death. Henry VIII used burning for heresy, torture to obtain evidence in state cases, and disemboweling, drawing and quartering, or beheading to punish treason in political circumstances.  

Under pagan conditions, such as existed in the non-Christian society of Utopia, or when heretics did not seem such a fundamental threat (i.e. earlier in Cardinal Wolsey's administration before Martin Luther's books reached England in 1518), freedom of religion might have been justified on the grounds of societal harmony, but once the theological truth of Christianity was at issue, then traditionalists used serious remedies for heretical threats to that truth. The late Geoffrey Elton, historian of Thomas Cromwell's role in Henry VIII's government, discussed More's reaction to the changes in religion:

No doubt, the more scurrilous stories of his personal ill-treatment of accused heretics have been properly buried, but

34. See ACKROYD, supra note 6, at 303 (citing JOHN GUY, TUDOR ENGLAND 26 (1988) for the statistic that in the century before More became chancellor, some thirty burnings are documented to have taken place). In 1538, King Henry VIII presided over the trial of John Lambert, asked whether the Eucharist was Christ's body and had Lambert burnt for denying the doctrine of the real presence. See GUY, TUDOR ENGLAND, supra, at 184; see also J.J. SCARISBRICK, HENRY VIII 378-383 (1968) (noting that the Act of Attainder against Thomas Cromwell in 1540 charged him with both treason and heresy). See generally JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME (1977) (discussing various investigations). To lend weight to the charges against Cromwell, three reformers were burned as heretics (anabaptists) on July 30, 1540, and three others were executed on the same day for popish treason. See id. at 380, 383. Luther also approved burning "for members of those sects which so confused and hindered his own preaching." Id. at 383. More's sentence stated:

Sir Thomas More, you are to be drawn on a hurdle through the City of London to Tyburn, there to be hanged till you be half dead, after that cut down yet alive, your bowels to be taken out of your body and burned before you, your privy parts cut off, your head cut off, your body to be divided in four parts, and your head and body to be set at such places as the King shall assign.

ACKROYD, supra note 6, at 398. Ackroyd also reminds us that we do not know "when More learned that his sentence had been commuted from disembowelment to beheading." Id. at 403.

35. See ACKROYD, supra note 6, at 105, 171-79 (describing More's imaginary society).

36. See id. at 183-84, 208-09 (discussing More's work on Utopia and skirmishes at Court). There is also a description of the opposition to Luther, including the burning of his works. See id. at 227, 246. Additionally, it is noted that one of More's two "honourable public dut[ies]" mentioned on his epitaph was his pursuit of heretics. See id. at 275.
that is not to make him into a tolerant liberal. Tolerance he
would have abominated as treason to God . . . . The More of
the Confutation may still be able to see, as the author of Utopia
so clearly did, that not all is well with the old Church, but he is
desperately certain that, as things are, reform can lead only to
destruction and must be resisted.37

The Utopians lived in a presumably pre-Christian society, so that for
More under those circumstances, one religion really was as good as an-
other. Elton recognized that for More, toleration lost its validity in the
face of the overwhelming need to protect and foster Christian truth for
the spiritual health of the present generation and as well as for their de-
scendants. More composed his epitaph for the monument in Chelsea
Old Church to "show off" his accomplishments, stating that he was
"grievous to thieves, murderers and heretics."38 The reformers were
equally jealous guardians of their own truth and, in today's terms, proved
as intolerant with their violent iconoclasm, justified in their minds as rid-
ding the world of idolatry, and punishment of recusants adhering to the
old faith as ever More was toward heretics.39

III. MORE AS CHANCELLOR

By the time More was made Chancellor of England, life was already
bittersweet because the King had moved forward in his quest for a di-
vorce, although More believed that not all was lost in that regard. In
1529, Wolsey was dismissed as Lord Chancellor for failing to obtain the
divorce the King desired. On accepting the chancellorship, More
thought he had reached an understanding with the King that he would
have nothing to do with the divorce. That arrangement did not prove
workable for long.

With regard to the legal work of the Chancellor, More had much suc-

37. G. R. Elton, Sir Thomas More and the Opposition to Henry VIII, 41 BULL. INST.
HIST. RES. 19, 21-22 (1968) (footnotes omitted).
38. E. E. REYNOLDS, THE TRIAL OF ST THOMAS MORE 147 (1964); see also
ACKROYD, supra note 6, at 325 (describing the heretical threat perceived by More).
39. See MARGARET ASTON, ENGLAND'S ICONOCLASTS: LAWS AGAINST IMAGES
237 (1988) (discussing the actions of Cromwell and his allies). EDWARD MUIR, RITUAL
IN EARLY MODERN EUROPE 229-30 (1997) describes events in the wake of religious di-
visions when the state required more elaborate ritual to command allegiance. "In all parts
of Europe—Catholic, Protestant, and Orthodox—liturgical rites provided a vast repository
of representational images that city officials and princes adapted to the needs of govern-
ment. Political ritual or ritualized politics tends to camouflage tensions, especially by rep-
resenting more political harmony than may actually exist." Id. In some sense allegiance
itself was transferred from the sphere of religion to the state. See id. at 230-31.
cess. His son-in-law, William Roper, clerk (the officer who kept the pleas) of the Court of King’s Bench, later wrote that his father-in-law realized the resistance of common lawyers to the use of injunctions, which were central to the equity courts of Chancery and Star Chamber. As a result, More took all the judges to dinner at Westminster to air their complaints. He took the opportunity to explain fully his use of injunctions in each different case. Once the judges admitted that they found no fault with any particular injunction More had issued, More urged the judges to issue injunctions themselves so that he would not have to do so himself in the future. More put his prestige as a common lawyer behind the use of injunctions and equitable decrees in Chancery. Among the many aspects of More’s career, his reputation as a judge, succeeding Wolsey as Chancellor, “stands highest.”

40. See ACKROYD, supra note 6, at 258 (describing William Roper’s place in a legal family: “Roper was also the grandson of Sir John Fineux, who had been until November 1525 Chief Justice of the King’s Bench, and Roper’s sister eventually married another Chief Justice.”). William Roper succeeded his father as clerk. See id.; see also JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 46 (3d ed. 1990) (pointing out that the Court of Common Pleas had more than one clerk (a prothonotary and two others)). In conversation, Professor Baker described the plea rolls of the period as sometimes having the drawing of a phoenix next to Fineux’s name leading to the suggestion that the name was pronounced “Phoenix.”

41. In a narrative revelatory of the attitude of the common law judges at that time, Roper wrote that More made the judges the following proposal:
That if the justices of every court—unto whom the reformation of the rigor of the law, by reason of their office, most especially appertained—would upon reasonable considerations by their own discretion, as they were as he thought in conscience bound, mitigate and reform the rigor of the law themselves, there should from thenceforth by him no more injunctions be granted. Whereunto when they refused to condescend, then said he unto them: “Forasmuch as yourselves, my lords, drive me to that necessity for awarding out injunctions to relieve the people’s injury, you cannot hereafter any more justly blame me.” Roper, supra note 31, at 221-22.

42. See GUY, PUBLIC CAREER, supra note 5, at 85 (noting that the “wider importance of More’s continued support for Chancery and Star Chamber” catalyzed the common lawyers to set out on the journey toward reforming common law justice but that More could go no farther because of King Henry’s divorce).

43. See id. at 93. Guy sums up More’s achievements as Chancellor:
More had maintained and strengthened the machinery of Chancery and Star Chamber, he had continued to grapple with the socio-legal problems of the period, and he was prepared to innovate where necessary in the pursuit of speedier or more effective justice. He had added practical realism to Wolsey’s idealism [regarding impartial justice not dependent on social status], and so ensured a smooth transition from the age of clerical to that of common-law chancellors. For thirty-one months in office, it was a magisterial performance.

Id.

44. Id.; see also GUY, TUDOR ENGLAND, supra note 34, at 28. The Compromise of
With regard to political issues, the time soon came when it was beyond More's power to continue to influence attitudes or the outcome of events. He saw all too presciently that his world would soon be no more. Rights won by the martyrdom of Thomas à Becket and recognized in Magna Carta, clause 1, by that time recognized for more than three centuries, would be simply disregarded by legislation from the king-in-parliament, and by implication, abrogated.45 From 1529 to 1532, More's attempt to shape events while he was Chancellor and while Henry VIII was seeking a divorce from Queen Catherine combined with the circumstances surrounding his final political defeat in May 1532, when the convocations of the clergy of the princes of York and Canterbury submitted their legislative and judicial authority to the King, threatened Henry VIII so that More was soon on the road to execution for treason.46 With the church's loss of independence and papal authority, More resigned as Chancellor, noting that his public life was over.47 As historian G.R. Elton "put the case" for Cromwell and Henry VIII:

What reason had the government to suppose that a man who had actively engaged in such controversial politics would now abandon them altogether? . . . Here was a man of stature and ability and European renown who had already done much to discredit their policy both at home and abroad. Left at large, he must have seemed like a time-bomb to them. And so the trag-

Avranches between King Henry II and the Pope in 1172 "secured the church's right to self-regulation." Id. In the concessimus Deo clause of Magna Carta, the kings confirmed again and again "for us and our heirs in perpetuity, that the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." Id.

45. See GUY, PUBLIC CAREER, supra note 5, at 202-03.
46. See ACKROYD, supra note 6, at 313, 328-29.
47. See Elton, supra note 37, at 34. Elton later stated that the king's printer did not publish the dialogues by Christopher St. German, one of More's opponents. See G.R. ELTON, POLICY AND POLICE: THE ENFORCEMENT OF THE REFORMATION IN THE AGE OF THOMAS CROMWELL 173, 174 (1972). In fact, however, St. German published anonymously and More answered him without exposing St. German's identity, but St. German's anonymous dialogues were in fact published by the king's printer. See FOX & GUY, supra note 5, at 113-15, 118-19. The King became angry when More answered St. German's tracts. See id. at 118. Fox and Guy ask
why had Henry's affection for his former chancellor—visible even at York Place in May 1532 [at More's resignation as Chancellor]—turned to malice and hatred a month before the First Act of Succession was on the statute book? The reason was in part that More had refused to attend Anne Boleyn's coronation the previous June. But it must in part, too, have reflected Henry's current mental association of More and Fisher as equal partners in the Catholic press campaign against 'his' jurisdictional revolution . . . . Within the volcanic recesses of the king's consciousness, Thomas More's mere existence came to pose an intolerable threat.
edy was staged: more pressure upon the now inflexible man to accept the new order, the king's increasing hatred, the rigged trial and the condemnation on a charge which rested on perjured evidence. But though the charge was false in fact, it was (as More's speech to his judges showed) true in spirit, and by his part in the events of 1529-32 More had made certain that his conscience could not in the end be left private to himself.48

Thus, even after 1532, More continued to write, being careful to choose subjects, such as heresy, that could not be deemed directly dangerous to the king.49

IV. PARLIAMENTARY LEGISLATION AFTER 1532

After More's resignation on May 16, 1532, following the clergy's surrender to King Henry VIII, More retired to Chelsea, leaving some thirty to thirty-five members of Parliament with similar sympathies for Queen Catherine and respect for the old ecclesiastical institutions. However, many other members of Parliament seemed indifferent to matters of ecclesiastical jurisdiction and some common lawyers had definite ideas for reform. The question of the day was whether Parliament could pass a bill overturning the ecclesiastical jurisdiction of the See of Rome in England. After Cardinal Wolsey's failure in 1529 to obtain a divorce from Rome, it took until May 1533, to secure the English divorce and the supporting legislation in Parliament. According to the weight of current scholarly authority, one reason for the lengthy process was that Thomas More after his resignation on May 16, 1532 continued, without speaking, to oppose the divorce and the early reformation legislation 50 both in his abstract writings, (never mentioning the King's divorce) and in his political galvanization of a small, but energetic, group composed of members of Parliament (who swayed some views and caused delay) and clergy who spoke from the pulpit against change.51 Indeed, another and probably more compelling reason for the delay in the divorce was that Queen

48. Elton, supra note 37, at 34.
49. See FOX & GUY, supra note 5, at 115 (describing More's belief that anonymously defending the church through his writing was "his Catholic (and public) duty").
50. See GUY, PUBLIC CAREER, supra note 5, at 207-12. According to a document in the Public Record Office State Papers of Henry VIII, which Professor Elton discovered, Sir George Throckmorton, M.P. confessed in October 1537 that he had engaged in Parliamentary opposition to the divorce and ecclesiastical reform at the behest of More and Fisher. That document embodying Throckmorton's confession is reproduced in GUY, PUBLIC CAREER, supra note 5, at 207-12.
51. See id. at 196-98 (noting More's meeting with Sir George Throckmorton and encouragement to "be not afraid to say your conscience").
Catherine's right of appeal to Rome from the Archbishop's decree loomed over the King, who realized that only schism with the Catholic church could intercept her right.  

Reformation legislation following More's resignation as Chancellor in May 1532 to November 1534 included several acts to remove the jurisdiction of the Pope and declare the separation of the English church from Rome, so that Henry VIII's English divorce from Queen Catherine could allow him to establish a new marriage and line of succession to the throne. The first legislation was the Act in Restraint of Appeals in April 1533, which declared England's independence from Rome in ecclesiastical matters. In reliance on a collection of patristic texts and a miscellany of other old documents and grants, both spurious and authentic, the language of the Act of Appeals deliberately harked back to the Roman empire for terminology to set forth Henry VIII's view that his new departure was asserted to be an older, and therefore presumably more authentic, approach to church-state relations. Henry VIII alleged that the new regime constituted a return to early roots, that this realm of England is an empire. Thus, the Act of Appeals was "the initial instrument of schism."  

The first Succession Act was passed on March 30, 1534, with its oath requirement to take effect on May 1, 1534. The Succession Act legislated that Henry's marriage to Queen Anne was deemed valid and made it treasonable to slander the king's marriage. In November 1534, Parliament proclaimed in the Act of Supremacy and Treason that the King was the "only supreme head in earth of the Church of England," required another oath of allegiance, and declared that denial of royal titles or calling the king "a heretic, schismatic, tyrant, infidel or usurper" would be considered treason.

52. See GUY, TUDOR ENGLAND, supra note 34, at 124-25 (describing the group of politicians and clergy who supported Queen Catherine and the Catholic Church).
53. See GUY, PUBLIC CAREER, supra note 5, at 183.
54. See FOX & GUY, supra note 5, at 158-59; see also ACKROYD, supra note 6, at 339. The language of the preamble relies on the Collectanea satis copiosa, the sufficiently copious collection of documents put together at Henry VIII's behest starting as early as 1526 and extending over some years. The influence of this collection on policy and legislation is treated further at notes 80-83 and accompanying text. See FOX & GUY, supra note 5, at 159 (paraphrasing the language of 24 Hen. VIII, c.12 (1533)).
55. GUY, TUDOR ENGLAND, supra note 34, at 132-34 (providing an excellent survey of the period for anyone wishing to supplement Ackroyd's biography).
56. See id. at 135.
57. Id.
58. Id. at 136.
This parliamentary declaration of royal supremacy over the church provided the basis for the hypothetical that More put to Sir Richard Rich on June 12, 1535, that is a parliamentary proposal to set in motion something beyond its control to effectuate. As the short speech after his trial demonstrated, More did not recognize the validity of this legislation abrogating the English church's relationship to the rest of western Christendom. Logically, if Henry VIII were not in fact supreme head, Parliament's recognition could not make him so. More believed that the nature of ecclesiastical headship required the universal western church government of a general council to overrule or depose a pope.  

V. MORE'S SPEECH AFTER THE VERDICT AND ITS RELATIONSHIP TO HIS EARLIER WRITINGS  

Because there are many fragmented sources for More's trial and nothing approaching a modern law report, study of what the trial can tell us about More's innermost thoughts is difficult. The sources for the trial and post-trial speech are found in many places. The writings providing the basis for the arguments in More's speech are published in the recent edition of More's Complete Works. Over the last decades, as better control over the scattered sources has become possible, many authors have prepared their own composite of the trial, putting excerpts and fragments from different sources together. Ackroyd's chapter on the trial, 'Call Forth Sir Thomas More,' is just such a composite using authentic sixteenth-century spelling, without accompanying interpretation or analysis.


60. See W. Cobbett & T.B. Howell, Complete Collection of State Trials 385-96 (5th ed. 1793). This work relies on extracted versions of trial and post-trial speech from the writings of Edward Hall, Lord Herbert of Cherbury's Life of Henry VIII and Cresacre More's Life of Sir Thomas More.


62. See Ackroyd, supra note 6, at 393-98. In his footnote to this chapter, id. at 433-34, Ackroyd cites J. Duncan M. Derrett, The Trial of Thomas More (a complete citation is found within that work at page 418). For those wishing to trace the quotations for them-
While Ackroyd's chapter covering the trial, verdict, motion in arrest of judgment, speech, pronouncement of judgment and imposition of sentence is effective standing alone, it leaves to the reader the task of drawing any connection to More's career or earlier writings (although Ackroyd does provide a general discussion of More's state of mind in the subsequent chapter). In this way, Ackroyd's presentation of the trial emphasizes his general theme of enigma, ambiguity, and isolation. Ackroyd carefully points out, however, that More's silence and conscience was not simply his individual, or idiosyncratic, conscience but conscience based on traditional principles of law. It is clear that More imposed silence on himself to maintain his loyalty to the King and to preserve his own life since he believed that silence would be interpreted as assent. He paid a great price for his silence—depriving himself of the opportunity to speak with his family about his matter of conscience, leaving them without access to his innermost thoughts and reasons for taking the position which ultimately led to the King's deadly wrath against him. Once More realized that silence could neither save his life nor satisfy the King's enmity, he explained in his post-trial speech why Henry VIII's changes in church-state relations required more than conscience could give, required even his very life's blood.

In order to relate this speech to More's earlier writings that contain the general principles on which More based his refusal to take the oath recognizing the King's supremacy, and his faith that the law would protect

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63. See Ackroyd, supra note 6, 399-400; see also Reynolds, The Trial of St Thomas More, supra note 38, at 127.

...
him because of his silence, it is worth quoting here a portion of Ackroyd's 'Call Forth Sir Thomas More' chapter. More's speech as matter in arrest of judgment is a pivotal statement explaining his motivation in refusing to take the oath in the form it was demanded. His reliance on the law to protect citizens indicates the major influence that structures of authority, such as the church and the law, played in his own life and the role he believed that the church and the law should play in society. At last, on July 1, 1535, after hearing the guilty verdict, More broke his silence, and went to some trouble to do so since the then-current Lord Chancellor Thomas Audley omitted the allocution of the prisoner and attempted to proceed directly to judgment:

Thomas More: My Lord, when I was toward the Lawe, the maner in suche case was to aske the prisoner before Judgment, why Judgement should not be geuen agaynst him.

Sir Thomas Audley: What, then, are you able to say to the contrary?

Thomas More: Seeing that I see ye are determined to condemne me (God knoweth howe) I will nowe in discharge of my conscience speake my minde plainlye and freely touching my Inditment and your Statute withall. Forasmuch as, my Lorde, this Indictment is grounded vppon an acte of parliamente directly repugnant to the lawes of god and his holy churche, the supreme gouerment of which, or of any parte whereof, may no temporall prince presume by any lawe to take vppon him, as rightfully belonging to the See of Rome, a spirituall preheminence by the mouth of our Sauiour hymself, personally present vppon the earth, only to St Peter and his successors, Byshopps of the same See, by speciall prerogative graunted; It is therefore in lawe amongest Christen men insufficient to charge any Christen man. This Realme, being but one member and smale parte of the Church, might not make a particuler lawe disagreeable with the generall lawe of Christes vniuersall Catholike Churche. No more then the city of London, being but one poore member in respect of the whole realme, might make a lawe against an acte of parliament to bind the whole realme. It was contrary

64. See ACKROYD, supra note 6, at 396-97 (discussing the end of More's trial and his request to speak against the judgment). In the Second Succession Act, Henry VIII demanded an oath of "faith, truth and obedience, alonely to the King's Majesty . . . and not to any other within this realm, nor foreign Authority . . . and [to] observe [and] keep . . . the Act [of Succession] . . . and all other Acts" on the penalty of death. REYNOLDS, THE TRIAL OF ST THOMAS MORE, supra note 38, at 42-43.

65. ACKROYD, supra note 6, at 396-97. Ackroyd, in his note to "Call Forth Sir Tho-
both to the laws and statutes of our own land yet unrepealed, as . . . in Magna Charta, Quod Anglicana ecclesia libera sit et ha-beat jura sua integra, et libertates suas illaesas. And also contrary to the sacred oath which the King's Highness himself, and every other Christian Prince always with great solemnity received at their coronations . . . No more might this realme of England refuse obediens to the Sea of Roome then might a child refuse obediens to his owne naturall father. For as St Paul said of the Corinthians, 'I have regenerated you, my children in Christ,' so might St Gregory, Pope of Rome, of whom by St Augustine his messenger, we first received the Christian faith, of us Englishmen truly say, 'You are my children, because I have given you everlasting salvation, a far higher and better inheritance than any carnal father can leave to his children, and by regeneration made you my spiritual children in Christ. 

Duke of Norfolk: We nowe plainely see that ye are maliciously bent.

Thomas More: Nay, nay, very and pure necessitie, for the discharge of my conscience, enforceth me to speake so muche. Wherein I call and appeale to God, whose onely sight pearceth into the very depth of mans heart, to be my witnes. Howbeit, it is not for this supremacie so much that ye seeke my bloud, as for that I would not condiscende to the marriage.

Sir Thomas Audley: My Lord Fitzjames, how do you find the case?

Lord Fitzjames: My lords all, by St Julian, I must needs confes that if thacte of parliament be not vnlawfull, then is not the Indictment in my conscience insufficient.

66. REYNOLDS, THE TRIAL OF ST THOMAS MORE, supra note 38, at 121 (quoting italicized passages inserted from HARPSFIELD, LIFE AND DEATH, supra note 62) (footnote omitted).

67. ACKROYD, supra note 6, at 397.

68. REYNOLDS, THE TRIAL OF ST THOMAS MORE, supra note 38, at 121-22 (footnote omitted).

69. ACKROYD, supra note 6, at 397; see also REYNOLDS, supra note 38, at 130. Reynolds finds the passage in Harpsfield about the marriage unlikely. Id. at 130. Taking only Henry's personal slight about the marriage also goes against the current knowledge that Henry VIII was angry with More for writing against Parliament's powers to move away from a universal western church. See 10 COMPLETE WORKS, supra note 61, at xviii. ("What had Sir Thomas done to incur Henry's disapproval as a private citizen in Chelsea? In part, he had been writing books: at Eastertide 1533 his Apology was published by William Rastell, followed by The Debellation of Salem and Bizance about October of the same year.").
Sir Thomas Audley: Loe, my Lordes, loe, you heare what my lord chief Justice saith. You are judged to be guilty, Sir Thomas More.\textsuperscript{70}

As Ackroyd succinctly interprets More’s position in the next chapter, More “simply did not believe that the English parliament could repeal the ordinances of a thousand years.”\textsuperscript{71} Ackroyd observes that More’s argument about the insufficiency of a statute to bind any Christian when the act violates the law of God brought forth the court’s assertion that in fact English statutory law pre-empts canon law.\textsuperscript{72} In his very first statement to the judges quoted above, More argued that violation of parliamentary acts which the rest of western Christendom rejected could not be the foundation for an indictment.

In the speech, More presented several arguments that not only reflected his writings but summarized the changes that had occurred in England since the Parliament opening in 1529 (later called the Reformation Parliament). His purpose in refusing the oath was “to defend the church’s liberty from the King-in-Parliament.”\textsuperscript{73} More’s preemption ar-

\textsuperscript{70} ACKROYD, \textit{supra} note 6, at 397. Another passage from Harpsfield which occurs just before the Duke of Norfolk’s comment is important for the legal argument:

Then was it by the Lord Chancellor [Sir Thomas Audley, More’s successor] thereunto answered that seeing all the Bishops, Universities and best learned men of the Realm had to this Act [Henry’s supremacy over the church] agreed, it was much marvel that he alone against them all would so stiffly stick thereat, and so vehemently argue there against . . .

To this Sir Thomas More replied, saying that these seven years seriously and earnestly he had beset his studies and cogitations upon this point chiefly, among other, of the Pope’s authority. ‘Neither as yet,’ said he, ‘have I chanced upon any ancient writer or doctor that so advanceth, as your Statute doth, the supremacy of any secular and temporal Prince. If there were no more but myself upon my side, and the whole Parliament upon the other, I would be sore afraid to lean to mine own mind only against so many. But if the number of Bishops and Universities be so material as your Lordships seemeth to take it, then see I little cause, my Lord, why that thing in my conscience should make any change. For I nothing doubt but that, though not in this Realm, yet in Christendom about, of these well-learned Bishops and virtuous men that are yet alive, they be not the fewer part that are of my mind therein. But if I should speak of those that are already dead, of whom many be now Holy Saints in heaven, I am very sure it is the far greater part of them that, all the while they lived, thought in this case that way that I think now, and therefore am I not bounden, my Lord, to conform my conscience to the Council of one Realm against the General Council of Christendom . . .”


\textsuperscript{71} ACKROYD, \textit{supra} note 6, at 400.

\textsuperscript{72} See id. at 399.

\textsuperscript{73} GUY, \textit{TUDOR ENGLAND, supra} note 34, at 141. A tablet in the floor of St.
argument (made clear in his analogy regarding the inability of the city of London to make local legislation contrary to parliamentary legislation which binds “the whole realme”) goes to the heart of legislative change in England during the 1530s. Recent legislation to the contrary did not change More’s opinion of the validity of the traditional relationship between church and state in England. Although these new laws abolished specific older ones, in More’s mind Parliament never had the authority to make these new laws since other more general and fundamental laws, such as Magna Carta and the coronation oath, remained (though Magna Carta, clause 1 was silently overruled by the legislation). The legislation that Henry VIII’s chief minister Thomas Cromwell previously shepherded through Parliament arguably rendered More’s arguments in his post-trial speech historical. In his speech, More argued that the legislation could not have been legally passed because it was beyond Parliament’s competence to pass legislation severing England’s ecclesiastical connection to Rome. Thus, More continued to believe that the mere ultra vires passage of pre-empted legislation did not invalidate his arguments. In an earlier letter of March 5, 1534, to Cromwell, More stated that no member of Christendom could lawfully opt out of its common head. Therefore, as More understood on July 1, 1535, England was still a part of “Christes vniuersall Catholike Churche,” as the laws of England themselves reflected through the first clause of Magna Carta (granting the freedom of the church with its rights undiminished and its liberties unimpaired) and the ex officio coronation oath King Henry VIII took to uphold the freedom of the church, a coronation oath all other Christian rulers took at that time. Furthermore, in More’s view, historical usage from the time of the coming of St. Augustine to Canterbury in 597, nearly a millennium before More’s speech, demanded greater care

Nicholas Chapel in St. Dunstan’s, Canterbury over the Roper family’s vault (in which More’s head is alleged to have been interred) states that More was beheaded on Tower Hill. The phrase that appears on the tablet, “ECCLESIA ANGLICANA LIBERA SIT” (that the English church might be free) reflects this thought. Reynolds, The Trial of St Thomas More, supra note 38, at 165.

74. See, e.g., Guy, Tudor England, supra note 34, at 135 (including the following legislation: an Act for the Submission of the Clergy (memorializing in statutory form the submission of May 15-16, 1532); an Act of Appeals locating the final authority in ecclesiastical cases in chancery; Dispersiations Act providing that dispensations and licenses are obtainable in England; and the heresy statute requiring two witnesses and the king’s writ for burning).

75. See St. Thomas More: Selected Letters, supra note 29, at 213 (Letter #53 [#199]).

76. Ackroyd, supra note 6, at 397; see also Reynolds, The Trial of St Thomas More, supra note 38, at 121.
in discharging the national spiritual inheritance.\textsuperscript{77} As Diarmaid MacCulloch described what happened to the old dispensation and to More during the Reformation Parliament, "[w]inter had come to his world, and frail humans must face what could not be avoided. No humanist optimism had any value, nothing had value but the sufferings of the God who had also died on a scaffold."\textsuperscript{78}

More's position on the authority of Parliament is discussed in the works of John Guy, who provided a legal introduction, including an explanation of the complicated heresy proceedings, to the modern edition of the \textit{Debellation of Salem and Bizance} and the reappraisal of the role of the laity in the church during More's time.\textsuperscript{79} Guy's work explained that More did not believe Parliament had the authority to change the English church's status as part of the universal western church. The slow, painful changes in public attitude during the early 1530s about the competence of Parliament to carry out these changes in church-state relations have been traced in contemporary documents.\textsuperscript{80} The \textit{Collectanea satis copiosa} and the writings of Christopher St. German constituted two prongs of Henry VIII's divorce campaign once Henry knew Wolsey's approach had failed. The \textit{Collectanea} was designed to collect documents demonstrating the legality of the divorce.\textsuperscript{81} With the help of the collec-

\textsuperscript{77} See ACKROYD, supra note 6, at 399-400; REYNOLDS, THE TRIAL OF ST THOMAS MORE, supra note 38, at 121-22. In a modern case, Amish parents used a similar view to argue successfully before Chief Justice Burger that their historical custom and religious freedom required recognition under the First Amendment. See Wisconsin v. Yoder, 406 U.S. 206 (1972).

\textsuperscript{78} MacCulloch, supra note 6.

\textsuperscript{79} See J.A. Guy, The Legal Context of the Controversy: The Law of Heresy, in 10 COMPLETE WORKS, supra note 61, at xlvii; GUY, PUBLIC CAREER, supra note 5. For a further description of the role of the laity, see generally EAMON DUFFY, THE STRIPPING OF THE ALTARS: TRADITIONAL RELIGION IN ENGLAND C.1400-C.1580 9-87 (1992) (describing the committed involvement of the laity in making sure that the religious services meaningful to their lives were provided).

\textsuperscript{80} See FOX & GUY, supra note 5, at 163-64 (explaining that "[c]ertainly the issue of statutory competence aroused perceptible agony in the 1530s. Thomas More knew well enough the efforts made by the draftsmen of the Act of Supremacy (1534) to avoid stating that Parliament had made Henry VIII supreme head of the Church of England."). Convocation had already assented to recognize Henry as head of the church on May 15-16, 1532.

tion of authorities, both spurious and authentic, Henry VIII went forward on two fronts. He argued that the Bible prevented him from marrying his older brother’s widow and that the Pope’s dispensation allowing him to marry Princess Catherine was therefore invalid since the Pope exceeded his authority.82 The Collectanea also gave the royal scholars the opportunity to address the “true difference” between regal and ecclesiastical power.83 While sifting through old documents, the King’s scholars traced England’s right to ecclesiastical independence from Rome to the period before Pope Gregory sent St. Augustine to Canterbury.84

The second prong of the campaign was supporting legislation to ensure that the divorce was legally recognized in England. St. German’s role as a propagandist in Salem and Bizance and legislative draftsman was to set forth reasons for reforming ecclesiastical jurisdiction. In the Debellation, More answered St. German, a staunchly anticlerical but otherwise orthodox, common lawyer very protective of common law jurisdiction, who wished to extend the common law to ecclesiastical courts and bring them under the aegis of the common law.85 In his most famous treatise, Doctor and Student, St. German was content to argue that if Parliament passed a

82. See RICHARD REX, HENRY VIII AND THE ENGLISH REFORMATION 8-9 (1993) (describing the biblical arguments). Rex explains the basis for the church’s prohibitions of such marriages quoting Leviticus 18:16 which said, “[t]hou shalt not uncover the nakedness of thy brother’s wife: it is thy brother’s nakedness;” and Leviticus 20:21 which stated, “[i]f a man shall take his brother’s wife, it is an unclean thing: he hath uncovered his brother’s nakedness: and they shall be childless.” Id. at 8. One contemporary English scholar of Hebrew interpreted nakedness to mean consummation of the marriage. See id. at 10. Since the woman is called wife and not widow, these verses arguably enjoined a relationship while both brothers remained alive, since a contradictory verse from Deuteronomy (25:5) said that when the brother died without a child, the other brother should marry his widow. See id. at 9-10.

83. See FOX & GUY, supra note 5, at 156; see also GUY, PUBLIC CAREER, supra note 5, at 131-35.

84. See FOX & GUY, supra note 5, at 158, 161 (concerning all points of the collection, imperial power, spiritual supremacy and English independence from the primacy of Rome, Guy remarked: “No wonder that Bishop John Fisher and Thomas More found the work of the king’s scholars unpersuasive.”).

85. See GUY, TUDOR ENGLAND, supra note 34, at 123. Guy notes that St. German’s lists of clerical abuses were copied from continental treatises and did not reflect higher clerical standards prevailing in England. See id. Nevertheless, St. German was a powerful populariser of ideas that had been held by many prominent common lawyers for the past generation. Professor John H. Baker in the introduction to his edition of Spelman’s Reports for the Selden Society details the most prominent jurisdictional claims of the common lawyers against the clergy. 2 THE REPORTS OF SIR JOHN SPELMAN, (J.H. Baker ed., 1978), reprinted in 94 THE PUBLICATIONS OF THE SELDEN SOCIETY 64-70 (1978) which will henceforth be abbreviated “S.S.”.
law, it had the authority to do so. Later, St. German sounded more confident in describing the King-in-Parliament as the “hyghe soueraygne ouer the people.” In 1531, St. German proposed a public committee to eliminate Episcopal jurisdiction over heresy. As Guy points out, at least the mode of expression, if not political mentality, had changed since 1471, when Sir John Fortescue proposed not a parliamentary but a representative organization within the King’s Council to control patronage and finance. St. German’s anonymously published proposal to curb ecclesiastical jurisdiction fit into the King’s plans to center religious institutions in England and sever the connection to Rome, previously unbroken since the coming of St. Augustine to Canterbury. By 1531, Parliament had grown more powerful since Fortescue’s time, though it still struggled with the legislation to sever English ecclesiastical ties with Rome. Thus, Parliament was prorogued through the fall of 1531, ostensibly because the air in London was too unhealthy for members to return, but more importantly because the King’s Council itself could not agree on a parliamentary program. Believing that the entire crisis might still be resolved within the King’s Council, More continued in office until May 1532, at which time the clergy surrendered to the King.

Meanwhile, Cromwell engineered renewed anticlerical discussion in Parliament. Heresy again came to the fore because of four burnings between August 1531 and January 10, 1532. At the opening of Parliament on November 3, 1529, More announced the policy of eliminating heresy, and his continued defense of heresy proceedings turned public opinion

86. See Fox & Guy, supra note 5, at 168-69. The authors quote from Doctor and Student, 91 S.S. 317 (T.F.T. Plucknett & J.H. Barton eds., 1974) stating that anticlerical legislation passed in 1529 was made

by the assente of the kynge, and of all the lorde spirituall and temporall of the realme, and of all the commons: and I holde it nat best to reason or to make argumentes / whether they had auctoritie to do that they dydde or nat. For I suppose / that no man wolde thynke, that they wolde do any thynge, that they hadde nat power to do.

Id.

87. Fox & Guy, supra note 5, at 169 (quoting from St. German’s New Additions in 91 S.S. at 327).

88. See id. at 128; see also Sir John Fortescue, On the Laws and Governance of England 115-16 (Shelley Lockwood ed., 1997).

89. See Guy, Public Career, supra note 5, 151-56 (noting that St. German’s reform plan was later found among other items in Cromwell’s archives).

90. See id. at 164.

91. See Guy, Tudor England, supra note 34, at 130; Guy, Public Career, supra note 5, at 159.
against him, reinforcing parliamentary anticlericalism, while the strict enforcement of the heresy laws did little to contain the spread of heresy itself. Public opinion had thus changed dramatically and Parliament seized the initiative. In 1534, Parliament therefore legislated again against the “mooste foule and detestable cryme of heresye,” which the draftsmen knew Henry VIII and the peerage in the upper house utterly “abhorred, detested and [wished to see] eradycate[d],” liberalizing the procedures along the lines of St. German’s suggestions. St. German’s interest in reforming ecclesiastical jurisdiction overlapped to some extent with the King’s, but St. German wanted to place sovereignty over the church not in the king alone, but in the King-in-Parliament. In the past, England had not used legislation to accomplish governmental aims on such a large scale. Master Secretary Thomas Cromwell knew how to use St. German’s treatises and legislative drafts to maximum effect. In 1532, however, the “Supplication of the Commons against the Ordinaries” petition circulating through Parliament did not lead to legislation against the church but it did force surrender of the clergy in their convocations to the King on May 15-16, 1532.

St. German claimed that English common law was superior to ecclesiastical law because it gave greater rights to litigants. Thus, he campaigned to have statutory law replace ecclesiastical law. He justified the state’s reform of the church on the grounds that the common law provided advantage and should therefore be followed when any conflicts between ecclesiastical and common law jurisdiction occurred. St. German argued that the church courts had exceeded their authority and that the scope of ecclesiastical expertise was far smaller than its area of legal jurisdiction. To St. German, there was little about ecclesiastical competence that required special favor, procedures, or jurisdiction.

St German’s writings aided in changing the legal philosophy of the age, indeed “[n]owhere was the juridical aspect of the Henrician schism better defended than in those books of Christopher St. German which were

92. See GUY, PUBLIC CAREER, supra note 5, at 165.
93. See id. at 175.
94. See 10 COMPLETE WORKS, supra note 61, at lxxv (referring to 25 Hen. VIII, c. 14).
95. Unlike More, however, St. German did not incur Henry’s wrath.
96. See FOX, supra note 5, at 188-89.
97. See FOX & GUY, supra note 5, at 104-05 (noting that St. German helped to nudge “English common law inexorably towards the apex of the jurisprudential pyramid”).
98. See id. at 101, 104.
99. See id. at 103 (explaining St. German’s view that the church should not make laws concerning goods or property).
More's Debellation was written late in 1533, to oppose St. German's arguments. The ensuing literary battle has been described as "a cause célèbre, a public conflict waged by intellectual titans; it was akin to a major political confrontation in a national daily newspaper."°

To More, St. German "was a dangerous man because his general theory of English law and institutions denied the independent legislative and jurisdictional powers of the church." More disagreed that the common law gave rights superior to those granted by the church (except in heresy cases, but he noted that general church councils approved the heresy procedures), reminding his readers that each convocation of the clergy in Canterbury or York province was summoned to its meetings by royal writ and alleging that the grave danger heretics posed to the church required stronger procedures for accusation and evidence.° More explained that hearsay evidence permitted in heresy proceedings was also used at common law for felony and corruption of justice.°° He further justified heresy procedures on the ground that vigilant ecclesiastical courts prevented many instances of heresy trials from occurring. Finally, More suggested that St. German's proposed English conciliar model for oversight of ecclesiastical courts would not work in other Christian countries without indigenous councils. The Debellation ended with a "ritual plea for unity and adherence to the harmonious consensus of the realm, general councils, and the whole of Christendom."°

The authority (or lack of authority) of Parliament to pass legislation altering the status of the church in England was important in More's determination not to take the oath in the form presented to him but to

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100. 10 COMPLETE WORKS, supra note 61, at xxviii.
101. FOX & GUY, supra note 5, at 111. The Debellation was More's "most legal, technical, and intricate book." 10 COMPLETE WORKS, supra note 61, at xlvi. While More's death did not keep the church free of government inference, as Becket's had done, "[t]he clash of minds that produced More's Debellation of Salem and Bizance marked a major turning point in English legal history." Id. at lxvii.
102. 10 COMPLETE WORKS, supra note 61, at xxix.
103. See FOX & GUY, supra note 5, at 106.
104. See id. As Guy further points out, Roman-canon law had influenced the development of English law and particularly its procedures. What were Chancery and Star Chamber oaths and interrogatories if not ecclesiastical in origin? Litigants' oaths were modelled on those of calumny and speaking the truth; examinations had shared origins. And the English law of uses, contract, and defamation owed substantive content to the church.
105. FOX, supra note 5, at 198.
stand on his conscience as a member of the universal western church. More abhorred schism, perhaps more than anything else, as a danger to western Christendom. More had been so intimately connected to all governmental institutions that he had a considered position about the powers of each institution and the way in which the law held those institutions together. As Guy put it, the legal forms the issues took were not the marriage or the supremacy issues but rather, parliamentary competency:

[T]he human positive law of the realm could not by itself displace the general law of Christendom . . . In the last resort, the debate would thus not be about the royal divorce. Neither would it concern the powers of kings or popes, General Councils, Scripture or the decrees of the Roman Church. It would centre on the power of Parliaments and statutes as against Convocation and Rome: that is, English national sovereignty and Parliament's legislative authority under Henry's imperial crown.

Jasper Ridley reminds us that, on June 3, 1535, when examined by the King's commissioners, including Cromwell, Audley and Cranmer, More denied having said

that the king was not Head of the Church, but claimed that he had always refused to answer the question, and that silence could never constitute an act of high treason . . . More had been careful, in making this statement [that the Act was like a two-edged sword], to put it as a hypothetical case . . .

More should therefore have been acquitted but for the almost certainly

106. See id. at 177 (citing ST. THOMAS MORE: SELECTED LETTERS, supra note 29, at 212-14 (Letter #53 [#199])).


108. RIDLEY, supra note 5, at 279; see also ACKROYD, supra note 6, at 387. It is interesting to compare the attitudes of these two authors toward More. According to Ridley, More "rested his defence on a legal quibble" while the other martyrs for the old faith said the Pope, and not the King, was supreme. See RIDLEY, supra note 5, at 279.

Ridley also criticized More because he "was much more reluctant to be a martyr than a persecutor." Id. at 291. On the other hand, according to Ackroyd, More had kept silent because he "never wanted to be convicted of treason . . . [which was] the wrong cause." ACKROYD, supra note 6, at 387. Lawyers' arguments may easily be misunderstood as quibbles, and unsympathetic commentators may draw non-existent lines between essentially similar situations. Ackroyd, perhaps because of examples such as these, is willing to portray More as essentially enigmatic. Guy gave yet a third view of the martyrs, explaining that "[m]oral authority was on [More's] side; in Fisher's case less so, since he had urged Charles V to invade England." GUY, TUDOR ENGLAND, supra note 34, at 141.
perjured testimony of Sir Richard Rich at More’s trial. More “had not expressly denied the supremacy, though he had discussed it by example, or what lawyers called ‘putting of cases.’”

On June 12, 1535, Rich visited More in the Tower to ask him to swear to the oath, and if not, More’s books would be removed. At this time, Rich put three questions embodied in legal hypotheticals to More who replied in terms of hypothetical cases, as it was customary in the Inns of Court and as More had done previously on June 3. The three cases revolved around the powers of the Parliament. In Rich’s version of the conversation as he testified at More’s trial, the first situation dealt with the subject’s duty to obey an act requiring everyone to swear an oath to Richard Rich as King. More acknowledged that subjects would be bound to obey but put another case, that if Parliament enacted that God should no longer be God (a reverse expansion of Parliament’s declaration that God had ordained the royal supremacy over the church), would the statute take effect? According to his trial testimony, Rich, of course, conceded that the hypothetical statute could not become operative but then put the third case that if Parliament enacted that the king was Supreme Head, the same answer as in the first case follows.

According to Rich, More replied that the cases were not similar, because a king can be made by Parliament and deprived by Parliament, ‘to which every subject present in Parliament could give his consent’; but as to the supremacy over the Church, a subject cannot be bound, ‘because he cannot give his consent to that in Parliament; and although the king is so accepted in England, yet many foreign countries do not affirm the same.’

109. See Ackroyd, supra note 6, at 388-89 (quoting REYNOLDS, THE TRIAL OF ST THOMAS MORE, supra note 38, at 166-67). Guy further suggests that nevertheless More’s “conviction was only inevitable if the jury was rigged, but a single piece of evidence exists to suggest that it was. One juror was John Parnell, a London draper and informer who had unsuccessfully accused More of corruption after More, as lord chancellor, had decreed a chancery case against him.” GUY, TUDOR ENGLAND, supra note 34, at 141; see also GUY, PUBLIC CAREER, supra note 5, at 75-77 (detailing the suit of a contract gone wrong and the saga of the infamous litigant Parnell who lost the case and alleged that More had accepted “a great gilt Cup” as a bribe after rendering a partially favorable decision to the plaintiffs, despite the fact that More sent the cup back).

110. GUY, TUDOR ENGLAND, supra note 34, at 139.

111. See ACKROYD, supra note 6, at 388-89.

112. RIDLEY, supra note 5, at 280. Ridley also cites More’s replies to interrogatories from the council, June 3, 1535 in VIII LETTERS AND PAPERS, supra note 59, at 309 (#814) and More’s letter of June 3, 1535, to Margaret Roper, id. (#815), later published in THE CORRESPONDENCE OF SIR THOMAS MORE, supra note 29, at 555-59 [#216] for the argu-
The hypothetical cases dealt with the power of Parliament to bind, thus illuminating Chief Justice Fitzjames’s remark that More’s indictment is valid if “that acts of parliament be not unlawful.” This trial reminds us that the theory of parliamentary competence was not always so capacious as it is today, and More “suffered execution not for denying the supremacy outright, but for refusing to be convinced that Parliament could require assent to it when the rest of Catholic Europe said otherwise.” Apparently More’s answer on June 12th (that in effect, only a general council of the western church rather than the parliament of one member country could consider the question of headship) did not appear to Rich at the time to be “an outright denial” of Henry’s supreme headship. In Rich’s debriefing afterward, he stated that his parting words to More included the following warning: “Well Sir God comfort you for I see your mynd will not change / which I feare will be very daungerous to you for I suppose your concelement to the / question that hath been askyd of you ys as high offence as other that hath denyd.” More’s silence was used as evidence against him; swearing an affirmative oath was required to avoid treason charges. Rich indicated that More did not directly express his opinion about Henry VIII’s royal supremacy and that More’s continued concealment of his opinion was as dangerous as denying the royal supremacy. At More’s trial, Rich nevertheless converted More’s statement that “although the Kyng were acceptyd / in Ingland yet moste Utter partes doo not affirme the same” into a denial of the royal supremacy. On June 14, More was again questioned by the council and maintained his silence, thus casting further doubt on Rich’s testimony at the trial.

VI. CONCLUSION: “A PORTRAIT AS DECISIVE AS HOLBEIN’S”

Ackroyd describes Holbein’s drawing of the More family at Chelsea, “preparing for their devotions in a room on the first floor of the house . . . placed by Holbein in subtly fluent arrangement, as if to emphasize the harmony of their spiritual and scholarly discourse.” More chose to

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113. ACKROYD, supra note 6, at 397.
114. GUY, TUDOR ENGLAND, supra note 34, at 139.
115. See REYNOLDS, THE FIELD IS WON, supra note 28, at 344; see also ACKROYD, supra note 6, at 389.
116. REYNOLDS, THE FIELD IS WON, supra note 28, at 386 (emphasis supplied).
117. See id.
118. See id. at 344.
119. ACKROYD, supra note 6, dust jacket.
120. Id. at 251.
sit in the center of his large family where he was most comfortable and where he longed to be when he was away on business. Yet the oath the King exacted tore him away from home and family and prevented him from speaking to them about the allegiances the royal oath demanded. His conscientious decision not to take the oath insured that he never returned and that his family was dispersed when his property was forfeited to the crown for treason.

For a man who imposed on himself an obligation of silence about the King's marriage—he had taken an oath of loyalty to the King on becoming Lord Chancellor of England in October 1529—Thomas More left clues everywhere to his important thoughts about the unity of Christendom and the compulsion to follow divine command in a matter of conscience, no matter what the earthly cost, even forfeiture of position, property, familial society and ultimately life itself. To Henry VIII, More's position was no secret, despite his silence about the marriage. To many in succeeding generations, More was an enigma, perhaps because of his uncompromising attitude to heretics, which provides a stumbling block to those like Jasper Ridley who see More's harshness to heretics as anathema to the tolerance we rightly prize today. More's desire to preserve his own life by using every legal argument and principle available to him seems like a cowardly or hypocritical act in one ready to condemn the heretic, and More is necessarily branded as a fanatic who seized on "legal quibbles" for self-protection. From that point of view, it matters little to distinguish the old ecclesiastical orthodoxy from the new political orthodoxy of the state when both demanded uncompromising loyalty on penalty of burning (for heresy) or execution (for treason against the state). More's resistance to the temptation to take the oath falsely and save his own life brings a little amelioration of that hard judgment: More's war on heresy is "much more of a problem than sex for modern readers who look for a saint." Perhaps the example of an earlier Lon-

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121. See, e.g., ST. THOMAS MORE: SELECTED LETTERS, supra note 29, at 91-93. Letter #17 [#437] states, "there is nothing which refreshes me so much in the midst of this bothersome business as reading what comes from you." Letters #22 [#69], 23 [#70], at 109-110 indicate More's loneliness for his family while he was away on business.

122. See RIDLEY, supra note 5, at 283 (describing the fate of More's family after his execution); see also ACKROYD, supra note 6, at 387-90 (describing More's time in the Tower).

123. See RIDLEY, supra note 5, at 292. More "claimed that the international Church was entitled to force an individual to violate his conscience, and denied the right only to a national government and Parliament when it was seeking to intimidate individuals whose views were upheld by the majority opinion in Christendom." Id

don saint, Thomas à Becket, who went into exile for six years before facing death at the hands of King Henry II's knights, is more appropriate, since Becket, whom More revered, died to establish the liberty of the church from the overwhelming desire of the king to control all.\(^{125}\) The political theory of the temporal and spiritual realms remained viable in England from the martyrdom of Becket to the martyrdom of More.

Ackroyd weaves together a picture of church-state relations during that important period when the King took the decisive step of removing England from the communion of the other members of the western Christian church. The legal changes necessary to implement that change are presented through the views of, and consequences to, one great lawyer and judge who did not agree with the decision. In the 1530s, political conformity was necessary to keep one's life. Different views were deemed either heresy or treason, and persistence in such views ultimately required the forfeiture of one's life. Even in today's ecumenical age when we can still see some American Lutherans afraid to get too close to American Episcopalian because of Lutheran fear of a historical episcopacy claiming apostolic tradition,\(^{126}\) we can appreciate some aspects of what More died for: the belief that there had to be a central guardian of the Christian faith—a guardian at that time thought to be divinely instituted—to keep the faith pure and entire and to keep us connected to one another in Christ. Ackroyd's *The Life of Thomas More* tells a compelling, if not so enigmatic, story of a complex man acting consistently through one of the most turbulent periods in English history. Yet once More stood condemned to death for having violated the new-minted orthodoxy of Henrician caesaropapism, More gave up the bitter tone of the authoritarian warrior against heresy. More's last words before the Lord Chancellor Sir Thomas Audley and the other judges enjoined us to abide by the example of the *Acts of the Apostles*. The Book of *Acts* records that before following Jesus, St. Paul the Apostle consented to the stoning of the first Christian martyr, St. Stephen:

> [A]nd yeat be they nowe both twayne holy Sainctes in heaven, and shall continue there frendes for euer, So I verily truste, and shall therefore hartelye pray, that though your Lordshippes haue nowe here in the earthe bine Judges to my condemnacion, we may yeat hearafter in heaven meerily all


meete together, to our everlasting salvation and thus I desire Almighty God to preserve and defend the king's Majesty, and to send him good counsel. 127

It is no wonder that in 1978, at the 500th anniversary of More's birth, he compared favorably with recent giants such as Winston Churchill as well as earlier historical figures such as William Shakespeare, Queen Elizabeth I and King Alfred as the most admired Englishman. 128 With the "me generation" an all too recent memory, lawyers would do well to reflect on More's life and works.

127. ACKROYD, supra note 6, at 398.
128. See RIDLEY, supra note 5, at xi (citing the TIMES OF LONDON for February 7, 1978: "If the English people were to be set a test to justify their history and civilization by the example of one man, then it is Sir Thomas More whom they would perhaps choose."). As Andrew Sullivan pointed out in Public Man, Public Faith, the lead review for N. Y. TIMES BOOK REVIEW 9, 10 (Oct. 25, 1998), Ackroyd's LIFE "became the best-selling book in England for a while."