

Statutory Making and Interpretation

The Lessons of 1533-5 for the Present Age

*An Acte for the Establishment of the Kynges Succession, etcetera
(and dyvyrs butt relatted statutes)*

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I. Introduction

The interpretation of statutes is often a labor consisting more of art than science, but the project of seeking the best, i.e., the most authentic and accurate meaning of statutory law, still merits scientific and careful investigation.¹ But in the process, it is most relevant to keep in mind that the words of a statute are selected to address the needs of society; therefore, statutory construction ought to keep this objective in view if statutes are to fulfill their function in the service of the common good.² In essence, the making and interpretation of statutes are elements of the same enterprise.

Of course statutes enacted by totalitarian regimes are not necessarily directed to serving the common good but are more likely directed to furthering the interests of dictators and despots, e.g., the Nuremberg Statutes.³ However, in realms that are not totalitarian, there should be

¹ See, generally, my article *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L. J. 225 (1998).

² By the common good, I mean that there is a just objective for society that can only be determined by assessing what is beneficial to the individual in the context of what is also beneficial to those with whom this person deals in their respective existences. In short, the common good cannot exist without taking stock of what is proper, what is beneficial for all the members of each community starting with the smallest and extending into the universal, global community.

³ This legislation was enacted by the National Socialists in Germany during the 1930s to promote the anti-Semitic policies of the regime. See, Amy Newman, *THE NUREMBERG LAWS: INSTITUTIONALIZED ANTI-SEMITISM*, (Lucent Books: San Diego, 1998).

reasonable expectations that the common good is served. I am hopeful that the members of the United States Supreme Court approached the Patient Protection and Affordable Care Act with the common good in mind as they executed their difficult task this past year.⁴

In addition to serving the common good, there is another aspect of the statutory process that needs to be kept in mind at the outset of the enterprise of explaining the meaning of these normative texts. The interpretation of statutes is and will remain a major part of the responsibility of those who uphold the rule of law.⁵ While reasonable people may differ in their conclusions about the meaning of a statute as it is applied in a particular context, there is nevertheless some general acceptance of the proposal that the meaning of the underlying, principal objectives of legislation can be agreed upon by demonstrably reasonable people most of the time.⁶ I hold that the view that this has been true of statute making and interpretation in Anglo-American legal institutions since their respective inceptions on many, but not all, occasions.⁷

⁴ *National Federation of Independent Business v. Sebelius*, 567 U.S. __ (2012) [2012 WL 2427810], upholding the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119.

⁵ As there are many conflicting definitions of the important concept, I offer my own. By the “rule of law” I mean the necessary reliance on juridical principles codified in some manner—by legislative act or by judicial opinion—which guide people and their institution when their formal relationships raise questions about rights/claims and corresponding duties/responsibilities. The moral action and the social conduct of individuals, groups, and organizations have a definite bearing on these formal relationships. The rule of law also has a bearing on understanding the freedom of persons vis-à-vis law as a constraint and law as a directive that guides. In essence, the rule of law is concerned with human reason developing normative principles that will have general application typically *in futuro*. The method underlying the human reasoning is based on objective human intelligence comprehending intelligible reality and formulating norms that will achieve the goals beneficial to the common good, the bonding agent that holds societies together.

⁶ Here I assume that each interpreter is a rational and reasonable person possessing a sufficient level of intelligence to interpret legal texts. Most interpreters are reasonable people who can agree on the general meaning of the important elements of a statute; however, they cannot always agree on particular meanings as the statutes are applied in particular cases.

⁷ Of course there are notable exceptions such as the upholding of the of the executive orders calling for the internment of Japanese-Americans during the Second World War, *see, Korematsu v. United States*, 323 U.S. 214 (1944), and the validation of the Commonwealth of Virginia’s mandatory sterilization law, *see, Buck v. Bell*, 274 U.S. 200 (1927).

Even though the term “statutorification” describes a legal event of relatively modern times in which legislation has become the predominant form of law,⁸ it is evident that Anglo-American law is no stranger to the making of statutes for the presumed common good, and this phenomenon is at the core of the society served by its legislature and the laws which this body enacts. Although the common law prevailed on both sides of the Atlantic well into the twentieth century until legislatures finally claimed their predominant role in the making of law, statutes are by no means a creature of the contemporary age. Since the thirteenth century,⁹ the English Parliament has been busy legislating for King, Queen, and country. Sometimes the legislation has addressed matters of mundane concern, for example standards for wool clothing merchants or coroners.¹⁰ However, legislation could also involve the gravest of matters such as statutes dealing with the commission of crimes such as acts of perjury.¹¹

In the United States, the colonial legislatures of the east coast provide other examples of early statute-making. These colonial laws also addressed the mundane and the exotic.¹² Returning to England, the heavy hand of the law was relied upon to protect the common good by criminalizing the destruction of dikes which were erected to protect lands and people from

⁸ See, e.g., Guido Calabresi, *A COMMON LAW FOR THE AGE OF STATUTES*, (Cambridge: Harvard University Press, 1982), at 1, 79. See also, Grant Gilmore, *THE AGES OF AMERICAN LAW*, (Yale University Press: New Haven, 1979), at 95, where Professor Gilmore uses a different term for the same phenomenon, viz., the “orgy of statute making.”

⁹ See, J. R. Maddicott, *THE ORIGINS OF THE ENGLISH PARLIAMENT, 924-1327*, (Oxford University Press: Oxford, 2012). As Maddicott points out, the origins of the parliamentary system go back to the tenth century. After 1066 and the formation of councils, the way was set for the emergence of the deliberative and legislative body that finally becomes the recognizable Parliament of the fourteenth century.

¹⁰ Statutes of the Realm, *An Act Concerning the Making of Woolen Clothes*, 1 Hen. VIII c. II (1509); see also, *An Act Concerning Coroners*, 1 Hen. VIII c. VII (1509).

¹¹ Statutes of the Realm, *An Act Against Perjury*, 1 Hen. VIII c. XI (1509).

¹² One intriguing example is the 1647 legislation of the General Court of Massachusetts making it a capital offense for a Jesuit to be found in the territory of Massachusetts Bay. See, *THE SACRED RIGHTS OF CONSCIENCE—SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING*, eds. Daniel L. Dreisbach and Mark David Hall, (Liberty Fund: Indianapolis, 2009), at 98.

flooding.¹³ In all these cases, however, it is generally regarded that the force of law is founded on some reason and the need for civil society to address, in a responsible fashion, pressing issues that require the formulation of norms which are then codified in legislation.

One set of English statutes of the early sixteenth century which has attracted attention since their promulgation is that body of legislative initiatives enacted from 1533 to 1534 regarding “the King’s great matter,” i.e., the circumstances surrounding Henry VIII’s efforts to divorce Queen Catherine in order to marry Ann Boleyn and to implement the king’s wish to ensure national acceptance of this plan through the force of law.¹⁴ Henry was accustomed to using the legal process to further his ambition, but when the existing law failed him, he encouraged Parliament to enact new statutes that would achieve his goals. The progression of the several statutes surrounding “the King’s great matter” illustrates how deficiencies of the earlier statutes were addressed with the passage of additional ones even though the king’s pleasure, rather than the common good, was the goal.

Robert Bolt’s play and screenplay, both entitled “A Man for All Seasons”,¹⁵ have brought popular understanding to “the King’s great matter” and the enactment of the statutes that were promulgated to realize the King’s implacable will to obtain a divorce on the one hand and to legitimize a remarriage on the other. The bearing that these legislative initiatives would have on England and her people, including such prominent persons as Sir Thomas More and John Cardinal Fisher, are well known by most individuals versed in the rudimentary history of Tudor England. As someone not accustomed to being refused his will and way, Henry saw to it that

¹³ Statutes of the Realm, *An Act Concerning Powdyke in Mersheland*, 22 Hen. VIII c.11 (1530).

¹⁴ As will be seen later in this article, it was Henry VIII’s plan to enforce the *Act of Succession* with a further statute requiring an oath to be taken by all his subjects. If a person refused, as was the case of Sir Thomas More and John Cardinal Fisher, attainder would follow necessitating imprisonment and the confiscation of the malfasant’s property.

¹⁵ Robert Bolt, “A Man for All Seasons,” (Random House: New York, 1960); Columbia Pictures, 1966.

each successive statute which he asked Parliament to enact would get him closer to his goal of divorce and remarriage notwithstanding what the law of the Church—at one time his Church—required.

This article is not about the trials for high treason and the evaluation of evidence used to convict Thomas More of the crime.¹⁶ Rather, the goal of this essay is a simpler one: to understand the promulgation of and to interpret the meaning of the legislative texts King Henry had enacted that were designed to pressure into submission those opposed to the king's plan of obtaining his divorce from Queen Catherine, of making Anne Boleyn queen, of providing for a new line of succession (hence, bastardizing Princess Mary), and of making the king the Supreme Head of the Church in England thereby separating English Christians from Rome and the pope. In these contexts, some of the evidence surrounding the trial will be discussed, but, again, this article is about statutory making and construction and not the trial itself as I have already stated. In short, this article is geared to extracting the best meaning from legislative texts which were enacted to further the goals of the sovereign. In this context, it can be reasonably assumed that statutes mean something. Moreover, they are typically intended to mean something that is

¹⁶ During the Tudor era, trials for treason were largely compliance with formalities. It was generally understood that there was a strong legal or political reason for bringing a person to trial under the charge of high treason. Rarely, if ever, was the accused acquitted of the charge. In the case of due process of law at the trial, defendants rarely saw the indictment before the trial began; moreover, the right to counsel was nonexistent. While there could be some questioning of witnesses and the presentation of legal argument, these mattered little especially when the sovereign was determined on achieving a conviction. Such was the trial of Thomas More. *See generally*, THOMAS MORE'S TRIAL BY JURY, especially chapter 3 "A Guide to Thomas More's Trial for Modern Lawyers," by Louis W. Karlin and David R. Oakley, (Kelly, Karlin, and Wegemer, editors), (Boydell Press: Rochester, 2011), at 71-93. At this point it is important to understand that elements of the legal proceedings against Fisher and More were different. More maintained his silence and never said anything to anyone prior to his conviction about the king's new title of Supreme Head of the Church in England; however, Cardinal Fisher, upon the presumption of confidentiality, did inform Richard Rich that the king was not and could not be the head of the Church. *See*, E. E. Reynolds, SAINT JOHN FISHER, (Burns & Oates: London, 1955), at 261, 276. The case of Cardinal Fisher differs from that of Sir Thomas More in some respects. The first is that for a while, Bishop Fisher publicly preached sermons on the indissolubility of the marriage between Henry and Catherine of Aragon. During her banishment from court, Bishop Fisher also supplied spiritual comfort by his visitations with Queen Catherine. Moreover, Fisher, unlike More, fell into a trap laid by the king's henchmen when Richard Rich, under the pretext of seeking Fisher's private view of the king's Parliamentary-conferred title, Supreme Head of the Church in England, by telling Rich confidentially, at the king's request, that the king as a layman could not be the head of the Church. This statement fraudulently extracted from Fisher was later used at his trial. *See*, Reynolds, SAINT JOHN FISHER, at 259-61.

intelligible and necessary. In addition, the words they contain and the syntactical order in which they are arranged are guides for subjects and citizens and anyone else who reads them. Most importantly, statutes are enacted to impact the lives of those who live under this law. This article is a search for an understanding of the statutes enacted and used against the English people whose views on “the King’s great matter” did not coincide with the king. In particular, these laws had a great impact on the life of Sir Thomas More.

The making of legislation is a somewhat easy task by considering what the law maker puts into the law by reading the words chosen. Of course, the meaning of these words and the laws they construct is the real work of the lawyer and the person whose life is affected by these words. So, how should the interpretative task proceed?

Statutory interpretation is a synthetic process that examines the words and their syntax along with the intention (i.e., the thoughts of the drafters), the objectives for which the statute was passed, and the contexts in which the statute was written and applied.¹⁷ The process of interpreting statutes should conclude with the goal of ensuring that the interpretation coheres with the other law applicable to the issue and the people involved. If it does not, then the rule of law becomes a hindrance rather than an asset to the common lives of those persons who come within the authority of the statutes. The application of statutes based on their interpretations can and do have an impact on the lives of those who come under the statutes’ purview. If the citizens (or, in the case of England, the subjects) complied with Henry’s statutory mandates, their lives would prosper—or at least continue—and the king’s plan to remarry and to separate the English

¹⁷ See generally, *supra*, note 4, Araujo, *Method in Interpretation*. My approach to statutory interpretation is a complement to rather than a competitor of plain meaning interpretation. Plain meaning interpretation has been defined as reliance on the ordinary meaning of the language of the legislative text. See, e.g., *Sussex Peerage Case* [1844] 1 Cl&Fin 85; see also, *Caminetti v. United States*, 242 U.S. 470 (1917). Courts relying on plain meaning interpretation do suggest that there are means for ignoring the ordinary meaning of the language such as when this would lead to an absurd result or impractical consequence.

church from Rome would go on; however, if they resisted in complying with his codified demands, the subjects' lives would be forfeited, and the King would still have his way.

The question can be refined to this: what did the statutes enacted for “the King’s great matter” objectively mean? In particular, what was the meaning of the two statutes used to convict Thomas More, and was the language used and the syntactical arrangement sufficient for the task at hand? Another question stands close by as it always does when the investigation of legal texts is underway: were these statutes intended to serve the common good or were they intended to do something else?

It became clear that the Defender of the Faith¹⁸ was on his way to joining the ranks of the tyrannical in large part because of his abuse of the legal process and the legislation passed to address “the King’s great matter” and to facilitate results conducive to his expectations.¹⁹ The objective interpretation of the relevant statutes enacted by Henry’s Parliament is crucial to the task of assessing whether a man like Thomas More was a traitor who had committed acts of high treason. Just as importantly, it is crucial to keep in mind why was the law of high treason

¹⁸ Papal Bull of Pope Leo X, October 15, 1521, reprinted in *DEFENCE OF THE SEVEN SACRAMENTS BY HENRY VIII*, (Benzinger Brothers: New York, 1908), at 171. As Pope Leo declared, “Considering that it is but Just, that those, who undertake pious Labours, in Defence of the Faith of Christ, should be extolled with all Praise and Honour; and being willing, not only to magnify with deserved Praise, and approve with our Authority, what your Majesty has with Learning and Eloquence writ against Luther; but also to Honour your Majesty with such a Title, as shall give all Christians to understand, as well in our Times, as in succeeding Ages, how acceptable and welcome Your Gift was to Us, especially in this Juncture of Time: We, the true Successor of St. Peter (whom Christ, before his Ascension, left as his Vicar upon Earth, and to whom he committed the Care of his Flock) presiding in this Holy See, from whence all Dignity and Titles have their Source; have with our Brethren maturely deliberated on these Things; and with one Consent unanimously decreed to bestow on your Majesty this Title, viz. Defender of the Faith... we likewise command all Christians, that they name your Majesty by this Title; and that in their Writings to your Majesty, immediately after the Word KING, they add, DEFENDER OF THE FAITH.” *Id.* The letter of the pope to Henry went on reminding him not to be proud but humble and to remain “strong and constant in your Devotion to this Holy See, by which you were exalted.” *Id.* (Capitals are in the original text.)

¹⁹ Under the *Act of High Treason* (1534) one of the statutes in More’s indictment and investigated in this article, it was an actionable offense to call the king a “tyrant.” It is relevant to note here that earlier in his career as Speaker of the House of Commons, Thomas More fought for and achieved the right of Members of Parliament to speak their mind and to be immune, therefore, from the wrath of Crown. The petition was made by More on April 18, 1523. See, e.g., Roper’s *A Life of Sir Thomas More*, in *A MAN OF SINGULAR VIRTUE*, (London: The Folio Society, 1980) at 39.

amended by King Henry as England already had legislation dealing with this matter that was enacted in 1351? In other words, was there a need for this new legislation to address threats to the common good of the English realm? So the task here is to determine, by careful construction, the meaning of these statutes used to convict people like More of high treason—a crime which, if proven, would necessitate the penalty of death.²⁰ While the king’s plan was a clever one designed to achieve results satisfactory to the interests of the Crown, each successive element of the legislative series had the additional purpose of closing all escapes that might otherwise

²⁰ Under the law of England, treason—or high treason (i.e., treason against the sovereign)—was a most serious offense. Blackstone in his *Commentaries on the Laws of England* devotes a chapter to it in Volume IV, which deals with Public Wrongs. As Blackstone noted, it “is the highest civil crime, which (considered as a member of the community) any man can possibly commit.” *Id.*, at 75. He also contended that words, by themselves, ought not to be considered treason although they may constitute a high misdemeanor, *Id.*, at 80; he says nothing of silence, and this would be logical following that if words are insufficient to sustain the crime, how could silence be any more offensive? Interestingly, Blackstone discusses Edward’s 1351 statute on treason, and he makes veiled reference to those enacted by Henry VIII, whose reign he calls “bloody,” and states that these laws were infected by “the spirit of inventing new and strange treasons including “refusal to abjure [renounce] the pope.” *Id.*, at 86. In this regard, Blackstone mentions the first statute enacted under the reign of Queen Mary was that repealing “certain treasons, felonies, and *praemunire*.” 1 Mar. Sess. 1 c. I. This very first statute enacted under the reign of Mary abrogated the laws enacted by her father, King Henry VIII, and reinstated those acts deemed to be treason under Edward’s *1531 Act of Treason*., as Blackstone acknowledges. Blackstone, IV, at 87. However, as Blackstone noted, Parliament later began to expand the nature of the crime of high treason once again, *id.*; however, this renewed expansion would not be pertinent to the specifics of this article. Yet, they do have a bearing on the general subject matter for, as Blackstone noted, Queen Elizabeth I again pursued steps making the acts of “papists” crimes constituting high treason, e.g., 5 Eliz. C. I; 27 Eliz. c. II. James I would follow suit, e.g., 3 Jac. I c. IV. This anti-Catholic theme in the subsequent statutes dealing with high treason would continue, e.g., 13 and 14 W. III c. III addressing the Catholic line of Stuarts and their claims to the English throne which would interfere with the “security of the protestant succession,” as Blackstone called it. Blackstone, IV, at 90-91. The crime of high treason is generally understood as a betrayal of the relationship and duty that a person has with the sovereign. The relationship and duty demand allegiance. Initially under the common law, high treason was a matter left to the judges of the courts to decide; however, in order to eliminate what might be viewed as arbitrary or discretionary, statutes were eventually passed. Edward III (1312-1377) was the king when Parliament passed the *praemunire* statutes that were a legislative effort to restrict papal influence in England. Most pertinent to this article is the *Treason Act of 1351* (25 Edw. III St. 5 c.2 which was the first codification of the crime in order to clarify the expansion given to it over time by the common law judges. The statute, albeit amended, is still in force today. The original statute provided two divisions: high treason which was against the sovereign and petit treason which was against another subject, typically one’s superior. The essence of the 1351 codification was to specify what acts—what offenses—constituted high treason, i.e., treason against the sovereign. If one were to “compass” [i.e., to contrive, devise, or machinate some bad purpose or evil design] or “imagine” [i.e., to conceive in the mind; to devise, plot, or plan against] the death of the king, the queen, or the heir; if a man violated the king’s eldest unmarried daughter or the wife of the king’s eldest son and heir; or if one were to wage war against the king in his Realm or give aid and comfort to the king’s enemies in his Realm; if one counterfeited the Great or Privy Seal or money; or, if one killed the Chancellor, Treasurer, or certain specified judges. For a fascinating article on King Henry VIII’s contribution to the law of high treason and his expansion of the offenses it contained, see I. D. Thornley, “The Treason Legislation of Henry VIII (1531-1534), *Transactions of the Royal Historical Society*, Third Series, Vol. 11 (1917), at 87-123.

frustrate the King's will.²¹ In this regard, there is one word in particular in the legislation enacted by Parliament at the King's insistence that will require particular consideration: "maliciously." For many interpreters, it was not a crime to do certain things that might adversely affect the king's interests; rather, it was a crime, i.e., high treason, to do certain things *if done maliciously*.²² I will discuss this in greater detail in the third section of this article.

This article will be presented in five parts, the first of which is this introduction which will be followed by several substantive matters. The second section will provide an overview of the legislation dealing with "the King's great matter." The third part will investigate the meaning of key words so as to refine the objective import of language which were used to prosecute persons of the crimes detailed by Parliament to address "the King's great matter."²³ The fourth

²¹ While it may seem that Henry was the sole force behind the legislation as the Crown typically was the dominant catalyst for new legislation, *see*, Thornley, *supra*, note 20, at 119, it is clear that Parliament often acted on its own by either blunting, eliminating, or modifying elements of the texts that the king and Thomas Cromwell, urged on them. *Id.*, at 120-21. Ultimately Thornley posited the view that the Henrician legislation that is the subject of this article "expressed the wishes of Parliament; it bore the hallmarks of parliamentary approval, and the Parliament which freely chose to pass it must bear the responsibility for its deeds." *Id.*, at 123.

²² Statutes of the Realm, 26 Hen. VIII c. XIII (1534).

²³ As I mention elsewhere in this article, the word "maliciously" which appears in Henry's the *Act of High Treason* and in other statutes plays a prominent role in the construction of the legislation. Generally in Anglo-American law, i.e., law which has developed in the common law system, the word malice and its derivatives (adjective and adverb) have largely meant dealing with an intentional doing of a wrongful act without just cause or reasonable excuse. The term "maliciously" played a key role in the prosecution of those like More and Fisher who were not compliant with the king's demands. The base word and those which derive from it can be used in criminal and civil contexts. In the cases of Sir Thomas More and John Cardinal Fisher the statute, the *Act of High Treason*, was a criminal law; thus, the meanings considered in this article are those which concentrate on a criminal statute. Malice can be express or construed. In the latter context there must be some evidence demonstrating how it is implied and being inferred from acts or words expressed in some fashion. In regard to its being used to modify a verb, and this is the case in the *Act of High Treason*, it imports a wish to vex, annoy, or injure in some substantive fashion another person. The construction of these definitions is based on the discussion of the terms appearing in Black's Law Dictionary, 1968 and the Oxford English Dictionary, which offers temporal definitions, i.e., the meaning of words as they were used in the reign of Henry VIII. For example, Thomas More would sometimes refer to "secret" matters, but he did intend the meaning we have today; rather the meaning he conveyed was synonymous with our present day understanding of "private matters."

component will consider whether the conviction of Sir Thomas More was supported by the objective meaning of the applicable statutes' language in the context of the evidence adduced.²⁴

In the end it will be clear that More did nothing or said nothing "maliciously" that would warrant his conviction as a traitor guilty of high treason.²⁵ The fifth and final section is a conclusion that will also offer some thoughts that should provide help to those involved with the drafting and interpretation of statutes in the present age of the early twenty-first century. This conclusion will also serve as a reminder about the role that legislation ought to have in the rule of law regardless of whether the legislation is from 1534 or 2013. I shall now turn to a consideration of the relevant statutes which have a bearing on the allegation of high treason brought against Sir Thomas More.²⁶

II. Statutes Enacted by Parliament (1534-35) concerning the King's Great Matter

A. An Act for the Establishment of the King's Succession

With the King's scheme in place to divorce and discard Queen Catherine in order to marry Anne Boleyn,²⁷ Henry VIII solicited the support of the Parliament to ensure the plan's

²⁴ Two excellent works address the trial of Sir Thomas More. The first is the classical work by E. E. Reynolds, *THE TRIAL OF SAINT THOMAS MORE*, (Burns & Oates: London, 1964); the second and more recent is *THOMAS MORE'S TRIAL BY JURY*, Henry Ansgar Kelly, Louis W. Karlin, and Gerard B. Wegemer, editors, (The Boydell Press: Rochester, 2011). A third source is William Roper's *A Life of Sir Thomas More*, *supra*, note 19.

²⁵ As More said to the Council convened to interrogate him in 1535, where there is no malice, there can be no offense. *See*, *A THOMAS MORE SOURCE BOOK*, *supra*, note 24, at 348.

²⁶ Readers will note that in a number of instances, I have supplied additional definitions to particular words of the statute. Although these words may have some familiarity to the reader of the twenty-first century, they had different meanings in to the user of Tudor English. So, to avoid confusion or lack of recognition, I have supplied in footnotes the meaning of these terms as they would have been understood by the contemporaries of King Henry and Sir Thomas More and company. Nonetheless, I also provide explications where necessary to assist the English speaker of the twenty-first century. In addition, I have substituted contemporary English spellings for Tudor ones where this has been necessary to facilitate an easier reading.

²⁷ *See generally*, J. J. Scarisbrick, *HENRY VIII*, (Berkeley: University of California Press, 1968), at 11-12.

implementation. In March of 1534, the Parliament enacted the initial legislation to further his objective, *An Act for the Establishment of the King's Succession*.²⁸ The legislation brought to the center the status of the marriage between King Henry and Queen Catherine thereby paving the way to declare the marriage with Catherine invalid and to make the Princess Mary an illegitimate offspring; moreover, the new law acknowledged the legality of the private and low key 1533 marriage between Henry and Anne Boleyn and further recognized that the Crown would succeed first to the sons who were the issue of Henry and Anne and then to daughters if no sons were born and who survived the King's death.²⁹

As is the case with many legislative matters of the present age, the *Act of Succession* began with a statement of purpose that recalled the recent English history of dynastic wars and proposing a solution to avoid these wars in the future, or as the text itself stated: "calling to our remembrances the great divisions" of the times initiated by the unlawfulness of the marriage between the king and the wife of his late brother, the act provided for a lawful succession "without any contradiction" thereby legitimating the heirs of Henry and Anne Boleyn.³⁰ This declaration presented the point of view that there were problems in the House of Tudor that would be unsettling to the future of England if they were not addressed quickly so that dynastic wars could be avoided. However, this statute presented a further concern unrelated to the English crown's succession that was at most remotely related to the succession issue: it was the assertion

²⁸ Statutes of the Realm, 25 Hen. VIII c. 22, (hereinafter, *Act of Succession*).

²⁹ Of course, Henry kept Parliament busy in its work regarding the line of succession. With the conviction and execution of Anne Boleyn, Parliament passed legislation, 28 Hen. VIII c. 7, the *Act of Succession of 1536* removing both Elizabeth and Mary from the line of succession. With the birth of Prince Edward in 1537, a third act of succession was passed by Parliament in 1543, 35 Hen. VIII c. 1, in which amongst other goals, Prince Edward would succeed King Henry; moreover, provision was made for the restoration of Princess Mary and Princess Elizabeth in the line of succession and in that order. While other machinations were planned during the reign of the boy king Edward, the third act of succession's terms ultimately prevailed. So, with Edward's death in 1553, Mary ascended the throne and reigned until her death in 1558; upon Mary's death, Elizabeth became queen and reigned until 1603.

³⁰ I have used contemporary English spellings which replace those of the Tudor English.

that the pope (the Bishop of Rome) had interfered with matters temporal and ecclesial in England “contrary to the great and inviolable grants of jurisdiction given by God immediately to emperors, kings, and princes...”³¹ It was the duty of Parliament to respond to these matters which the king deemed in urgent need of legislative resolution. As tension grew between the king and the pope, it was the view of the king that the Vicar of Christ had no jurisdiction in matters ecclesial or temporal on the British Isles particularly with regard to the king’s marital situation as was evidenced by the tenor of several of the statutes investigated in this article.³² Thus singling out Rome’s ecclesiastical authority regarding the king’s marital state become a further project for Parliamentary action.

The statute further acknowledged that if there had been a marriage of sorts between the king and “Lady Catherine,” it was invalidated by certain facts or allegations, viz. that Catherine had been Arthur’s (Henry’s older brother) wife before the marriage with Henry, and that Arthur and Catherine had consummated their marriage thereby intensifying the gravity of the relationship between Catherine and Henry.³³ Henry had argued that the law of God prohibited him from marrying his brother’s widow notwithstanding the different Biblical passages that presented different perspectives on the matter.³⁴ This initial legislation relied upon the assertions

³¹ Statutes of the Realm, 25 Hen. VIII c. XXII (1534), the *Act of Succession*. Not wishing to let the pope off too easily, this legislation reinforced the concerns about threats from the pope by pointing out how Rome’s attempt to influence authority over the English king could act as an incentive and encourage other temporal authorities to attempt to do the same. *Id.*

³² King Henry was an adept user of sacred scripture when it was to his advantage to rely on Biblical quotations. However, when it came to removing the pope as the head of the Church and replacing himself, Henry conveniently forgot the Biblical passage, “And I say also unto thee, that thou art Peter, and upon this rock I will build my church; and the gates of hell shall not prevail against it.” *Matthew* 16:18 (King James Bible) See, *infra*, note 34.

³³ The fact of the consummation of the marriage between Arthur and Catherine is highly contested. See, e.g., G. W. Bernard, *THE KING’S REFORMATION: HENRY VIII AND THE REMAKING OF THE ENGLISH CHURCH*, (Yale University Press: New Haven, 2005), at 20-25.

³⁴ See, *Leviticus* 20:21, “If a man takes his brother’s wife, it is impurity; he has uncovered his brother’s nakedness, they shall be childless.” King Henry thought that this was why Catherine produced no viable sons, although Princess Mary was born of this marriage and would eventually rule England from 1553-58. But see,

of the new Archbishop of Canterbury, Thomas Cranmer (a compliant human instrument in the hands of the king), asserting that the marriage between Henry and Catherine was “against the laws of Almighty God” and should be “taken of no value or effect.”³⁵ These declarations of Cranmer, as codified in the *Act of Succession*, were deemed by the king to supersede and thus neutralize the dispensation given by the pope that had previously permitted Henry to marry his brother’s widow, i.e., Catherine.³⁶ Through the enactment of this statute, England also sent Rome and the pope a message presenting Henry’s view that Rome’s authority did not reach into the king’s realm of England on any matter dealing with temporal or spiritual issues. This would be subsequently confirmed by the *Act of Supremacy* (discussed below) which acknowledged that Henry was the Supreme Head on earth of the Church in England. As the *Act of Succession* suggested, what had been dispensed by Rome could not be considered a dispensation in England since the Bishop of Rome had no valid authority to usurp the authority of God—as interpreted by Thomas Cranmer—over England.³⁷ Interestingly, there was no mention in the statute citing the

Deuteronomy 25:5, “When brothers live together and one of them dies without a son, the widow of the deceased shall not marry anyone outside the family; but her husband’s brother shall come to her, marrying her and performing the duty of a brother-in-law.” Thomas More thought the Deuteronomy passage more applicable to King Henry’s circumstances than the Levitical text. *See also*, John Edwards, *MARY I—ENGLAND’S CATHOLIC QUEEN*, (Yale University Press: New Haven, 2011), at 24-25.

³⁵ Statutes of the Realm, *An Act for the Establishment of the King’s Succession*, 25 Hen. VIII c. XXII (1534).

³⁶ There were doubts by even ecclesiastical officials that the six year old dispensation was no longer operative given the long passage of time. *See*, Scarisbrick, *supra*, note 27, at 13.

³⁷ In an effort to add further authority to these provisions, Parliament took steps to make “the King’s great matter” seem like one that affected other segments of the general population. Consequently, the act stated: “in case there be any person or persons within this Realm or in any the King’s Dominions already married within any the said degrees above specified, and not yet separate from the bonds of such unlawful marriage, that then every such person so unlawfully married shall be separate by the definitive sentence and judgment of the Archbishops, Bishops, and other Ministers of the Church of England, and in other your Dominions within the limits of their jurisdictions and authorities, and by none other power or authority. And that all sentences and judgment given and to be given by any Archbishop, Bishop, or other minister of the church of England, or in other the king’s Dominions within the limits of their jurisdictions and authority, shall be definitive, firm, good, and effectual to all intents, and be observed and obeyed without suing any provocations, appeals, prohibitions or other process from the Court of Rome to the derogation thereof, or contrary to the acts made since the beginning of this present parliament for restraint of such provocations, appeals, prohibitions and other processes.”

authority by which the king or Parliament could transfer the pope's authority to the king. However, the legislation was fortified by a provision stating that the illegality of the marriage between Henry and Catherine was confirmed by the most highly regarded and competent academics of the English universities as well as some of their continental European counterparts.³⁸ Of course the fact that these academics relied upon the king's good grace to continue their work and physical existence was not mentioned. The act did state, however, that the opinions of these members of the academy were those of "many right excellent well-earned men." So in the company of and with the concurrence of such learned persons, the king could not be wrong—or so it was thought.

There remained one other matter requiring legislation and this involved the matter of what was to be done with Queen, now Lady, Catherine who had been considered Henry's wife for over twenty years. Parliament did not waste any time in addressing this issue by conferring a new title on her: "that said Lady Catherine shall be from henceforth called and reputed only Dowager to Prince Arthur and not Queen of this Realm."³⁹ What God, the Church, the pope, and many others had declared a marriage was no longer so by the stroke of the Parliamentary pen thereby making the union of Henry and Anne "the lawful matrimony" according to the judgment of Henry and his allies in Parliament and the universities.

The *Act of Succession* addressed several other related issues by specifying that the male offspring of Henry and Anne would be the lawful heirs and in the immediate succession to the Crown by order of age from the oldest male heir to the youngest male heir; however, if there

³⁸ While reformed or reformist-oriented scholars on the European continent had little to fear from Henry, the English scholars did not have much of a choice in the matter since the king was their sovereign and they were his subjects.

³⁹ Shortly after this, Parliament enacted another statute, *An Act for the Lady Dowager*, 25 Hen. VIII, c. XXVIII, which made certain provisions for the Queen—although she was not to be referred to as "Queen" but as "Princess Dowager to Prince Arthur."

were no male issue alive at the time of the king's death but there were female issue, then the females beginning with the oldest to the youngest would be in the line of succession. Specific reference was made in this legislation to "Lady Elizabeth now princess" who would have lawful claim to the Crown should there be no male heir alive at the time of the king's death. Perhaps no one thought at the time that this is what eventually would happen, but the king's evolving prudence would revisit the matter in later years.⁴⁰ No mention was made, however, of the Princess Mary, the older daughter of the king. As a practical matter, she was bastardized by the legislative acknowledgment that there never was a marriage between Henry and Catherine.

This statute, like the others that would follow, not only declared what the law was according to the lawmaker, it also specified the means by which the law was to be administered and enforced. In this regard, a variety of enforcement mechanisms would be called upon to implement and enforce legislation such as conducting investigations and holding hearings which could be followed by some kind of penalty for the failure to observe the requirements of the statute. In the case of any failure to abide by the *Act of Succession of 1534*, Parliament chose the enforcement mechanism of criminal penalties and specified two: high treason and misprision of treason.⁴¹ Regarding the first matter of high treason against the sovereign, a person could be convicted of a crime,

⁴⁰ In subsequent years, Henry would have Parliament enact further legislation removing Princess Elizabeth from the line of succession. However, in the *Act of Succession to the Crown*, 35 Hen. VIII c.1 (1544), both Mary and Elizabeth were restored to the line of succession, in this order, after the Prince of Wales who would later become King Edward VI, but he died at the age of fifteen. Under the growing influence of Protestantism in England, Edward attempted to prevent this act from taking effect in his will, especially with regard to the Catholic Mary; however, the 1544 legislation ultimately prevailed. See, John Edwards, MARY I, *supra*, note 34, at 76-77, 103, 106.

⁴¹ High treason is a crime against the sovereign. It is distinguished from petit treason which is against one's master but not the sovereign. Misprision of treason is essentially the failure to perform a lawful duty, in this case the duty was to take the oath required by the *Act of Succession*. A person convicted of misprision of treason would forfeit all his or her property to the Crown and would be imprisoned; however, the death penalty could not be administered to a person convicted only of misprision of treason. Capital punishment consisting of hanging, drawing, quartering, and beheading was reserved for those persons convicted of high treason.

*by writing or imprinting or by any exterior act or deed, maliciously procure or do or cause to be procured or done anything or things to the peril of your most royal person, or maliciously gave occasion by writing, print, deed, or act whereby your Highness might be disturbed or interrupted of the Crown of this Realm, or by writing, print, deed, or act procure or do or cause to be procured or done anything or things to the prejudice, slander, disturbance, or derogation of the said lawful matrimony solemnized between your Majesty & the said Queen Anne, or to the pyll [slander], or derision of any the issues and heirs of your Highness being limited by this act to inherit and to be inheritable to the Crown of this Realm in such form as is aforesaid, whereby any such issues or heirs of your Highness might be destroyed, disturbed, or interrupted in body or title of inheritance to the Crown of this Realm as to them is limited in this act in form above rehearsed, that then every such person and persons of what estate, degree, or condition they be of, subject or resident within this Realm, and their aider, counselors, maintainers, and abettors and every of them, for every such offence shall be adjudged high traitors, and every such offence shall be adjudged high treason, and the offender and their aiders, counselors, maintainers, and abettors and every of them, being lawfully convicted of such offence by presentment, verdict, confession, or process according to the customs and laws of this Realm, shall suffer pains of death as in cases of high treason.*⁴²

The statute focused on acts and publications that would give offense to the king, Anne Boleyn, or their children (heirs) in two contexts: the legitimacy of the marriage and the succession to the Crown. However, it is not just any deed or word which achieves these ends but rather deeds or words that are produced *maliciously*. The meaning of this word is crucial to any effort to understand the scope of the legislation passed by the Parliament. An examination of this word's meaning will subsequently follow in the next part of this essay as the word "maliciously" appears prominently in the legislation relied upon to prosecute Thomas More. However, I note here this word's prominence in the *Act of Succession*.

Even though More said or did nothing maliciously against the line of succession that would emerge from the issue of Henry and Anne, it was the next requirement dealing with the

⁴² Italics added.

oath which had a bearing on his case insofar as another statute requiring the taking of an oath would be used to implement the next segment's elements. However, it was evident that *if the Act of Succession* only required an oath by the subjects simply affirming their acceptance of the line of succession for which the statute provided, Thomas More would have likely gone along.⁴³ But the fact that the legislation covered other matters beyond the line of succession, particularly the illegality of the marriage with Queen Catherine and the legality of the new marriage with "Queen Anne," prevented More from taking the oath mandated by the *Act of Succession*.⁴⁴ In retrospect, blood could have been saved rather than spilt if the statute only addressed the line of succession and nothing else. This simple and clear objective would have served the king and his realm well; moreover, a prominent person such as Thomas More, who might have had other objections to the king's plans, would likely have gone along by publicly taking the oath if it had only dealt with the line of succession. In the context of the purposes for which legislation was enacted, Henry may well have spared his country and the Church many difficulties if this legislation had been restricted to determining who would succeed him. Unfortunately this prudent course of action was not pursued. As a result, lives were lost, and England broke from Rome.

The misprision of treason element of the *Act of Succession* was another crucial element of this legislation, and it provided that:

if any person or persons...by any word without writing or any exterior deed or act *maliciously* and obstinately publish, divulge, or utter anything or things *to the peril of your Highness, or to the slander or prejudice of the said matrimony solemnized between your Highness and*

⁴³ As Reynolds noted in his biography, More realized that he had to study carefully together the *Act of Succession* and the *Act Requiring the Oath for the Act of Succession*, because the *Act of Succession*, by itself, did not contain the words by which each subject was to swear. For More, the two sticking points in the oath dealt with (1) the repudiation of papal authority, and (2) the validity of the marriage with Anne Boleyn and the invalidity of the marriage to Queen Catherine. E. E. Reynolds, *THE LIFE AND DEATH OF ST. THOMAS MORE*, (Burns & Oates: London, 1968), at 300-1. *See also*, E. E. Reynolds, *THE TRIAL OF ST. THOMAS MORE*, (Burns & Oates: London, 1964), at 112.

⁴⁴ *Id.*

the said Queen Anne, or to the slander or derision of the issue and heirs of your body begotten and to be gotten of the said Queen Anne, or any other your lawful heirs which shall be inheritable to the Crown of this Realm as is afore limited by this act, that then *every such offence shall be taken and adjudged for misprision of treason*; And that every person and persons of what estate, degree, or condition so ever they be, subject or resident within this Realm or in any the King's dominions so doing and offending, and being hereof lawfully convicted by presentment, verdict, process, or confession, *shall suffer imprisonment of their bodies* at the King's will, and *shall lose as well all their goods, chattels, and debts as all such interests and estates of freehold or for years* which any such offenders shall have of or in any Land, Rent, or Hereditament whatsoever at the time of conviction and attainder of such offence.⁴⁵

Once again, the word “maliciously” played a key role in this statute.⁴⁶ The statute contained other provisions such as eliminating the right of sanctuary which would have otherwise been available to those who may be charged with crimes,⁴⁷ but the elements presented here are the ones crucial to this essay's objectives. Again, by itself, this unambiguous language had no bearing on More. However, when combined with the statute requiring an oath to the substantive provisions of the *Act of Succession* dealing with not only the identification of the legal heirs to the Crown but also the legitimacy of the marriage with Anne Boleyn, Thomas More would find himself in peril.

It was recognized by the king and his counselors that other statutes were necessary to implement the king's will and were subsequently enacted so as to restrict the escapes that the

⁴⁵ Italics added.

⁴⁶ But as Thornley points out in referring to a statement attributable to a Thomas Bayly discussing the case of John Cardinal Fisher, “The adverb [maliciously] was forced into the Bill, and was as nugatory in its effects as an adverb in a Bill can be.” Thornley, *supra*, note 20, at 122.

⁴⁷ As Thornley mentions in her informative essay, sanctuary became a target of the anti-clerical sentiments of the time and the anti-Roman views of Henry. However, in spite of the growing dislike of the clergy by some Englishmen and of Rome by the king, Thornley indicates that there appeared to have been temporal limits on how long sanctuary could be respected; in other words, the idea was that the few days of sanctuary in a church or monastery would give the offender sufficient time to reconcile with God and with any person who may have been offended. However, Henry and his Parliament were anxious to deprive any person accused of high treason even these several days of sanctuary. See, Thornley, *supra*, note 20, at 112-15.

talented mind of More was able to identify. The ensuing legislation was viewed as essential to tighten the noose around the necks of those who were able to slip through the thicket of the first statute. With the passage of time, three more statutes were passed in order to facilitate the plans surrounding “the King’s great matter.” It was the next statute which offered a potent mechanism for implementing the *Act of Succession*, and it was the *Act Ratifying the Oath that Every of the King’s Subjects Has Taken and Shall Hereafter Be Bound to Take for Due Observation of the Act Made for the Surety of the Succession of the King’s Highness in the Crown of the Realm*.⁴⁸

B. *The Act Requiring the Taking of the Oath Concerning the Act of Succession*

This legislation mandated that subjects would swear an oath “without fraud or guile” pledging, in the affirmative, their agreement with the *Act of Succession* of 1534 that was just discussed. As the statute requiring the oath is substantively directed to the acknowledgement of succession of the Crown, the oath required public acknowledgement of the legitimacy of the succession of the Crown to the issue of Henry and Anne Boleyn. The oath to be made by the declarant was to follow this formulation:

YE shall swear to bear faith truth and obedience alone to the King’s Majesty and to *his heirs of his body of his most dear and entirely beloved lawful wife Queen Anne begotten & to be begotten*, And further to the heirs of our said Sovereign Lord according to the limitation in the Statute made for surety of his succession in the Crown of this Realm mentioned and contained, *and not to any other within this Realm nor foreign authority or Potentate*; And in case any oath be made or hath be made by you to any person or persons, that then ye to repute the same as vain and annihilate; And that to your cunning, wit, and utter most of your power without guile, fraud or other undue means you shall observe, keep, maintain & defend the said act of succession, and all the whole effects & contents thereof, and all other acts and statutes made in confirmation or for execution of the same or of anything therein contained ; and this ye shall do against all manner of persons of what estate, dignity, degree, or

⁴⁸ Statutes of the Realm, 26 Hen. VIII. c. II (1534). (hereinafter the *Act Requiring the Taking of the Oath Concerning the Act of Succession*).

condition so ever they be, And in no ways do or attempt, nor to your power suffer to be done or attempted, directly or indirectly anything or things privily⁴⁹ or apartly⁵⁰ to the let⁵¹, hindrance, damage, or derogation thereof or of any part of the same by any manner of means or for any manner of pretense; So help you God, all Saints, and the Holy Evangelists.⁵²

As already noted, More was willing to concede the line of succession established by Parliament. Indeed, there was nothing to indicate that they would have objected to legislation specifying who would succeed King Henry VIII—if that were all the legislation contained and if that were all the oath required, but it did contain more which would be the impediment to Thomas More’s compliance. However, a grave problem lurked in the actual oath’s acknowledgement about two other matters, and these were: (1) the validity of the marriage with Anne Boleyn, *and* (2) the denying of any authority of foreign authority and potentates—which would have been a public denial by More of the lawful authority of the pope. Undoubtedly this oath would serve as a mechanism to eradicate any lingering loyalty to Rome and the pope through a repudiation of any allegiance to Rome with the words “and not to any other within this Realm nor foreign authority or Potentate.” The oath mandated affirmative action on the part of the declarant to not only observe and keep the oath but also to maintain and defend the *Act of Succession* and observe the succession that was mandated.⁵³ The oath would also serve as a means of giving one’s blessing to the marriage between Henry and Anne Boleyn. The references to fraud, guile, and “undue

⁴⁹ Not openly or publicly; secretly; in secret; stealthily; craftily; discreetly; by oneself. Also incognito; obscurely. OXFORD ENGLISH DICTIONARY.

⁵⁰ Being removed from the general body; separately; independently; individually. OXFORD ENGLISH DICTIONARY.

⁵¹ According to the OXFORD ENGLISH DICTIONARY, “Hindrance, stoppage, obstruction; also, something that hinders, an impediment. Now arch.: most common in phrase let or hindrance. (Cf. Middle English *lite*)”

⁵² Italics added, highlighting the elements of concern to Thomas More.

⁵³ Statutes of the Realm, *An Act for the Establishment of the King’s Succession*, 25 Hen. VIII c. XXII (1534).

means” indicated that the oath was to be made in such a way that each declarant had to assert most sincerely without any reservation, qualification, or duplicity his or her agreement with the rest of the legislation’s provisions. Finally, the oath statute contained a mechanism for prosecuting cases of refusal. If any person, regardless of his or her status as public official or private subject failed to take the oath or displayed any hesitation in doing so, the commissioners who would administer the oath had the duty to certify the refusal, which would serve as the triggering mechanism to bring legal proceedings against any person who failed to comply with the oath law. This certification could then be used as a means for attainder of those who refused to take the oath in the prescribed manner. Failure to take the oath in the manner prescribed would constitute the failure to comply with a legal duty which constitutes the crime of misprision of treason. To a devout person like More, the invocation of the names of God, the saints, and the Evangelists of the Gospel would have intensified the seriousness of the oath and the complications it presented concerning the marriage with Boleyn and the separation from Rome.

Because of his refusal to take the oath required by this statute, Sir Thomas More became a target of attainder legislation in which arrest and imprisonment were mandated for his misprision of treason; furthermore, in accordance with the provisions of attainder, his property was forfeited and confiscated by the Crown for failure to take the required oath. Parliament consequently enacted two attainder statutes, one directed at John Cardinal Fisher and other bishops⁵⁴ and the other at Sir Thomas More.⁵⁵ These attainder laws levied against More and Fisher were based on and mentioned the two previous statutes (i.e., the *Act of Succession* and the *Act Requiring the Taking of the Oath Concerning the Act of Succession*), so indirectly the oath

⁵⁴ Statutes of the Realm, *An Act Concerning the Attainder of the Bishop of Rochester and Others*, 26 Hen.VIII. c. XXII (1534).

⁵⁵ Statutes of the Realm, *An Act Concerning the Attainder of Sir Thomas More Knight*, 26 Hen.VIII. c. XXIII (1534).

statute and the *Act of Succession* had a distinct role in the imprisonment of More and Fisher and the confiscation of their property.⁵⁶ The wording of this legislation indicated that More and Fisher were attainted, judged, and convicted of misprision of high treason (which was referred to in the *Act of Succession*) because they would not swear to the oath required for the *Act and Succession*.

While capital punishment could not be meted out for misprision of high treason, arrest and incarceration and the confiscation of property could be and were meted out. In the case of the statute pertaining to Fisher, he also forfeited the see of Rochester “as though [he] were then naturally dead.” He would be in due course. While these statutes are important to the complete history of Tudor England and the crusade pursued on behalf of “the King’s great matter,” I will not focus on them any further in this article as they were not directly involved in the trial of More for the charge of high treason.

In spite of the attainder of More and Fisher for misprision of treason, the king remained unsatisfied. Holdouts like More and Fisher who refused to take the oath that complemented the *Act of Succession* were viewed as making a statement to England and the world that unsettled the king and his increasingly despotic regime. Hence, additional legislation was prepared to force More to make the kind of declaration that would satisfy the king, or so Henry thought. If More persisted in his refusal, the former Lord Chancellor would face the death penalty for high

⁵⁶ In both cases, the attainder legislation against More and Fisher were based on the *Act of Succession*, 25 Hen. VIII c. XXII and the *Act Requiring the Taking of the Oath*, 26 Hen. VIII c. II. The legislation against More, *An Act Concerning the Attainder of Sir Thomas More Knight*, 26 Hen. VIII c. XXIII stated that the attainder was appropriate because “contrary to the trust and confidence aforesaid being lawfully and duly required...unnaturally and contrary to his duty of allegiance, intending to sow and make sedition and murmur and grudge within this the King’s Realm amongst the true and obedient and faithful Subjects... hath obstinately, frowardly [disposed to go counter to what is demanded; perverse; ungovernable; evilly disposed—interestingly, Fisher’s attainder legislation used the word “maliciously” rather than “frowardly”, see *An Act for the Attainder of the Bishop of Rochester and Others*, 26 Hen. VIII c. XXII], and contemptuously refused to make and receive such corporal oath as was ordained to be accepted of every Subject of this Realm for the surety and establishment of the succession of our said Sovereign Lord...”

treason. Thus the next statute of significance was the statute entitled *An Act Concerning the King's Highness to be Supreme Head of the Church of England and to Have Authority to Reform and Redress All Errors, Heresies, and Abuses in the Same*.⁵⁷

C. The Act of Supremacy

The statute is relatively brief and read in its entirety:

ALBEIT *the King's Majesty justly and rightfully is & oweth to be the supreme head of the Church of England, and so is recognized by the Clergy of this Realm in their convocations ; yet nevertheless for corroboration & confirmation thereof, and for increase of venue in Christ's Religion within this Realm of England, and to repress & extirpe all errors, heresies, and other enormities & abuses heretofore used in the same, Be it enacted by authority of this present Parliament that the King our Sovereign Lord, his heirs, and successors, Kings of this Realm, shall be taken, accepted, & reputed the only supreme head in earth of the Church of England called Anglicana Ecclesia, and shall have & enjoy annexed and united to the Imperial Crown of this Realm as well the title and style thereof, as all Honors, Dignities, preeminences, jurisdictions, privileges, authorities, immunities, profits, and commodities to the said dignity of supreme head of the same Church belonging and appertaining; And that our said Sovereign Lord, his heirs, and successors, Kings of this Realm, shall have full power & authority from time to time to visit, repress, redress, reform, order, correct, restrain, and amend all such errors, heresies, abuses, offences, contempts, and enormities whatsoever they be, which by any manner spiritual authority or jurisdiction ought or may lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended, most to the pleasure of Almighty God the increase of virtue in Christ's Religion and for the conservation of the peace, unity, and tranquility of this Realm; any usage, custom, foreign laws, foreign authority, prescription, or any other thing or things to the contrary hereof notwithstanding.*⁵⁸

⁵⁷ Statutes of the Realm, 26 Hen. VIII, c. I. (1534), (hereinafter, the *Act of Supremacy*).

⁵⁸ Italics added.

This was the first of the two statutes cited in Thomas More's indictment.⁵⁹ The title synopsizes the content of the statute's substance by announcing that the law confirmed that the temporal sovereign, i.e., the king, was also the supreme head of the Anglican Church "in earth." Clearly the king held this status only in England and nowhere else, since Parliament obviously could not legislate for all of Christendom or for the entire world. It needs to be emphasized here that Parliament did not make the king the Supreme Head of the Church; rather, it declared its recognition of "the fact" that he was the head of the Church. This formulation may have anticipated the objection that the subject matter was within the province of the ecclesiastical rather than the civil authorities; however, it could be argued that this formulation was a simple recognition of what many ecclesiastical authorities, at least in England, considered to be the case. While the practical effect between making and recognizing may be the same, the selection of the wording suggested that even Parliament had to acknowledge some limit on its competence and authority in making laws.

Nevertheless, if Thomas More and anyone else disagreed with this acknowledgement of the king's title, they would be disagreeing with a Parliamentary opinion that the king was an ecclesiastical official and therefore head of the Church in England. Knowing that this statute had a bearing on ecclesial matters on which Parliament had not previously legislated, other English law and precedent needs to be considered as they had a definite bearing on the Parliamentary recognition codified in the *Act of Supremacy*.

It is relevant to note that the *Act of Supremacy* was at odds with the *Magna Carta* of 1215 in that King John assented to the freedom of the Church which was beyond the control of the

⁵⁹See, Section 2, More's Indictment, in THOMAS MORE'S TRIAL BY JURY, *supra*, note 16, at 176.

temporal authorities including the king.⁶⁰ Although the exercise of Henry's temporal ignored the provisions dealing with the freedom of the Church contained in the *Magna Carta*, this fact did not escape the eye of Thomas More who remarked about the violation of the *Magna Carta* at his trial.⁶¹ Notwithstanding the *Act of Supremacy*, it was still necessary for the Parliament to enact

⁶⁰ The very first substantive provision of the *Magna Carta* states, "FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections—a right reckoned to be of the greatest necessity and importance to it—and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity." That final substantive provision asserts, "IT IS ACCORDINGLY OUR WISH AND COMMAND that the English Church shall be free, and that men in our kingdom shall have and keep all these liberties, rights, and concessions, well and peaceably in their fulness and entirety for them and their heirs, of us and our heirs, in all things and all places forever." The reference to the pope makes clear that while King John (1166-1216) acknowledged in the *Magna Carta* the authority of Rome in at least some ecclesiastical matters, Henry unilaterally abandoned this principle with the *Act of Supremacy*. A. E. Dick Howard has a different take on this. As he says, "the use of the phrase 'English Church,' in contrast to the language 'Holy Church' in earlier charters, is evidence of the sense of a distinctively English Church, a consciousness which became a reality in the reign of Henry VIII." See, A. E. Dick Howard, *MAGNA CARTA: TEXT AND COMMENTARY*, (University of Virginia Press: Charlottesville, 1998), at 20. Of course throughout Christendom, the churches in the lands of Christendom had their own local identity and particular authority even to this day in accordance with the now codified Code of Canon Law; however, to say that there was some particular division between London and Rome that was long-standing before the divorce between Henry and Catherine presents a questionable claim. Professor Howard does not consider in his brief commentary on the Church-State issues what King Henry himself asserted in his *Defence of the Seven Sacraments* about Rome and its relationship to England. See, *supra*, note 16 and related text. Still, the role of the *Magna Carta* should be neither overemphasized or minimized or dismissed in these matters. Moreover, the relationship between Rome and England went through various forms of closeness and distance, and as McKechnie contends, after the Norman Conquest, "the English Church was brought into closer contact with Rome, and with the ecclesiastical ideals prevailing on the Continent." From McKechnie's view, the English clergy did look within England for guidance for centuries, but it was to the Archbishop of Canterbury and not the king. See, William Sharp McKechnie, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN*, (James Maclehose and Sons: Glasgow, 1914), at 16. McKechnie offers the further insight that during the early second millennium, the spiritual and temporal authorities were "indissolubly locked together" because the bishops often had a dual allegiance: one to the crown since most bishops were vassals of the king as holders of Crown baronies, and one to the Rome since they were prelates of the Holy Church. *Id.*, at 17. The point here is that the *Magna Carta* provisions just cited were at the insistence of the clergy who sought protection not from Rome but from the Crown. As McKechnie further states, "A new definition of the frontier between the spiritual and temporal powers was the outcome of John's need of allies on the eve of the *Magna Carta*." *Id.*, at 19.

⁶¹ The status of the *Magna Carta* and whether it was some kind of juridical document is an important question that McKechnie tackled. *Id.*, at 104-109. While not definitive, McKechnie's discussion is very useful as he covers parallels with the English conciliar efforts before the establishment of Parliament. He also discusses the charter in the context of a treaty. He also considers it as akin to a declaration of rights. Perhaps the best characterization of it was that "it was something definite and utilitarian—a legal document with specific remedies for current evils. To English lawyers and historians of a later age it became something intangible and ideal, a symbol for the essential principles of the English Constitution, a palladium of English liberties." *Id.*, at 120. McKechnie identifies its great value by enunciating "a definite body of law, claiming to be above the King's will and admitted as such by [King] John." *Id.*, at 123. Here McKechnie relies on A. V. Dicey's idea that the charter enunciated "the reign of law" or the "rule of law." *Id.*, at 124. Of course, McKechnie points out that one of the greatest defects of the

one more piece of general legislation since this statute, by itself, contained no enforcement mechanism; rather, it simply acknowledged a new title held by the king. But Parliament remedied this matter by enacting a further complementary statute entitled *An Act Whereby Diverse Offences Be Made High Treason and Taking Away All Sanctuaries for All Manner of High Treason*.⁶² This was the tool that put teeth into the Parliamentary recognition that the king was in charge of ecclesiastical affairs.

D. The *Act of High Treason*.

This was the second statute cited in Thomas More's indictment. Calling attention to the presence of "shameful slanders," "perils or imminent danger or dangers" which might be directed to the king, Anne Boleyn, and their children, the law specified that certain acts, utterances (words spoken or written), and deeds could constitute high treason and therefore punishable by death if other conditions were satisfied. Once again the word "maliciously" played a prominent role in this statute as these additional conditions were elaborated. The pertinent text of the statute reads as follows:

FOR AS MUCH as it is most necessary, both for common policy and duty of subjects, above all things to prohibit, provide, restrain, and extinct all manner of shameful slanders, perils, or imminent danger or dangers which might grow, happen, or rise to their Sovereign Lord the King, the Queen, or their heirs... Be it therefore enacted by the assent and consent of our Sovereign Lord the King and the Lords spiritual and temporal and Commons in this present Parliament assembled and by the authority of the same, *that if any person or persons* after the first day of February next coming, *do maliciously wish, will, or desire by words or writing*, or by craft imagine, invent, practice, or attempt any bodily harm

Magna Carta was the fact that it had no means of sanction or enforcement against the king. *Id.*, at 129. But as we have seen, neither did the *Act of Supremacy* enacted by Henry's Parliament, but it was still the law to be enforced by another, viz., the *Act of High Treason*.

⁶² Statutes of the Realm, 26 Hen.VIII c. XIII (1534). (hereinafter, the *Act of High Treason*)

to be done or committed to the King's most royal person, the Queen's, or their heirs apparent, or *to deprive them or any of them of the dignity, title, or name of their royal estates*, or slanderously & maliciously published & pronounce, by express writing or words, that the King our Sovereign Lord should be heretic, schismatic, tyrant, infidel, or usurper of the Crown... That then every such person and persons so offending in any the premises after the said first day of February, their aiders, counselors, consenters, and abettors, being thereof lawfully convicted according to the laws and customs of this Realm, *shall be adjudged traitors; and that every such offence* in any the premises that shall be committed or done after the said first day of February, *shall be reputed, accepted, and adjudged high treason*, and the offenders therein, and their aiders, consenters, counselors, and abettors, being lawfully convicted of any such offence as is aforesaid, *shall have and suffer such pains of death and other penalties as is limited and accustomed in cases of high treason...*⁶³

Because of the significance of this statute in the prosecution of Thomas More, I will offer a detailed explanation of its substance in the third section of this article. However, it is important to note here that prior to the enactment of this statute, deeds were essential for prosecuting cases alleging the commission of high treason; however, with this 1534 legislation, spoken words alone became actionable in a prosecution of this crime.⁶⁴

E. Other Legislation

Although not having a direct bearing on Thomas More, additional legislation was enacted by Parliament ensuring that the royal plans surrounding “the King’s great matter” would be followed, if not enthusiastically, then, at least out of sheer obedience. While not having the same widespread profile as the statute requiring the oath, Parliament in short order also enacted legislation mandating the payment of “first fruits” [i.e., first of annual incomes] by those in

⁶³ Italics added and highlight the elements allegedly violated by Thomas More. *See also*, THOMAS MORE’S TRIAL BY JURY, *supra*, note 16, at 176-7.

⁶⁴ *See*, Thornley, *supra*, note 20, at 109.

ecclesiastical office or positions.⁶⁵ Traditionally these payments were sent to Rome or to ecclesiastical officials in England. However, this legislation arrested the payments to Rome and redirected them to the Crown. Once the legislation went into effect, the payments would be made for the support, maintenance, and defense of the “royal estate” of the king. The effect of this statute confirmed that the Crown, not the pope, was in charge of matters ecclesial as well as temporal, and it worked in tandem with the *Act of Supremacy*. Unlike the statutes address so far, this one went on for several pages detailing who or which offices were responsible for paying “first fruits.”

Not only would this legislation have an impact on those holding high church office, but it would also affect those who held academic posts (since members of the clergy were the predominant holders of academic posts at Oxford and Cambridge). It was clear that this law would not only provide the Crown with a new source of income, but it would also divert payments to Rome and keep this wealth within England, which would have otherwise gone abroad to Rome, for the use of the king or for the purposes to which the Crown would direct them. This statute would clearly have an impact on the coffers of the universal Church in Rome, a matter about which the king and his complacent Parliament were surely aware. At this stage, I will now consider the language of the two principal statutes addressing Sir Thomas More (i.e., those named in his indictment: the *Act of Supremacy* and the *Act of High Treason*, which imposed the death penalty of hanging, drawing, and quartering⁶⁶) and propose reasonable and objective constructions of their words and syntax.

⁶⁵ Statutes of the Realm, 26 Hen.VIII c. III, *An Act Concerning the Payment of First Fruits of all Dignities, Benefices, etc.* (1534).

⁶⁶ It is uncertain when the king did so, but prior to the executions of Cardinal Fisher and Sir Thomas More, King Henry commanded that both be beheaded only thereby sparing them of the ignominy and the torture of the standard death sentence for those convicted of high treason. See, Reynolds, *THE LIFE AND DEATH OF ST. THOMAS MORE*, *supra*, note 43, at 376.

III. The Language of the Statutes Named in More's Indictment and Their Reasonable Constructions

A. Background

I now turn to a more detailed consideration of the two statutes named in the indictment of Thomas More (*viz.*, the *Act of Supremacy* and the *Act of High Treason*) and offer what I suggest is an objective interpretation of these based on the plain meaning of their words,⁶⁷ the underlying intent, and the intended purpose as accurately presented by the words used. As these were the texts that led to the conviction and execution of Thomas More, they merit a close reading and an dispassionate interpretation. A basic question concerns whether More violated these statutes by running afoul of their intent and purpose as determined and defined by the words employed in the text. The language chosen by anyone, including Parliament, typically indicates something about the drafters' intention, i.e., the thinking that undergirds the language that is selected and the objectives toward which the chosen language is directed. In the context of More's prosecution, the objective was to obtain, voluntarily or otherwise through a variety of pressures,⁶⁸ compliance with the king's will by some kind of public agreement or approval concerning his marital state, his claimed supremacy as head of the Church, the line of succession, and the break with Rome. However, it is the texts themselves which are determinative rather than possible meanings which could have been conveyed by the use of specific language. For example, if a legislature deems it unlawful to kill another person, it can specify this with different formulations that essentially mean the same thing. Consequently, the legislature can

⁶⁷ See, *supra*, note 17.

⁶⁸ By "otherwise" I mean the application of pressure, such as duress or threats, that inclines a person to the conclusion that it would be best to do what the civil authority, i.e., the state, desires, suggests, or outright commands.

simply state that “it is a criminal offense punishable by the law to kill another person.” As this language makes no exception for self-defense, the legislature could reformulate by stating that “it is a criminal offense punishable by the law to kill another person unless the killing is done in self-defense.” Another option would be for the legislature to state that “it is a criminal offense punishable by the law to kill another person unless it is absolutely necessary to do so in self-defense.” While the tenor of the second and third examples are similar, interpreters could be expected to argue over the presence and absence of the phrase “absolutely necessary” and this phrase’s impact on the meaning of the law. Once again we see that words that are ultimately used in legislation mean something.

While English law has held onto an interpretative methodology that largely focuses on the words of the text,⁶⁹ there was movement as early as the late sixteenth century during the reign of Elizabeth I when the English courts were prepared to explore more deeply into the intention and the objectives of the legislation being reviewed by the court. For example, in *Heydon’s Case*⁷⁰ of 1584, the court developed the so-called “mischief rule” for interpreting

⁶⁹ But see, *Pepper v. Hart* [1993] AC 573 modifying the “exclusionary rule” stating that legislative reports of Parliament could not be considered by courts when construing statutes; see also, Johan Steyn, *Pepper v. Hart: A Re-examination*, 21 OXFORD J. L. STUDIES 59 (2001), questioning that review of legislators remarks can provide insight into legislative intention and arguing the case for less reliance on these remarks in order to avoid constitution objections; Scott C. Styles, *The Rule of Parliament: Statutory Interpretation after Pepper v. Hart*, 14 OXFORD J. L. STUDIES 151 (1994), suggesting that most statements are made by Government ministers and therefore reflect the executive opinion rather than the legislature’s opinion; the author further suggests that this would unduly influence judges to see the executive perspective but not necessarily that of general members of Parliament; moreover, the author expresses concern that too much reliance on these statements would make judges “mere reflecting mirrors” and thus argues the case for judicial independence and the preservation of the duty of the courts to determine the meaning of the legislation.

⁷⁰ 76 ER 637 (1584). As the court stated in pertinent part, “And it was resolved by them, that for the sure and true interpretation of all statutes in general [be they penal or beneficial, restrictive or enlarging of the common law,] four things are to be discerned and considered: 1st. What was the common law before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd What remedy the Parliament bath resolved and appointed to cure the disease of the commonwealth. And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo* [for private or personal gain], and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono public* [for the public welfare or good].

statutes.⁷¹ Although it had not yet been decided at the time of More's trial, *Heydon's Case* provides a pertinent insight into background investigation of statutes passed by Parliament when their meaning and application have a great impact on the commonweal. While statutes were by no means uncommon during the Tudor reign as I have already demonstrated, the common law was still largely viewed as the nucleus of the English legal system. Thus, the *Heydon's Case* court raised as its first point in statutory construction the need to know what was the principle in the common law before the statute was enacted addressing this item. In essence, this element of the *Heydon's Case* decision presents the issue of what was the previous law on point and what did it say. The second element presented by the court necessitates the investigation of what mischief did the previous law dealing with the subject matter fail to take stock of, or to put it another way, what was the defect of the common law which failed to give an answer to or otherwise satisfactorily address and remedy the matters to which Parliament responded? The third point is this: what remedy did the legislation provide in order to address the lacuna in the common law? In the context of the statutes dealing with "the King's great matter," the remedies of the legislation enacted by Henry's Parliament were designed to compel in public fashion compliance with the king's will, a royal will that was in conflict with the *Act of Treason of 1351*⁷² and the *Magna Carta*.⁷³ The final matter raised by the *Heydon's Case* court, which is strongly related to the third point, presents a provocative question: what is the true reason for the legislative remedy? In other words, what were the motivation and justification for making this law. These points offer additional tools for investigating the meaning of the words of the statute

⁷¹ The case was decided in 1584 during the reign of Henry's second daughter, Elizabeth I (1558-1603).

⁷² See, *supra*, note 20 and the discussion of the first Parliamentary statute enacted on the subject of high treason.

⁷³ See, *supra*, note 60 and the discussion of the *Magna Carta*'s recognition of the freedom of the Church from control by the king.

and the intention and objectives that undergird the words selected so that a more accurate interpretation of the statute can be achieved.

In fine given the background of *Heydon's Case*, the interpreter must consider carefully the text promulgated by the legislature and ask the most fundamental question not formally raised but implied by the court in *Heydon's Case*: what do these words mean in their ordinary or general application so that they fairly apprise the king's subjects of their duties to their sovereign given the context that the law has changed as a result of this statute? Being satisfied that there is something beyond the plain or ordinary meaning of the language of the statute raises a crucial concern that legislation is supposed to be understood by the ordinary person who is put on general notice regarding the meaning, i.e., the application, of the law to each person.⁷⁴ In other words, fair notice of the law's obligations and requirements is in order due to the fact that statutes in the Anglo-American tradition have a general application and most if not all those subject to law are required to observe. With these considerations in mind, I now turn to the first statute mentioned in More's indictment, the *Act of Supremacy*.

B. *The Act of Supremacy*

As I turn to the first statute named in the indictment, a question presented by *Heydon's Case* surfaces: what mischief did the prior law not address thereby necessitating Parliament to enact this statute dealing with the king's title? On its face, the statute did something never addressed by the common law, or for that matter earlier legislation: an act of Parliament

⁷⁴ H. L. A. Hart developed this point in Chapter VII, "Formalism and Rule-Scepticism," of his major work *THE CONCEPT OF LAW*, (Oxford University Press: Oxford, 1961), wherein he develops a rule of general application regarding the exclusion of motor vehicles, but demonstrates how the average person must assess certain factors to determine the applicability of the statute to the specific case and deal with the ambiguity ("open texture") of the language used. Justice Holmes had this to say about general application and notice, "it is reasonable that a fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear." *McBoyle v. United States*, 283 U.S. 25 at 27 (1931).

recognized—it did *not* make—the king to be the Supreme Head of the Church in England. By this acknowledgment, King Henry was substituted for the pope; however, this was contrary to the previous royal declaration regarding the freedom of the Church from the temporal authorities as express with abundant clarity in the *Magna Carta*.⁷⁵ So if the *Magna Carta* had been the state of English law in past (and it was to some degree although a law that would trump legislation enacted by Parliament⁷⁶), what mischief was the *Act of Supremacy* designed to address that was not in the earlier law? As the *Act of Supremacy*’s fundamental objective deals with the recognition of the temporal sovereign as the head of the church in England by an act of Parliament, was this legislation an appropriate solution to some unaddressed “mischief”? In short, was there a mischief necessitating a legislative response? It would seem that there was no problem on this matter for centuries, that is, the intra-ecclesial establishment of papal authority was not of a concern to England, her people, or her sovereign. This point is all the more evident when one considers the state of affairs earlier in the reign of Henry VIII. Specifically in 1521, Henry himself had acknowledged the role of Rome and the pope in his work *In Defense of the Seven Sacraments* and in his correspondence with Pope Leo X.⁷⁷ What mischief had then

⁷⁵ See, *supra*, note 60.

⁷⁶ *Id.*

⁷⁷ See, *supra*, note 18 and accompanying text. This is how Henry expressed the role of Rome and the Pope in his May 21, 1521 letter to Pope Leo X: “Most Holy Father, I most humbly commend myself to you, and devoutly kiss your blessed feet. Whereas we believe that no duty is more incumbent of a Catholic sovereign than to preserve and increase the Christian faith and religion...[herein follows a condemnation of Luther]... we were so deeply grieved at this heinous crime of the German nation..., and for the sake of the Holy Apostolic See, that we bent all our thoughts and energies on uprooting in every possible way, this cockle, this heresy from the Lord’s flock... But convinced that, in our zeal for the Catholic faith and our devotion to the Apostolic See, we had not yet done enough, we determined to show by our writings our attitude towards Luther and our opinion of his vile books; to manifest more openly to all the world that we shall ever defend and uphold, not only by force of arms but by the resources of our intelligence and our services as Christian, the Holy Roman Church.” See, *supra*, note 16, *Defence of the Seven Sacraments*, at 152, 154. In the Epistle Dedicatory of Henry’s book, the king said this: “We have meditated therein; that, under Your Protection, who are Christ’s Vicar upon Earth, it may pass the public Censure... Whether or no any Thing is effectually done in this, shall rest to Your Holiness’s Judgment: If We have erred in any Thing, We offer it to be corrected as may please Your Holiness.” *Id.*, at 182, 184. Chapter II of the king’s book was on the papacy, and it condemned and countered Luther’s views by stating: “For he [Luther] cannot deny, but that all the Faithful honour and acknowledge the sacred Roman See for their Mother and Supreme, nor does Distance of Place or Dangers in the

emerged between 1521 and 1534 was not identified with any helpful specificity in the legislation of 1534.

The “mischief,” if there were any, resided in the fact that the king wanted to “change his woman” by divorcing Queen Catherine so that he could marry Anne Boleyn.⁷⁸ The king was familiar with papal dispensations which allowed him to marry his brother Arthur’s widow, Catherine, in the first place. But if he could not get a second dispensation from Rome to undo the first dispensation, he would merely avoid the inconvenience of going to the former ecclesiastical authority by declaring that he as the sovereign, i.e., the temporal authority, was now the only essential ecclesiastical authority who was supreme head of the Church in England and could thus determine whether he was married in the eyes of God and the Church or not. Previously in his 1521 book on the seven sacraments, the king acknowledged that the pope was Peter, i.e., the head of the Church and the Vicar of Christ, rather than the temporal sovereign, the king.⁷⁹ So if the existing head of the Church was unable or unwilling to comply with satisfying the “mischief” that Henry had identified, the Parliament would turn against Rome and recognize that the king possessed the means to exercise the mechanisms he needed, *viz.*, a dispensation of some kind—a divorce—to marry Anne Boleyn. With the sympathetic assistance of Parliament, the king became, by a statement of recognition rather than an enactment of making, the competent authority who now held the exclusive power to dissolve his marriage of twenty-some years.⁸⁰

Way hinder Access thereunto. For if those who come hither from the Indies tell us Truth, the Indians themselves... do submit to the See of Rome... Truly, if any will look upon antient Monuments, or read the Histories of former Times, he may easily find, that since the Conversion of the World, all Churches in the Christian World have been obedient to the See of Rome.” *Id.*, at 202, 204.

⁷⁸ The “wanting to change his woman” language refers to a line attributed to Thomas Cromwell in the Bolt screenplay for “A Man for All Seasons,” *supra*, note 15.

⁷⁹ *See, supra*, note 18.

⁸⁰ The pertinent Parliamentary language asserted that, “the king’s majesty justly and rightfully is and oweth to be the supreme head of the Church of England, and so is recognized by the clergy of this realm in their convocations... should be taken, accepted, and reputed the only supreme head in earth of the Church of England...”

When Henry needed help from the pope, he was not shy to ask for this assistance as he did when he chose to marry Catherine of Aragon, his late brother's widow, and when it was thought that a papal dispensation was needed to do so. Unmistakably these actions demonstrated the king's acknowledgment that the pope was Peter and that the temporal sovereign, Henry, was not. These activities and earlier acknowledgements of the king supply probative evidence that the pope rather than King Henry was the head of the Church. But when Henry's temporal and personal interests began to wander and expand from his earlier position regarding the authority of Rome, and when he could not get Rome's consent regarding the dissolution of his marriage to Catherine in a timely fashion that comported with his schedule, he took matters into his own hands and produced an artificial "mischief" mandating legislative action. So with the help of Parliament, he declared himself the competent authority which had the exclusive power to dissolve his marriage of twenty-some years and declare it invalid. But was this situation in accordance with *Heydon's Case* a mischief requiring a Parliamentary response?

While most interpreters would likely be open to considering the circumstances militating a sensible change that would necessitate legislation to further the common good,⁸¹ there is no substantive justification offered as to why the supreme authority of the Church should be divested from the spiritual authority and transferred to the temporal one. After all, the king was married to Queen Catherine and he had an heir, the Princess Mary, who, as it would turn out, would become the first Queen of England. If there were some mischief that that was not addressed by the earlier law, it is unclear what it was. The threat of dynastic wars that Henry feared did not materialize when two women—ironically Henry's daughters by different women—became queen. Mary Tudor who became Mary I reigned for five years, and her half-

⁸¹ For an interesting take on this point, see, Andrew Beck, "The Common Good in Law and Legislation," in *THE KING'S GOOD SERVANT: PAPERS READ TO THE THOMAS MORE SOCIETY OF LONDON*, (The Newman Press: Westminster, 1948), at 71-82.

sister Elizabeth I reigned for forty-five years. In both cases, neither queen had to contend with dynastic wars. The lack of specificity about what was the mischief prompts the question: was there a mischief in the first place that required a response by the legislature, or was there some other catalyst other than a “mischief” that prompted the legislation used to condemn Thomas More? This question becomes all the more poignant when one considers the fact that Parliament did not make the king Supreme Head; rather it merely corroborated, confirmed, or recognized this dubious claim without specifying any competent authority for doing so as I have already mentioned. The justification for altering the law is, in fact, nonexistence. There was no mischief that the new law was designed to combat. What was offered for the validation of changing the law was a bold assertion and nothing more. While there were corroborations offered by many of the clergy in England (who undoubtedly considered the alternatives they would face by denying the king⁸²), it is clear that the ultimate cleric, the pope, was not one of them who shared in the false claim.

Given the fact that this legislation further empowered the king to wipe out all “errors, heresies, abuses, offences, contempts, and enormities whatsoever they be” and knowing that he had a great deal of enforcement mechanisms at his disposal to obtain compliance with statutes whose validity was questionable, the interpreter can straightaway conclude that clergy who recognized in their convocations and attested to this title did not have much choice because any disagreement with the king’s wish, as subtle and respectful as it might be, would be met with the enforcement power of the state. This was evident from Henry’s extortion from the clergy made

⁸² One concrete example of how the king could instill fear was through the application of the praemunire legislation enacted by Henry’s Parliament. In short, this method of extortion would enable the clergy to avoid the wrath of the king but at an expensive price. See, J. A. Guy, “Henry VIII and the Praemunire Manoeuvres of 1530-1531,” *The English Historical Review*, Vol. 97, No. 384 (July 1982), at 481-503. See also, chapter xix in E. E. Reynolds, *supra*, note 16.

possible by the *praemunire* legislation.⁸³ Moreover, as the self-made head of the Church in England, the king now possessed the means to discipline any cleric who disagreed with him on anything.⁸⁴ It was patent that any recourse against this legislation by appeal to Rome, which would have been the traditional means of challenging actions against the Church, would be met harshly by the king and most likely with great force. Henry now had the political authority to arrest anyone from resorting to “any usage, custom, foreign laws, foreign authority, prescription, or any other thing or things to the contrary hereof notwithstanding.” Should any cleric be inclined to pursue the traditional grievance mechanism that would involve Rome, he would be confronted by the force generated by the legislation. In short, the king, through Parliament’s legislation, indicated that the due process of the past, *viz.*, appeals to Rome on ecclesiastical matters, would be countered by the state which Henry directed with Parliament’s assistance.

From Thomas More’s perspective, the most problematic element of the legislation was the recognition of a layman, in this case the king, as the head of the Church in England. However, the *Act of Supremacy* had no stated means of enforcing its terms, but this problem was only temporary as further legislation would remedy this. The nature of the enforcement for the *Act of Supremacy* against More was contained in the second statute of the indictment, namely the *Act of High Treason* to which I now turn.

C. *The Act of High Treason*

This statute provided the enforcement muscle to implement the king’s objectives contained in the *Act of Supremacy*. The *Act of High Treason* consequently requires careful linguistic analysis. While it is a relatively long statute, there are only a few elements that

⁸³ See, Scarisbrick, *supra*, note 27, at 235, 273-75, 278, 296-97.

⁸⁴ *Id.*

pertained to cases like the former Lord Chancellor's. More was aware of this, but he realized, nevertheless, that he had to study carefully the intricacies of the legislation in order to avoid the lethal traps which it contained. Evidently he did this with great astuteness. But even his legal aptitude could not protect him from the tyrant king whose goals were to be attained regardless of the law. Through his careful review of the text, More understood how these complexities could apply to him and to his fellow countrymen if the law's provisions were not carefully observed. In the context of these two statutes that would unnaturally hasten More's death, he acknowledged that it was important to read prudently and precisely their texts of the statute in a letter to his daughter, Margaret, so that he and everyone else could comprehend their impact as to which words and deeds of the king's subjects would or could be criminalized.⁸⁵ Depending on what words were used and how they are to be understood, it could be possible for a person faithful to God, the Church, and the king to comply. But after reading the substance of the statutes, More subsequently acknowledged that he could neither agree with the king's new title nor publicly declare so as many others were willing to do.⁸⁶

However, he devised a way out of his predicament—saying nothing and doing nothing pertaining to “the King's great matter”—that would not trigger the *Act of High Treason's* firing pin. Thus, if he were to remain silent and say nothing publicly about the content of the *Act of Supremacy*, he thought he would avoid the triggering mechanism for the application of the *Act of High Treason*, but, as will be seen, the prosecutorial action that was formed by pressure from the king would be satisfied with nothing less than conviction regardless of whether the statute's

⁸⁵ In his April 17, 1534 letter to his daughter Margaret written after his imprisonment in the Tower, More discussed his recent interrogation about the *Act of Succession* and the oath, and he informed her that he “desired the sight of the oath” and then “the sight of the Act of Succession.” He then read them but once he found the need to concur with the marriage to Anne Boleyn and the stripping of the authority of Rome, he could not take the oath. See, letter 63, in *FOR ALL SEASONS: SELECTED LETTERS OF THOMAS MORE*, editor Stephen Smith, (Scepter Publishers: New York, 2012), at 224-8.

⁸⁶ *Id.*

provisions were violated or not. But this plan of the Crown was in conflict with the most objective reading of the statute. I now turn to consideration of the legislation's wording.

The first element of the *Act of High Treason* made it an offense to “maliciously” wish, will, or desire—either by words [i.e., oral communications] or writing, craft, imagination, invention, practice, or attempt—any bodily harm on the king, Anne Boleyn, or their issue. Although this is a critical element of the statute, I have already demonstrated why this portion did not apply to the prosecution of Thomas More because he did nothing in word or deed that would lead to or result in the bodily harm of the king, his new wife, or their children. In addition, there is nothing in the record of his case which indicates that the former Lord Chancellor was being prosecuted for planning or executing something that would bring physical harm to the king and his family. Even the despotic Henry and his allies realized this. As the record of More's tribulations indicated, he prayed for the king's welfare until the end of his earthly life, and this activity would not be that of a person who wished harm upon the king, Anne Boleyn, or their children.⁸⁷

If the authorities were interested in manufacturing an admission that More did intend in some way such harm, they could have used force or duress or torture to obtain the information that was needed. However, the use of torture was something that was technically forbidden by the law. These methods, especially the rack (initially referred to as the Duke of Exeter's Daughter⁸⁸), were thought to be a means for the state to find out information but not for the law to use in the exercise of due process. Of course, this disagreement between politics and the law

⁸⁷ Evidence of More's sentiments, of which the authorities likely would have had knowledge, was contained in his May 2 or 3, 1535 letter, to his daughter, Margaret, Letter 77, in *FOR ALL SEASONS: SELECTED LETTERS OF THOMAS MORE*, *supra*, note 86, at 288, “I am, said I, I am (quoth I) the King's true faithful subject and daily bedesman, and pray for his highness and all the realm. I do nobody no harm, I say none harm, I think none harm, but wish everybody good. And if this be not enough to keep a man alive, in good faith I long not to live.”

⁸⁸ Named thus because at one time John Holland, the Duke of Exeter, was the constable of the Tower when the torture rack was first installed and likely used in 1447.

did not prevent the use of torture for whatever reasons were convenient to the state. Some years later, Blackstone concluded that its use was a means unfit for both as its use was contrary to the laws of England.⁸⁹ In the final analysis, this method of duress was not imposed on either More. However, it is clear that he faced harassment in a variety of forms that we designed to submit him into compliance with the king's desire regarding his new title and acceptance of his new wife. The attainder legislation that was the cause for imprisonment and confiscation of property illustrates this point.⁹⁰

It was the second action/deed element of the *Act of High Treason* that clearly had a bearing on the case against Thomas More, and it was the basis of his being tried for high treason. This element of the statute could make a person a candidate for high treason for engaging in those steps and actions which would *maliciously* by “wish, will, or desire by words or writing, or by craft, etc.” deprive the king, Anne Boleyn, or their children “of the dignity, title, or name of their royal estates.” The application of this provision to the case of Thomas More was that he maliciously deprived the king of his title as Supreme Head of the Church in England. Two questions now present themselves: (1) did Thomas More do or say anything that deprived the king of his title?; and, (2) did he do this maliciously?

The definition of “malice” will be considered first as it is the root word upon which “maliciously” is based. The root word focuses on the intention or desire or attitude of a person to accomplish evil, especially by causing injury to another person. Another way of understanding the word's meaning is to perceive in the actor an ill will or hatred by the actor toward another. This would have an important bearing on More's case if there were some evidence indicating his

⁸⁹ William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Volume IV (Of Public Wrongs), facsimile edition, (University of Chicago Press: Chicago, 1979), at 320-21.

⁹⁰ See, *supra*, note 16, THOMAS MORE'S TRIAL BY JURY, Guildhall Report, section 1(b), at 186.

intention to deprive the king of his title as Supreme Head of the Church due to ill will or hatred. But More said nothing and did nothing based on such intent. So let us look further at what the word can mean. Malice also meant in Tudor times a kind of wickedness or possessing a bad intention. Malice was also understood as a harmful or dangerous quality. It could also mean being full of hate, spite, or poisonous attitude or disposition. In the English law of the time of Henry, malice was also considered to be the necessary state of mind of a person to be liable under the law for certain harms suffered by another. Thus, a person or an act would be considered malicious if there were a demonstration that the person and his intent were addicted to sentiments or acts of ill will or hatred or hostility toward another person. Its meaning would also be synonymous with being warlike or fierce, wicked or sinful, poisonous, malignant, dangerous, or harmful. The person or the act could also be malicious if it were disposed to evil. There was also an understanding that malicious could mean that the person's thought or deed was clever or artful—but directed toward an evil or a wicked outcome. For someone or something to be labeled malicious, the person or other thing could be malignant, virulent, or harmful.

Hence, the deed or the thought or the expression of opinion that is done maliciously would essentially be wickedly or sinfully or pursued with ill will in mind. Especially with regard to actions, the action would be maliciously done if done fiercely or violently or with fierceness and hatred in mind. These would have been the meanings of the words malice, malicious, and maliciously during the reign of Henry VIII.⁹¹ With these understandings of the word's meaning in place, the question is whether More did or said anything maliciously?

⁹¹ The sources of these definitions come from the Oxford English Dictionary focusing on the definitions of these terms that were in use from the fourteenth century to the reign of Mary Tudor.

As it turns out, his indictment relied on two matters that appear not to be covered by the language of this statute: his silence and his use of the “two-edged sword” remark. But as it turned out, neither was done maliciously nor were they the sorts of things addressed by the *Act of High Treason*. The question now becomes what did the law say, if anything, about silence and the expression actually used by More. I will turn to this inquiry in the subsequent fourth section, but I must first look at one other element of the *Act of Treason* that might have a bearing on More’s prosecution.

The third element addressed in the acts was directed toward the slanderously *and* maliciously [i.e., wickedly, sinfully, in a spirit of ill will, mischievously, violently, or fiercely]⁹² publishing and pronouncing—by express writing or words [i.e., speech, utterance, verbal expression, anything said at all, something said about another person, rumor, gossip, arguing, quarrelling, verbal altercation, expression of an idea or concept]—that the king was a heretic, schismatic, tyrant, infidel, or usurper of the Crown. By breaking with Rome, the king was at a minimum a schismatic. There is little to suggest that the inclination toward Protestant theology and beliefs did not occur until the reign of Edward VI; however, if Henry were inclined to change these beliefs, for example the nature and number of the sacraments, he might have also been viewed as a heretic. Thus calling him in some fashion one of these derogatory names would have activated this part of the *Act of High Treason* as well. Although he undoubtedly had grave concerns about Henry’s threatened and ultimate break—schism—with Rome, Sir Thomas More did not disclose his thoughts on the matter in any fashion. By breaking with Rome, Henry in fact earned the title of schismatic by his own deeds. So in this sense it would not have been productive for the prosecution to have brought up the issue of the king’s being called a

⁹² This key word’s meaning has already been addressed at some length; however, I have inserted within the brackets a condensed version of the earlier discussion about the meaning of “maliciously.”

schismatic. But More did nothing and said nothing that could be construed as his calling the king any of these derogatory names that were punishable as acts of high treason. Denying the title of Supreme Head of the Church would prove to be sufficient for the prosecution.

The fourth and fifth elements of the *Act of High Treason* could not have been addressed in More's prosecution (and were not) because there was no evidence or suggestion that he in any fashion rebelliously detained or interfered with those properties of the king or those instruments of war and defense that are catalogued in these elements of the statute. Indeed, this segment of the *Act of High Treason* was geared to acts of violence and rebellion in which case the accused's actions were designed to deny the king his means of making war and defending himself and the country.⁹³

Since it was the *Act of High Treason* working in tandem with the title given to the king by the *Act of Supremacy*, Thomas More's fate as a traitor could lead to conviction if More had deprived the king of his self-assumed title: Supreme Head of the Church of England. The fundamental issue here is whether More in fact deprived the king of his title by some declaration that Henry could not be the Supreme Head of the Church in England and did he do so maliciously?⁹⁴ This question can be addressed now by considering the record of the indictments and interrogations of and additional evidence presented at More's trial.

IV. Was the Conviction of Sir Thomas More Supported by the Language, Intent, and Lawful Objectives of the Applicable Statutes?

⁹³ See, Thornley, *supra* note 20, at 106. As she stated, "The clause as to detaining royal castles or munitions of war was useful as a check on attempted rebellion, and it made the law more stringent than it had previously been by making a bare detainer treason; previously, forcible resistance had been necessary to constitute the offense."

⁹⁴ See, Section 4 of the indictment, in THOMAS MORE'S TRIAL BY JURY, *supra*, note 16, at 178.

The present task is now to assess whether the meanings of the key words of the *Act of Supremacy* and the *Act of High Treason* as explained in the previous sections were violated by More in the light of the evidence mustered and the objective explanation of the statutes' provisions. In this regard, reliance on the indictment's language and the statements given by More, the Tower staff who oversaw the prisoner, and others who provided testimony will need to be considered. Let me now turn to the language of the indictment.

In Sections 2 and 3 of the indictment, the two statutes just discussed are prominently listed and relied upon in the prosecution of the former Lord Chancellor.⁹⁵ The language of the indictments concentrated on the issue regarding More's denying that the king was the "sole Supreme Head on earth of the English Church."⁹⁶ This charge was based on the allegation that Thomas More's words and deeds deprived the king of his ecclesiastical title which would be an actionable offense covered by the plain meaning of the *Act of High Treason* as read in conjunction with the *Act of Supremacy*. The next segment of the indictment focused on the particular language of the *Act of High Treason* that is relevant: if a person "should maliciously choose, wish, or desire, by words or writing, or by craft... to deprive them [i.e., the king, Anne Boleyn, or their lawful heirs] or any of them of dignity, title or name of their royal condition," this person should be adjudged traitor.

The next section of the indictment, Section 4, is crucially related to the previous point, for it was asserted that on May 7, 1535, that More, "seduced by diabolical instigation," "maliciously attempted to deprive King Henry of his title of Supreme Head [of the Church]" before Thomas Cromwell and other persons when "he [More] maliciously remained silent and refused to give a

⁹⁵ *Id.*, at 176-77.

⁹⁶ *Id.*, at 176-85.

direct answer.”⁹⁷ If this were the case, what was it that More said or did which would support the conclusion that he offered some word or made some deed that deprived the king of his title as conferred by the *Act of Supremacy* when he said nothing and all that he did was nothing? As it turns out, neither act nor word (oral or written) was actually mentioned and identified in the indictment’s text that would correspond with and trigger the provisions of the *Act of Treason*. The “words” and “acts” which are ultimately relied upon by the prosecution were More’s failure to say anything about the king, particularly about his title as head of the Church. Although the language of the statute in both sixteenth century and twenty-first century English is straightforward, one is hard pressed to see how the silence of More constituted, in fact, an oral or written expression intended to deprive the king’s title of Supreme Head of the Church in England.⁹⁸

More’s silence, and only his silence, was the means by which the Tudor officials argued that the former Lord Chancellor “deprive[d] the said serene lord our king of a dignity, title, and name of his royal condition, namely... Supreme Head on earth of the English Church.”⁹⁹ It was only his silence, and nothing else, that was listed in the indictment. No words, be they written or orally express, were cited or quoted. As the language of the indictment unambiguously stated, the only manner in which Thomas More “offended” the statute was by the fact that he “maliciously remained completely silent and refused to give a direct response to that question.”¹⁰⁰ This is not a deed and silence is not words; rather, it is the absence of a deed or words. During this period of More’s prosecution, the word “silence” meant, as it does today, the

⁹⁷ *Id.*, at 178-79.

⁹⁸ The indictment specified that it was More’s silence that constituted the treasonable offense, for as it stated, “seduced by diabolical instigation, maliciously attempted to deprive King Henry of his title of Supreme Head when... he maliciously remained silent and refused to give direct answer.” *Id.*, at 178.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

fact of not speaking; a refraining from speech; an omission of words by speech; or, an omission to write something. In essence, there were no deeds or words, direct or indirect, in which More could have been said to deprived the king of his title.

There were, however, some words attributed to More, which he did not deny, that were used to reinforce the silence theory relied upon by the prosecution: “I will not meddle with any such matters, for I am fully determined to serve God and to think upon His Passion and my passage out of this world.”¹⁰¹ But these were not words of deprivation of the king’s title; rather, they were a refraining from stating or making any words about the king’s title. Moreover, these words do not conform to the requirements of the *Act of Supremacy* or the *Act of High Treason* that could be interpreted as a deprivation of the king of his title as Supreme Head of the Church in England. In addition, there was nothing malicious about his statement as he expressed the view that he was preparing to meet his Maker. The meaning of the words used by More suggest nothing about the king’s title; conversely, they distinctly present the sentiments of a man who was no longer concerned with the events of his world. He was preparing for his earthly end (be it natural or artificially hastened) and for the encounter with his Creator. This was all that he said, and these are the only sentiments he conveyed which had nothing to do with Henry’s person or status.

It is incomprehensible to conclude how his silence or the words “I will not meddle with any such matter” came within the ambit of the words of the statute and thereby constituted an offense of the language of the *Act of High Treason* as incorporating the *Act of Supremacy*.¹⁰² There was no offense contained in these words because they did nothing, conveyed nothing, nor

¹⁰¹ *Id.*, at 178-79.

¹⁰² In the Guildhall Report of Thomas More’s trial, his silence was characterized by the language, “I wished to answer nothing.” Section 2(b) *See*, THOMAS MORE’S TRIAL BY JURY, *supra*, note 16, at 188.

did anything that would deny anyone including the king of his name or title as Supreme Head of the Church. Any sentiment which More uttered by these words was neutral regarding the king's title, and consequently they were ineffective to make the case that he had done something forbidden by the *Act of High Treason* and the *Act of Supremacy*, i.e., depriving the king of his title.

Furthermore, this statement was vacuous of any effort to construe his attitude about the king's claim to be anything, including the head of the Church. During his trial, the former Lord Chancellor noted quite correctly that the language of the statute did not cover silence but concerned only words and deeds.¹⁰³ Even though his body was weakened by his extended imprisonment, his keen legal mind still functioned well enough to make this critical distinction regarding statutory language and its construction. Unfortunately, this crucial distinction made no substantive impact on the legal system of a tyrannical state.

Nonetheless, further elements of the indictment need to be studied to be sure that there is nothing else to consider regarding how More allegedly ran afoul of the words of the legislation and committed high treason as defined in the *Act of High Treason*. The fifth section of More's indictment¹⁰⁴ thinly contended that there were written words betraying More's mind and therefore constituted "word and deed" that offended the statute's coverage pertaining to the king's title of Supreme Head of the Church. As the indictment stated, "More maliciously wrote to Bishop John Fisher telling the cardinal of his own silence and calling the legislation a two-edged sword."¹⁰⁵ But these were words of an astute lawyer explaining the effect of a law rather than an expression of his opinion about the king's title. It appeared that Fisher and More did

¹⁰³ Guildhall Report Section 2(c), *Id.* More continued by asserting that the law made "no penalty for silence." *Id.*

¹⁰⁴ See, section 5 of the indictment, THOMAS MORE'S TRIAL BY JURY, *supra*, note 16, at 179-80.

¹⁰⁵ *Id.*

communicate in writing with one another after their respective imprisonments in the Tower.¹⁰⁶ In their exchange of notes (none of which survive), the subject matter of the statutes was purportedly discussed hypothetically and was considered to be like a two-edged sword: if a person did one thing in accordance with the statute, he would condemn his soul to hell; but, if a person did the opposite, i.e., he did nothing, then he would be condemned to die a premature death. But nothing was said about the king and his title.

In short, the “two-edged sword” analogy was the Catch—22 of this period in Tudor history.¹⁰⁷ Even if the statement were subscribed to by Fisher and More, it is inconceivable that the wording could be construed as a denial or deprivation of the king’s title or name as Supreme Head of the Church in England. All that Thomas More said in his June 3, 1535 Tower interrogation about the *Act of Supremacy* was this: “the [statute made in the Parliament] whereby the king’s Highness was made Supreme Head... [was like a sword] with two edges, for if he said that the same law were good, then [it] was dangerous to the soul. And if he said contrary to the said statute, [then] it was death to the body. Wherefore he would make thereto none other answer.”¹⁰⁸ In fine, More said nothing to indicate his view about the statute conferring the problematic title on the king. The statement mentioning the “two-edged sword” did nothing to deprive or deny the king of his self-imposed ecclesiastical title.

The indictment characterized the two-edged sword image used by More in this way: “The act of Parliament... is like a sword with two edges, for if a man answer one way it will confound

¹⁰⁶ Most of the communication dealt with the respective good wishes for one another or other personal matters, but nothing was said about the king’s title or the *Act of Supremacy*. See, Reynolds, *THE LIFE AND DEATH OF ST. THOMAS MORE*, *supra*, note 43, at 364, and Reynolds, *SAINT JOHN FISHER*, *supra*, note 16, at 266-70, 275.

¹⁰⁷ For those unfamiliar with the expression of Joseph Heller’s novel *CATCH 22*, it is a theme he developed of a no-win situation.

¹⁰⁸ See, *THOMAS MORE’S TRIAL BY JURY*, *supra*, note 16, at 145.

his soul, and if he answer the other way it will confound his body.”¹⁰⁹ In this context, the indictment of More contended that he communicated the “two-edge sword” concept to Bishop Fisher by correspondence carried from More to Fisher by George Gold of the Tower staff. As a result of this “conspiratorial communication,”¹¹⁰ it was argued that Fisher “falsely, treasonously, and maliciously refused to receive, accept, and hold that the foresaid lord king was Supreme Head on earth of the English Church.”¹¹¹ If this were true, by what deed or word was this done? Again, the concern of this exchange was not the expression of a word or the doing of an act that was forbidden by the *Act of High Treason* and the *Act of Supremacy* as read together; rather it was about silence, yet this silence was viewed as the act of high treason.¹¹² But once again, neither the *Act of Supremacy* nor the *Act of High Treason* addressed silence. The statutes only addressed deeds or words (spoken or written) that would assert or could be construed to serve as a denial of the king’s title as Supreme Head of the Church. But no words, be they spoken or written, were used or exchanged by More and Fisher regarding the king’s title. Had the *Act of High Treason* required some kind of affirmation of the king’s title which was responded to by silence, then the construction of the statutes would be based on an objective reading leading to the only conclusion that silence was a treasonable offense if there were an affirmative duty to accept by public declaration the king’s title. However, this is not what the wording of the statute required. What the statute specified was a deprivation by words, and silence was not listed as

¹⁰⁹ See, indictment, Section 5, THOMAS MORE’S TRIAL BY JURY, *supra*, note 16, at 179-80.

¹¹⁰ *Id.*, at 180, Section 6. In this element of the indictment, it was stated that More wrote Fisher on May 26 warning the latter not to use the words dealing with the “two-edged sword” “lest there appear to be a confederacy between them.” But even if the words were adopted by Fisher, and the record suggests that they were (Section 7 of More’s indictment), these words do not fall into any category as defined by the Act of High Treason. Moreover, Fisher’s adoption of the words of the “two-edged sword” used to describe the Act of High Treason does not constitute any of the acts or deeds described by the high treason legislation. As this element of More’s indictment acknowledges, the interrogation of Fisher was responded to with nothing as he “remained completely silent and was unwilling to give a direct answer to it.” *Id.*

¹¹¹ *Id.*, section 5 of the Indictment, at 179.

¹¹² *Id.*

indictable offenses in the *Act of High Treason*—only deeds or words that would deprive the king of his title.

When questioned further about the king's title on June 3, the indictment asserted that More, once again, "maliciously persevered in his silence."¹¹³ Although it was contended by the indictment that this further inaction of silence deprived the king of a dignity, title, and name of his royal condition and generated sedition and malignity in the hearts of true subjects,¹¹⁴ neither the language of the indictment nor the statement of silence demonstrated how Thomas More's silence violated the *Act of Supremacy* as implemented by the *Act of High Treason*. In other words, the indictment failed to demonstrate how silence and the words dealing with "the two-edged sword" fall within the scope of the things prohibited by the *Act of High Treason*.

Silence is not words—written or spoken. Silence is nothing.¹¹⁵ As Shakespeare's *King Lear* reminds us, "Nothing will come of nothing. Speak again."¹¹⁶ Silence makes no statement that is words—oral or written—which maliciously, or for that matter innocently, wish or desire anything. Neither is silence an act which maliciously by craft imagines, invents, practices or attempts any bodily harm or deprives anyone of a dignity, title, or name or slanderously and maliciously publishes and pronounces that someone is a heretic, schismatic, tyrant, infidel, or

¹¹³ *Id.*, at 182, indictment, section 8.

¹¹⁴ *Id.*

¹¹⁵ *Id.*, section 9 of the indictment. To the end of the indictment, the only statement (the only words) which could be solicited from Thomas More was this: "The law and statute whereby the king is made Supreme Head...be like a sword with two edges; for, if a many say that the same laws be good, then it is dangerous to the soul; and if he say contrary to the statute, then it is death to the body. Wherefore I will make thereunto none other answer, because I will not be occasion of the shorting of my life." *Id.*

¹¹⁶ *King Lear*, Act I, Scene 1, ln. 91, Yale University Shakespeare volume. Lear is trying to get his daughter Cordelia to express her love for him. The other two daughters, Regan and Goneril, express false words of love which the Lear interprets as sincere. Cordelia knows this but cannot do the same as her sisters. Her reticence is noted by Lear who prompts her to speak as her sisters did.

usurper of the Crown.¹¹⁷ Silence is not an act; it is inaction. Furthermore, it is an abstention that communicates nothing because it is nothing. Silence is not a word, spoken or written, it is an absence of words. Silence is no expression of a wish or desire, nor is it any kind of malice dealing with actual or meditated harm to another, nor is it a deprivation of any dignity, title, or name, nor is it calling someone a hateful thing such as a heretic, schismatic, tyrant, infidel, or usurper.¹¹⁸

This brings me to a further consideration of the role of silence in the accusation against More and how the English law considered its bearing in matters of assent or consent and, therefore, guilt.¹¹⁹ The role of consent—by word or deed—must specifically be considered in the context of the two statutes that were relied upon to convict More of high treason. But if consent were not given by a person, it was erroneously assumed that the statute’s language would consider the failure to consent as a means, by word or deed, of depriving the king of his title. Yet Thomas More was correct in arguing the defense that silence did not mean disagreement with the thing proposed; rather, he argued that his silence was neither denial nor deprivation.

Under the common law of England at the time of Thomas More’s prosecution, silence had to be legally construed as a implicit means of assenting to the thing asserted by the person

¹¹⁷ Although no writing was extant in that the correspondence between More and Fisher was burned after being read, *see*, indictment section 10, THOMAS MORE’S TRIAL BY JURY, *supra*, note 16, at 183, no Tower official interrogated by the authorities involved with the prosecution of Fisher and More was able to testify what was the substance of the correspondence; therefore, the only evidence of what was contained in these letters exchanged while both More and Fisher were imprisoned would be oral evidence, but there was none. *See*, THOMAS MORE’S TRIAL BY JURY, *supra*, note 16, Interrogation of Tower Servants, June 7-11, 1535, at 150-57.

¹¹⁸ As one witness against John Fisher stated regarding their discussion in the Tower, when presented with the statute Fisher noted to the witness that there was nothing in the statute binding him to answer. *Id.*, at 152.

¹¹⁹ When the question of More’s silence was introduced at his trial, he stated, “To which I clearly respond to you that it is not lawful for me to be judged to death [i.e., to be convicted of high treason] for such silence on my part, because neither your statute nor anything in the laws of the whole world can rightly afflict anyone with punishment, unless one has committed a crime in word or deed, since laws have constituted no penalty for silence.” *See*, THOMAS MORE’S TRIAL BY JURY, *supra*, note 16, at 188, Guildhall Report, Section 2(c).

presenting the matter for which agreement or disagreement was solicited.¹²⁰ More pled the rule: *qui tacet consentire videtur*, that is, silence gives consent to the thing asserted or done.¹²¹ There was a variant of this principle within English law which stated: *qui tacet non utique fatetur, sed tamen verum est eum non negare*, that is, he who is silent does not indeed confess, but yet it is true that he does not deny.¹²²

The key to answering the questions about the legal meaning and relevance of silence lies within the fourth paragraph of More's indictment. There was an effort to make the failure to take the oath the same thing as plotting against the king, his titles, etc. But the law regarding the oath and the failure to take the oath was already disposed of in the attainder legislation relying upon the misprision of treason doctrine. It was the attainder legislation that dealt with silence by refusing to declare the oath and not the *Act of High Treason*. Thus the indictment incorrectly asserted that silence was a violation of the *Act of High Treason* because More "maliciously remained completely silent and refused to give a direct response to the question [whether he, More, accepted the king to be the Supreme Head on earth of the English Church], and he spoke these following English words, 'I will not meddle with any such matters, for I am fully determined to serve God and to think upon His Passion and my passage out of this world.'"¹²³

The *Act of High Treason* was silent about silence. In this regard, Thomas More's silence was neutral about the proposition offered by the state since it was neither word asserting

¹²⁰ *Id.*, at 189, Guildhall Report, Section 4.

¹²¹ *Id.* A similar axiom was: *qui tacet consentire videtur, ubi tractatur de eius commodo*, that is, he who is silent is considered as assenting, when his interest is at stake. Here, the interest at stake may be that the outcome of the legal proceedings would determine whether More was to be found guilty or not. If he were found guilty, he would die. Surely his interest was at stake given this context. However, in another fashion, could it be argued that More had a personal interest in whether King Henry was to be considered Supreme Head of the Church. From a purely personal standpoint, this would probably not matter too much; however, by making it necessary for subjects to assent to this assertion the temporal sovereign is the Supreme Head of the Church, it can then be said that anyone who was pressed with this would have an interest that is at stake.

¹²² These are the definitions of BLACK'S LAW DICTIONARY, 1968.

¹²³ See, section 4 of the Indictment, THOMAS MORE'S TRIAL BY JURY, *supra*, note 16, at 178.

something or deed doing something that could be considered a deprivation of the king's title. In addition, his words, "I will not meddle with any such matters," could only be regarded as a statement that he had no opinion on the matter, and therefore he could neither deny nor deprive anything that properly belonged to the king. And his non-opinion was not addressed by the language of the *Act of High Treason*, but only words and deeds maliciously depriving the king of his title were violations.

The legislation necessitated some affirmative expression or deed by the accused for a finding of high treason because the statutory text required some kind of words that had the effect of denying or depriving a title claimed by the king. As More's trial progressed, no evidence pertaining to deeds or words was presented demonstrating how deprived the king of his title as Supreme Head of the Church.¹²⁴ No evidence was produced—with the exception of Richard Rich's perjury in the trial of Thomas More (which will be addressed in a moment)—demonstrating thoughts pertaining to Parliament's competence to acknowledge the king's assumed ecclesiastical title.¹²⁵ It was reported in More's indictment that there was an exchange between More and Sir Richard Rich in the Tower on June 12, 1535.¹²⁶ Beyond pleasantries, the words between the two concerned various hypotheticals regarding the competence of Parliament to pass certain kinds of law. Now a few words are needed to dispose of allegations that More did deprive the king of his ecclesiastical title in his conversation with Rich.

Based on the objective evidence, both More and Rich were in agreement that Parliament could enact legislation making Richard Rich king of England.¹²⁷ Furthermore, both concurred

¹²⁴ See, THOMAS MORE'S TRIAL BY JURY, *supra*, note 16, at 188, Guildhall Report, Section 2 (c)

¹²⁵ *Id.*, at 184, Indictment, section 11(d).

¹²⁶ *Id.*, at 183-85, Indictment, section 11. Robert Bolt captured well this testimony in the play and screenplay for "A Man For All Seasons." See, *supra*, note 15

¹²⁷ *Id.* See also, Roper, *A Life of St. Thomas More*, *supra*, note 19, at 85-87.

that it was beyond Parliament's authority to declare that God was not God.¹²⁸ Where the two departed company was on the so-called middle case concerning the competence of Parliament to make the sovereign the Supreme Head of the Church in England.¹²⁹ But as things evolved, this middle case, *viz.* Parliament making the king the head of the Church, was not considered in that there was disagreement between More and Rich as to what constituted the "middle case."¹³⁰ According to More, what was discussed was whether Parliament had the competence to make Richard Rich pope.¹³¹ Moreover, the account of the trial given by Will Roper, the son-in-law of Thomas More, corroborated More's contention that he said nothing about the king's supremacy of the church or the Parliament's ability to legislate such a thing in the presence of Richard Rich.¹³²

In recap, it was the *Act of High Treason*, relying on the title conferred by the *Act of Supremacy*, that was the key to the prosecution of Sir Thomas More. In essence, in order to understand on what words or deeds the claimed acts of high treason rested, it was necessary to

¹²⁸ See, THOMAS MORE'S TRIAL BY JURY, *supra*, note 16, at 183-85.

¹²⁹ *Id.*

¹³⁰ This prompted More to declare after his conviction, "If this oath of yours, Mr. Rich, be true, then pray I that I may never see God in the face, which I would not say otherwise to win the whole world. In good faith, Mr. Rich, I am sorrier for your perjury than for my own peril. And you shall understand that neither I, nor no man else to my knowledge, ever took you to be a man of such credit as in any matter of importance I, or any other, would at any time vouchsafe to communicate with you." Roper's *A Life of Sir Thomas More*, *supra*, note 19, at 87. See also, Reynolds, THE LIFE AND DEATH OF ST. THOMAS MORE, *supra*, note 43, at 341-44.

¹³¹ See, Roper's *A Life of Sir Thomas More*, *supra*, note 19, at 85. See also, Reynolds, THE LIFE AND DEATH OF ST. THOMAS MORE, *supra*, note 43, at 341-44.

¹³² Roper's *A Life of Sir Thomas More*, *supra*, note 19, at 87-89. Only after he was convicted did More express his opposition to the legislation making the king the supreme head of the church. See also, THOMAS MORE'S TRIAL BY JURY, *supra*, note 16, at 191-92, Section 8, Guildhall Report. When he was presented with the evidence that many of England's ecclesiastical officials disagreed with More, the defendant stated in reply, "For one bishop who agrees with you, I have easily a hundred, including some who among the saints. And for your one Council [i.e., Parliament] and your statute (what it is worth the great good God knows), on my side are all the general councils celebrated during the last thousand years." *Id.*, at 192, Guildhall Report, Section 10. As Peter Ackroyd's biography, *Thomas More* indicates, "It was not a trial which More could have won." Peter Ackroyd, THE LIFE OF THOMAS MORE, (Doubleday: New York, 1998), at 399; moreover, as Ackroyd further points out, the lack of corroboration by those who accompanied Rich to the Tower and were present during the discussion between More and Rich intensifies the questions about the reliability of Rich's testimony. *Id.*, at 399-400.

refer to the *Act of Supremacy*. The *Act of Treason* gave the teeth to the *Act of Supremacy*, that is, it provided the means to punish anyone for doing something contrary to the king's title acknowledged by the *Act of Supremacy*. The two statutes worked in tandem: the first providing the foundation for the offense, i.e., doing or saying something contrary to the king's supremacy, and the second giving the muscle to protect the dignity of the king and his title.

Once More realized that the legislation would be used as a package deal (i.e., the *Act of Supremacy* and the *Act of High Treason* being read together), he knew that he could not speak about the king's title for that would be construed as some kind of denial or deprivation of a dignity belonging to the king that the legislation recognized. Thus he chose the path of silence which would avoid doing anything that might be objectively construed as a word or deed by the terms of this legislation. When pressed, he offered the theoretical remark that laws can be like two-edged swords, but nothing more was said and certainly nothing was said or done that could be reasonably construed as a deprivation, malicious or otherwise, of the king's title.

Upon consideration of the indictment and the two statutes upon which it relied, one thing remains clear: Thomas More did nothing and said nothing indicating that he intended to deny or deprive the king of the title Supreme Head of the Church of England in a malicious fashion.

V. Lessons for the Present Age

In this article, I have attempted to demonstrate the objective meaning of the two statutes used to prosecute Thomas More on the charge of high treason. I have also examined the meaning of the auxiliary statutes enacted during the same period of Tudor history dealing with "the King's great matter" to keep in mind issues and concerns that might have had or did have a bearing on the legislation used to address the division that occurred between Sir Thomas More

and King Henry VIII. It is patent that the counts of the indictment against and the evidence presented at More's trial along with the theories upon which he was tried did not address any real act or deed covered by either of the statutes listed in the indictment. At most, his trial and subsequent conviction proceeded on the basis that Thomas More's silence was a manner of communicating positions on matters covered by the *Act of High Treason* relying on the *Act of Supremacy*. However, as I have also demonstrated, More's silence and anything that he actually said or wrote were not matters that were covered by the *Act of High Treason* relying on the *Act of Supremacy*. His silence and his words did not constitute any opinion that deprived the king of his title as Supreme Head of the Church. More's silence and the few words that he uttered which were addressed in his indictment failed to meet the criteria of the crime of high treason as defined in the *Act of High Treason*. However, if the common law were to be relied upon as a means of communicating a position on the king's title as Supreme Head of the Church in England, then More's silence must be viewed as a form of consent or assent to the title, not as an expression of disagreement and, therefore, not a deprivation or denial of Henry's self-conferred ecclesiastical title acknowledged by the *Act of Supremacy*.

While the events surrounding the promulgation and application of the *Act of High Treason* and the *Act of Supremacy* in England occurred almost five hundred years ago, they contain important lessons today for legislators, administrators, judges, lawyers, and citizens (or subjects). Statutes are an important part of our societies and of our seeking to protect and to advance the common good. But the formulation of legislation necessitates careful selection of words that properly and morally address the "mischief" necessitating legislative action. In essence, their meaning should be readily discernable by both citizen and public official. The passage of almost half a millennium does not in any way detract from this principle which I have

presented in the context of the legislation used to prosecute and execute Thomas More—a man who lived by the rule of law. Given the world that confronts us in the early twenty-first century where legislation has sometimes become the tool once again to advance special interests rather than the common good, the principle is all the more important. I offer this thought in the context of four lessons that emerge from the meaning of the statutes used to prosecute Thomas More.

The first lesson is that it is vital to know the mischief (if any) or, better yet, the motivation which serves as the catalyst for the statute's enactment. This is critical to the task of statutory interpretation. It presents an important context on why legislators are doing something essential to further the common good. Putting aside the passage of private bills which clearly are enacted to address matters dealing with specific persons, legislation is typically promulgated to address societal issues and applied generally to the entire population for its general welfare.

The second lesson is this: understanding the context of the surrounding circumstances which energized the legislature into promulgating a statute is relevant to an examination of statutory law and its meaning. Once the motivation for the enactment becomes clear and the words selected have been given objective definition, examining the syntax used is essential so that the reader can best determine how this new law will address the “mischief” that threatens the common good. Questions can and do emerge about why some words were ultimately chosen and others were not selected for incorporation into the statute. The consideration by the interpreter of these linguistic options is generally instructive because it can rule out meanings or include meanings that might initially escape the interpreter's cursory parsing of the text.

Once these two lessons are in place, a third lesson should follow. The interpreter is now in a position to ask how the ultimate formulation of the statutory language can best further the common good, i.e., how does it promote the beneficial interests of the commonweal. This is an

important task in that it assists the interpreter to exclude those possible meanings which might actually frustrate the protection of the common good and promote new forms of mischief. I would argue that this is precisely what occurred in the interpretation and misapplication of the *Act of High Treason* and the *Act of Supremacy* to Thomas More.

In the final analysis, it is the task of statutory law to advance the general welfare of the nation by promoting and protecting the common good. While the promulgation of statutes can promote other legitimate objectives, this is the one primary purpose for which they exist. This is why the fourth and final lesson is so important: if the interpreter realizes that the legislation does not promote the common good and the welfare of the commonwealth, how should the text's meaning be explained? Here I return to my definition of the rule of law which I proposed at the outset of this article that will help answer this question: is the statute founded on the use of objective reason, that is, the application of human intelligence that comprehends the intelligible reality which provides the best normative guidance for the welfare of society and the promotion of the common good? If not, might it be argued that the statute is mischief itself rather than a remedy for mischief? Here we need to be mindful of the wisdom of Augustine of Hippo and relied upon by Martin Luther King, Jr. that an unjust law is no law at all.¹³³

I hope that this essay demonstrates that these lessons, if kept in mind by public official and citizen alike, lead us to the conclusion that there was something wrong with the statutes Henry VIII urged his Parliament to enact regarding "the King's great matter." In addition, there were grave problems in how these statutes were interpreted and applied in the prosecution of Thomas More. These are valuable lessons for the present age which ought not to be forgotten.

¹³³ See, Martin Luther King, Jr., *Letter from a Birmingham Jail*, 26 U.C. Davis L. Rev. 835, 840 (1993).

Although the development of the legislative process in England was surely an important development in the rule of law as I have explained that concept earlier in this article, the legislative process can be commandeered by the totalitarian and dictatorial influences which give birth to or sustain the tyrannical state. That is what happened in England under the reign of Henry VIII when he commandeered Parliament to implement his will by law that was designed to serve his own interests and little else. It might be said that the parliamentary system of England in the first half of the sixteenth century was a development in the experiment of democracy—insofar as some members of society had a representative voice in the law making process. Although democracy as we know it in the twenty-first century may have been a considerable distance in the future, we can still learn another lesson from Henry’s legislation discussed in this article: when democracies relinquish the duty to promote the common good and seek, instead, establish a society in which “passive obedience” demanding “full cooperation” or else from the citizen-subjects, they transform into the totalitarian state.¹³⁴ This is what faithful subjects like Thomas More, John Fisher, and others experienced in Tudor England in the early sixteenth century. In his own way, Thomas More recognized that what should have been a benevolent government had become a tyranny when he wrote to his daughter Margaret from the Tower, “I do nobody harm, I say none harm, I think none harm, but wish everybody good. And if this be not enough to keep a man alive, in good faith I long not to live.”¹³⁵

In the end, the laws which Henry had Parliament enact did not promote the common good and advance the welfare of the commonwealth. In fact, they did just the opposite. Rather than promoting an authentic justice, these statutes and their application advanced terror by which

¹³⁴ Cf., Christopher Dawson, *Christianity and European Culture—Selections from the Work of Christopher Dawson*, (Washington, DC: The Catholic University of America Press, 1998), at 81. Interestingly, in his encyclical *Centessimus Annus* (1991), Pope John Paul had this to say of democracy: “As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.” N. 46.

¹³⁵ See, *supra*, footnote 87.

some profited but many in the commonweal did not. This is why Saint Augustine cautioned so long ago that kingdoms without justice are nothing more than bands of robbers.¹³⁶ Justice must reside in the words of legislation and their subsequent interpretation and application. If not, the state—regardless of the time in which it exists—becomes the band that robs citizens and subjects of the authentic rule of law. This is yet another lesson for the present age.

¹³⁶ St. Augustine, *THE CITY OF GOD*, Book IV, Chapter 4.