

RATIONING JUSTICE—WHAT THOMAS MORE WOULD SAY

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I'm going to talk today about history, on the theory that those who do not understand it are condemned to repeat it. This is not a novel idea. I say every year that those who do not understand civil procedure are condemned to repeat it.

In celebration of Monroe Freedman, I'm glad that this conference is called "Access to Justice." You know, Monroe's favorite phrase about lawyers is "The duty of the advocate is to represent the client with warm zeal." When I look around at what's happening to public defenders and legal services, I wonder what's happened to the warm zeal. I think the warm zeals are being clubbed to death. They're out on the ice to make coats for rich people, and that's why we have to save the zeals. That's my pitch today.

I'm not going to pretend that what I say is objective. William James said that a great many people think they are thinking when they are merely rearranging their prejudices. For the next few minutes, I am going to rearrange my prejudices, and talk about the legal system. I have received support for my view from what some might regard as unexpected quarters. After Walter Smith was appointed as a Republican United States District Judge in Waco, at his very first judicial conference he came upon the Chief Judge, Lucius Bunton, whom many of you know at least by reputation. Judge Bunton was sitting at breakfast in the Hyatt Hotel in Austin, and he called out, "Walter! Come over here! What the hell is the matter with you? I understand that you just took five days to try a half a day case!" And Judge Smith replied calmly, "Well, Lucius, if it's the one I'm thinking of, the Fifth Circuit sent it back after you tried it the first time. I think the other four and a half days is what they call due process."

To begin with, I want to ask, where did we start? Is there some golden age when everybody had access to justice, when everybody could

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come to court and be heard? I think not. I am not here to romanticize the past, much less to point to some mythical time long ago when things were right. I do think that one can usefully look at history to identify some of the contradictions that run through the system. And I include, in Paul Sweezy's phrase, "the present as history."

To begin with, there's a terminological problem. That is, when we say "access to justice," as this morning's proceedings have already shown, we'll get some dispute about what that means. Jane and I have been representing, *pro bono*, a young man in Austin, Texas, who is charged with the capital murder of a police officer. His name is David Lee Powell. The offense took place twenty years ago. The United States Supreme Court reversed the conviction the first time, for a serious constitutional violation. The Texas Court of Criminal Appeals said in effect, "Well, that was just an advisory opinion. It really was harmless error." The United States Supreme Court said, "No, no, you don't understand. We are the United States Supreme Court and you are the Texas Court of Criminal Appeals. You are not free to reinterpret our mandate." With that, the Court of Criminal Appeals got the idea, and they sent the case back for retrial.

At this young man's second trial the courtroom was filled during defense counsel's death penalty summation, with uniformed, armed police officers, who occupied all the seats in the courtroom and then came into the well of the court and sat between defense counsel and the jury with purple tape over their badges, in memory of their slain comrade. The Court of Criminal Appeals of Texas regarded that as an undue influence on the sentencing jury. And yet, now that David faces the prospect of a third trial, this time on penalty only, a police department spokesman held a press conference the other day, saying that he is tired of all of this delay and just wants justice. His idea of access to justice for David Powell, therefore, is that someone will take him, strap him to a gurney, take him into a room and pump poison into his veins until he's dead.

I think, or at least I hope, that our idea as lawyers of access to justice is different. Although this is not the main subject of my remarks today, my experience in the Nichols case has borne upon me the realization that our system of justice is being turned upside down. Something has made the people impatient with the idea of providing full and fair trials for those accused of heinous crimes. When, in such a trial, the defendant is not convicted of everything the state has alleged, there is an outcry that justice has not been served.

One aspect of this problem is illustrated in *Payne v. Tennessee*. I say this because I have seen the victim impact evidence. The notion of victim impact evidence, now that the flood gates have been opened by *Payne*, has contributed to a retributivist, vengeful theory of criminal justice. This theory is at war with the rights-based model of the constitution, which was put there because people recognized that state exercise of power in impermissible ways was more dangerous to human liberty than the criminal act of any defendant could ever be.

The thesis of *Payne*, of course, supports the retributivist idea, but in practice its malign effects are readily seen. Once the jury hears such evidence, they are hard put to ignore the call. We saw it in the *Nichols* case: 54 witnesses in a row, each describing the same scene with the same horror, and with a similar overt anger and cry for vengeance. It is a miracle to us that this spectacle did not get in the way, that the jurors indeed went through the special issues that were submitted to them and decided that Mr. Nichols had no culpable intent with respect to resulting death. But the intent of all of it was, as presented, to drive out the counsel of reason from the deliberation on just desserts.

I will also not comment in detail about the remarks yesterday, except to say that what I will today defend the adversary system. Anybody who thinks that the adversary system is inferior to what the French are doing needs to read the newspaper. They should go to Toulon, and learn of a little rock group called Nique Ta Mère [NTM]—which I will not translate for this gathering. Loosely and literally, it means what Oedipus was about. NTM sang some songs in Toulon that were regarded as obscene. I know a jury would have acquitted in a heartbeat. I mean it's just rap music; yes, it's offensive; yes, it's a little vulgar, but a judge in Toulon, a politically-influenced judge, railroaded these people to the point where the French Ministry of Justice had to interfere.

And that's not to mention the scandal that has accompanied attempts to protect leading political figures in the sixteenth *arrondissement*. My experience of the French system is that we may be able to learn something from it, but believe me, the independence of French judges is almost nonexistent in many cases. The independence of defense counsel is much less than in this country; and the chummy relationship that you observe between the *procureur* and the *tribunal*, when looking at a correctional or penal case, should give you pause.

So much for introduction and some comments on other themes at this conference. For the main part of my remarks on access to justice, I invoke the name of Sir Thomas—or St. Thomas—More. I do that because we all have understood, from the writings of Frank Michelman

and others, that we need to bring to bear nonmonetary values on our evaluation of the system of justice. That is, we cannot do a market analysis of the justice system and expect to see that everybody gets what we would regard as their due. I want to talk in some historical perspective about how a nonmonetary or proprofessional view of the system of justice might inform our deliberations about this question of access. I do this knowing that the crisis of our day, in terms of access, is the reduction of funding of legal services organizations. It is what has happened to death penalty resource centers; that is to say, their abolition. For millions of Americans with all sorts of disputes, and for those facing serious consequences in criminal cases, access to justice is denied.

The one shining exception, of course, is that under Title 21 of the United States Code, a federal death penalty defendant has access to resources. Our experience—Jane’s and Ron Woods’ and mine and the other lawyers, law clerks, law students and investigators who worked on the *Nichols* case—is that only with the resources that were made available, and believe me they were a minuscule fraction of what the prosecutors and FBI had, we were able to go into court and cross-examine more than 100 witnesses, to present more than 80 witnesses of our own and to do a job of representation that resulted in 18 not-guilty verdicts and findings that Mr. Nichols possessed no higher or greater intent with respect to resulting death, than the gross negligence implicated in involuntary manslaughter.

You could agree or disagree with that verdict. As Justice Kennedy said last night, “two juries might look at the facts differently.” The point is that when we contrast what we were able to do with those resources, with the \$5,000 or \$10,000 that you get to try a capital case in a state court in many parts of the United States, the notion of “access to justice” is laughable.

Without talking about where it went wrong, or exactly how to put it right, let us see what we can learn from Thomas More’s life and work. Everyone knows from having watched the movie or read the play, *A Man for all Seasons*, Thomas More was Lord Chancellor of England, appointed by Henry VIII. He was the first layman to be Lord Chancellor. That is to say, up to that time all of the chancellors had been clerics and that clerical influence was responsible for introducing into English law many of the ideas of continental law and canon law that give us what is now equity. It is also that clerical influence that led to the creation of the prerogative courts or King-established courts, which the English Revolution swept away.

More was appointed because he was a remarkable success as a lawyer, a person learned in the law. His father was a judge of the King's Bench, one of two common law courts. More had been Speaker of the House of Commons. He had been a lawyer in private practice, actually the highest paid lawyer of his time. He had represented merchant interests in diplomatic missions to Flanders. He had also made his name as a scholar, beginning shortly after he got out of Oxford with a series of lectures on St. Augustine's *City of God*.

Let me begin near the end of More's life. More was forced to give up the Chancellorship, because he was about to be prosecuted for refusing to take the test oath acknowledging King Henry's supremacy as defender of the faith, Henry having sundered his relationship with the Pope. We know, from his son-in-law Roper's biography, that More walked in his garden at Chelsea with the man who was to succeed him, Thomas Cromwell. He said something to Cromwell, that to me echoes down to today as we look at the lawyer's obligation:

Master Cromwell, you are now entered into the service of a most noble, wise and liberal prince; if you will follow my poor advice, in your counsel-giving unto his Grace, ever tell him what he ought to do, but never what he is able to do. . . . For if a lion knew his own strength, hard were it for any man to rule him.

Cromwell did not follow that advice. He slavishly sought Henry's favor, which turned out to be a fool's quest. Cromwell himself perished on the scaffold just a few years later because apparently he had not read Machiavelli, who wrote "That man who leaves what is done, for what ought to be done, learns sooner his ruin than his preservation." Cromwell's speech on the scaffold had that air of, "my goodness, what went wrong." He simply said, "I am by the law condemned to die. I have offended my prince." He was, at least, a master of understatement.

What led More to give that advice, in that Chelsea garden in 1535? It was a year later that Henry began the seizure of monastic lands. Originally a move justified by the church's extravagant spending, over the next dozen years, the seizure of those lands proceeded apace to where the churches had been practically dispossessed. The lands were funneled into the hands of Henry's political supporters, most of them bankers in the city of London, including Sir Richard Gresham, who is famous for other things.

More saw that coming, and I think that beyond the dispute about whether or not King Henry could divorce his wife and whether the Pope would consent to it, and more than the dispute over whether Henry could legitimately wear the title Defender of the Faith, the collision between

what Henry was about to do and what More's conscience would permit him to say grace over, was becoming obvious. After all, the idea of seizing monastic lands had already been bruited about.

There was a writer named Simon Fish who wrote a treatise stating that he thought that it would be a good idea to turn the lands over to public uses. That was in a pamphlet in 1529, entitled *A Supplication for the Beggars*. More answered him:

But now to the poor beggars: what remedy findeth their proctor for them? To make hospitals? Nay, ware of that! Thereof he will none in no wise. For thereof, he saith, the more the worse, because they be profitable to priests. What remedy then? Give them any money? Nay, nay, not a groat. What other thing then? . . . [L]et him give nothing to them, but look what the clergy hath, and take all that from them. Is not here a goodly mischief for a remedy? Is not this a royal feast, to leave these beggars meatless, and then send more to dinner to them?

"A royal feast"—you can imagine how Henry got upset when he read that.

Well, you may be asking, what does the seizure of monastic lands have to do with this question of access to justice? To answer such a concern, let us look at what was happening in English society at this time. The monastic lands being seized were ones on which peasants felt free to pasture their beasts and to till. That is to say, they were held in common. Although the church had suzerainty over them, there was no concept of individual properties, such as you and I owning a house. The property norm was much more diffuse than it is today. Therefore, church lands, although surely they contributed to the financial well-being of the church and surely there was excess, were a social mechanism by which the commonwealth and common interest was preserved against the strident forces of individualism. Had they gotten loose, they would be unrestrained by any other force existing in the society, so that the seizure of those lands, simply let free upon this peasantry, all of the forces of the moneyed and propertied classes, without them having any opportunity to do anything about it. Tawney quotes a banker, who had come out from London to view his new property and to see that no assertion of customary right stood in his way:

Do ye not know that the King's Grace has put down all the houses of monks, friars, and nuns? Therefore, now is the time come that we gentlemen will pull down the houses of such poor knaves as ye be.

Now whether that's some pamphleteer's version of a speech that happened or whether it actually was said, it certainly reflected what was going on. And so the peasantry, upset about the fact that old institutions

were being torn apart, began to do something about it. They couldn't get relief by going to the manorial court or going to the priest or to any of the other institutions that had traditionally exercised jurisdiction over disputes involving customary rights because one of the results of Henry's actions was to displace these powers in favor of royal courts. This had been done not only by the seizure of the monasteries, but by the Statute of Uses and the Statute of Wills, which everybody studied in property and almost nobody understands, but which I'm here to tell you were enacted to enforce the property norm. To get into the royal courts, of course, one needed access to legal counsel, which the peasantry did not have. More saw this social crisis coming.

Faced with these challenges, what did the peasantry do? It should not surprise you that some of them decided to take matters into their own hands. In the mid-1500s there was a broadsheet ballad, requiring the tearing down of the enclosures that had been built by the recipients of these lands.

Syr I thinke that this wyrke
 Is as good as to byld a kyrke
 For Cambridge bayles truly
 Give yll example to the cowntrye
 Ther comones lykewises for to engrose
 And from poor men it to enclose . . .
 Therefore it is goud consciens I wene
 To make that common that ever hathe bene

And so, all over England began this process of tearing down hedges and fences. The struggle endured for the next 150 years. To finally put an end to it, during the Whig ascendancy beginning in 1721, Parliament passed the infamous Black Acts, making of some 120 offenses capital, all as chronicled by E.P. Thompson. This was the course on which Henry embarked.

So Thomas More's vision could not be clearer. Indeed, if we go back and read his *Utopia*, we find a remarkable document. Here is a man who was the highest paid lawyer of his time sitting in his study with Erasmus and speaking of nation-states as childish scrawlings by princes on maps. And in *Utopia* writing about "noblemen who live like drones on the labor of other people, in other words, of their tenants." And in a caustic passage:

Sheep . . . those placid creatures, which used to require so little food, have now apparently developed a raging appetite, and turned into man-eaters. Fields, houses, towns, everything goes down their throats. . . . Nobles and gentlemen, not to mention several saintly

abbots, [are] no longer content to lead lazy, comfortable lives, which do no good to society—they must actively do it harm, by enclosing all the land they can for pasture, and leaving none for cultivation. Each greedy individual preys on his native land like a malignant growth, absorbing field after field, and enclosing thousands of acres with a single fence. Result—hundreds of farmers are evicted. . . . By the time they've been wandering around for a bit, . . . then what can they do but steal—and be very properly hanged for it?

The commercialization of agriculture, as a result of restructuring the property norm, was yet another thing that More observed was tearing apart the society in which he lived. In the words of one social critic who had initially supported the seizure of the monasteries, these developments were “turning a commonwealth into a common misery.”

I think the celebration of More's vision becomes appropriate for us because we really are—or could be—the last holdouts. You and I, the lawyers and the judges, see in our profession today, a thoroughgoing attempt to replace the idea of lawyers as servants of some vision of a commonwealth by the notion of lawyers as plumbers, the servants of the billable hour. In this new vision, the lawyer's time is merely property that he or she owns absolutely, for sale to those and only to those with the money to pay for it.

There are many consequences of this vision of lawyers and you'll hear some of them at this conference. One of them is that to call upon a lawyer to do a *pro bono* service and perhaps of a judge to require it, is to take from that lawyer some property, as though you had seized her house or taken her car, rather than calling upon her or him to fulfill a duty that is as old as the profession itself. The same sort of argument is used to say that such things as IOLTA programs to benefit *pro bono* activity somehow interfere with constitutionally-based property rights. This is, I suggest, an inappropriate matrix within which to describe these problems. After all, the notion of lawyers as engaged in the common enterprise of preserving some notion of a commonwealth, far antedates any of the constitutional provisions upon which people who make those arguments would rely.

Now, of course, More couldn't see all that was going to happen. Some of the basis for his distress at the dispossession of the peasantry was undone. Some of these men of London contributed vitally to the success of the English Revolution. And they had to acknowledge that perhaps Lord Coke had outsmarted them. In *Littleton on Tenures* and in his *Institutes*, Coke looked back to the 14th century. You remember the 14th century, at least as it is discussed in the writings of Shakespeare.

Remember the play where somebody said, "The first thing we do, let's kill all the lawyers." Well, what is meant in that exchange is taking the manorial lord's steward and hanging him in the yard as a way of preserving rights of tillage and land use. Lord Coke attempted to restore to the peasantry what had been called copyhold tenancy, by insisting on its historical legitimacy. So the English Revolution, though sponsored by the men of London, made some progressive changes, and it abolished most of the prerogative courts that Henry VIII and his predecessors had set up.

Lord Coke also gave us, by the way, a fictitious look back at Magna Carta, as though to pretend that Magna Carta could be a charter of liberty. He frankly acknowledged that this was a revisionist history, for as he said, "from the old fields, must come the new corne." What he meant by this was that he was going to use the language, and the royalty-limiting idea of Magna Carta, to erect some new structure and definition of liberty and how it might be protected.

More was wrong, of course, in believing that reason, discourse, or faith could greatly change the course of events set in motion by the Tudor sovereigns. But his clear vision of the forces at work has made his life and work a subject of study by writers as diverse as G. K. Chesterton and Karl Kautsky. The latter wrote: "The aims More set before himself are not the fancies of an idle hour, but the result of a deep insight into the actual economic tendencies of his age."

For the greater part, More was right to be concerned that the victory of capital over its adversaries would wreak great and untoward changes. Today, if we want to look back at the vision that Thomas More had, of what we are about, there is, I suppose, ample room to despair. But I don't.

In part, I don't despair because I was in South Africa while Nelson Mandela was imprisoned on Robben Island. I remember one night standing on a hill in Capetown. This was in June, about six months before Mandela was going to get out, but none of us knew that. We were teaching lawyers, Black lawyers who had come to learn trial advocacy. I spoke with Dullah Omar, who's now the Minister of Justice of South Africa, but at that time was the head of the Community Law Center of the University of the Western Cape.

I said, "Why do these lawyers want to learn all this for?"

He replied, "Well, I'll tell you. This summer massive nonviolent demonstrations will bring many social activities in South Africa to a halt. There will be arrests, and we're going to go into court. We need to teach these young lawyers how to cross-examine police officers. Because as a result of these nonviolent demonstrations, we will show the white gov-

ernment that they can't operate this country in violation of the will of the majority."

Well, they did it. They succeeded, and we all know what happened. As L.B. Sachs, who had been a banned person, but is now a member of the Constitutional Court of South Africa said, "All revolutions are impossible, until they happen, and then they become inevitable."

By this token, all great social changes are impossible until they happen, and then they become inevitable. They become inevitable because we look back at those, however few, in any given moment, who kept alive some vision of what ought to be happening. And so I remember after Mandela got out, going out to Fort Hare, in Ciskei, where Mandela and Oliver Tambo had attended law school. As you can observe, I am a tall white guy; I wear boots; I was the only white person in a room of some 900 law students and students from around the campus, and I spoke with the students about the vision of judicial review and a bill of rights. They stood, applauded and sang together, a song that had been a felony to sing only a year before. The title translates as "Come Back Africa." Of course, even then the turmoil was not over for a week later the white government which was still in power sent its soldiers out and gunned down 27 of those students. The point is that they had seized this vision and were moving forward.

For me and for now, I want to say that my faith in the adversary system is fueled by this sense of history. If there is a theme for me right now, for a conference entitled "Access to Justice," it is that the crimes of the state are always more dangerous than the most heinous crimes against the state. The suppression of evidence of innocence as in *Demjanjuk*, the refusal to produce exculpatory material as in the *Nichols* case and the marching of the police officers in order to distort the judgment of a jury in a death penalty case are more dangerous than anything of which an accused in those cases could be accused. This is a statement, knowing as you know, what those folks were accused of, that I would not make lightly. I say it because the state is the most in danger of being a recidivist. Because it is the omnipresent teacher of which Brandeis spoke, telling us, as it commits its crimes again, that this is all being done for our own good.

I defy anyone who challenges the wisdom of the adversary system to tell me what other way we could possibly reform this state in order to prevent it from committing these crimes. If jurors are, as Justice Kennedy said, "citizens who participate in the most direct way we know," a statement he made not only last night, but so eloquently for the Court, we

should also know that lawyers have a special right and a special place. Nobody needs to elect us for us to do our jobs. We simply, by virtue of having acquired this profession, have the opportunity to go to a place where justice is claimed. Now, of course, it requires, and we cannot forget, that for us to be there, someone must have taken a risk, suffered an indignity, or faced sometimes mortal danger. In civil society, there is no profession who has the same duty that we do. Oh yes, there are professionals whose obligation it is to save lives and to help. But there are none who combine that duty with the opportunity to participate in the way that Thomas More did in the operation of the commonwealth and in a way that benefits individual citizens. This is remarkable.

In the wake of the Holocaust, a German friend wrote Albert Camus, and said "What is it that we are to do?" and Camus wrote back,

Qu'est-ce sauver l'homme? Mais je vous le crie de tout moi-même, c'est de ne pas le mutiler et c'est donner ses chances à la justice, qu'il est le seul à concevoir.

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What is it that will save mankind? I cry to you with all my being, that we must not mutilate his image and we must give him his chances for justice, which he is the only species to have conceived.

