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Lessons From Thomas More's Dilemma of Conscience: Reconciling the Clash Between a Lawyer's Beliefs and Professional Expectations

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ARTICLES

LESSONS FROM THOMAS MORE'S DILEMMA OF CONSCIENCE: RECONCILING THE CLASH BETWEEN A LAWYER'S BELIEFS AND PROFESSIONAL EXPECTATIONS

BLAKE D. MORANT[†]

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[†] Professor of Law and Director of the Frances Lewis Law Center, Washington and Lee University School of Law. B.A. and J.D., University of Virginia. The inspiration for this Article was the invitation to deliver a lecture during the July 6, 2003 Saint Thomas More Commemorative Service at St. Dunstan's Church Canterbury, England. I wish to express my appreciation to The Reverend Maurice Worgan, Vicar of St. Dunstan's Church, Canterbury, England, whose kind invitation to speak led to my study of works concerning Sir Thomas More and contributed immeasurably to the ultimate completion of this Article. I also appreciated the opportunity to present my work on Thomas More in the St. John's School of Law Colloquium Series, during which I garnered wonderfully insightful comments and suggestions. I convey gratitude to the following individuals: Dr. Thomas Burish, President of Washington and Lee University, Dean David F. Partlett, Washington and Lee University School of Law, Barry Sullivan, Esq., partner, Jenner & Block, LLP, and Professors Leonard Baynes, David Caudill, Paul Kirgis, Brian Murchison, Julie Woodzicka, and Brad Wendel, whose comments on drafts were particularly helpful as I explored this new scholarly area. I also acknowledge the conscientious research assistance of Mr. Joseph Dunn, J.D. Candidate, Washington and Lee School of Law and Mrs. Terry Evans, whose administrative support was invaluable for the completion of this project. Of course I must, as always, acknowledge the support and assistance of Mrs. Paulette J. Morant, whose patience and persistence always inspire my scholarship.

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INTRODUCTION

The story of Sir Thomas More, the former Lord Chancellor of England¹ who refused to endorse King Henry VIII's ecclesiastical proclamations, has become legendary fodder for historians² and playwrights.³ The resulting plethora of literature is no doubt due to More's extraordinary adherence to the theological principles that fueled his refusal

¹ Incidentally, Prime Minister Tony Blair recently abolished the post of Lord High Chancellor of Great Britain and replaced it with the Department for Constitutional Affairs. Citizens of Great Britain had often complained that the post carries too much power, as the Lord Chancellor is simultaneously a member of the Cabinet, a judge, and a legislator. See Frances Gibb & Richard Ford, *Supreme Court to be Heart of New Justice System*, TIMES (London), June 13, 2003, Home News, at 6; *Great Britain Abolishes Post of Lord Chancellor*, ROANOKE TIMES, June 14, 2003, at A6; Warren Hoge, *Britain: Blair Shuffles Ministers*, N.Y. TIMES, June 13, 2003, at A6; Stephen Morris, *1,398 Years After Angmendus, The Lord Chancellor's Reign Comes To An End*, GUARDIAN, June 13, 2003, Home Pages, at 4.

² See generally PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1998) (providing an extensive and detailed account of the events of More's life); R.W. CHAMBERS, *THOMAS MORE* (1951) (depicting More as a martyr and a great statesman with consistent political ideals); ALISTAIR FOX, *THOMAS MORE: HISTORY AND PROVIDENCE* (1982) (noting the significance of More's death as perpetuated by his personal philosophy); J.A. GUY, *THE PUBLIC CAREER OF SIR THOMAS MORE* (1980) (analyzing More's contribution to English society through his career achievements and dedication to the law); JUDITH P. JONES, *THOMAS MORE* (1979) (assessing the historical and literary significance of More's writings as a Christian contemplating death); ANTHONY KENNY, *THOMAS MORE* (1983) (analyzing More's contribution to the "standard English conception of the English character" through his service and scholarship); RICHARD MARIUS, *THOMAS MORE* (1984) (depicting More as a complex, misrepresented individual torn between religious beliefs and worldly concerns); LOUIS L. MARTZ, *THOMAS MORE: THE SEARCH FOR THE INNER MAN* 64 (1990) (presenting factual account of the events surrounding More's last writings and effect of the events on their content); E.E. REYNOLDS, *THE FIELD IS WON: THE LIFE AND DEATH OF SAINT THOMAS MORE* (1968) (assessing More's effects on the Renaissance Period and Reformation); E.M.G. ROUTH, *SIR THOMAS MORE AND HIS FRIENDS* (1934) (emphasizing More's character as extracted from his own writings).

³ See generally ROBERT BOLT, *A MAN FOR ALL SEASONS* (1962) (recounting the latter part of More's life and eventual trial and execution); ANTHONY MUNDAY ET AL., *SIR THOMAS MORE* (1990) (including portions reportedly written by William Shakespeare). For cinematic adaptations of Robert Bolt screenplays, see generally *A MAN FOR ALL SEASONS* (Turner Home Video 2002), and *A MAN FOR ALL SEASONS* (Columbia Pictures 1966).

to capitulate to power—a stance which ultimately led to his demise by decapitation.⁴

Thomas More's legacy takes center stage each summer at St. Dunstan's Church, Canterbury, England,⁵ where the martyr's head is buried.⁶ This historical and physical connection to More has inspired St. Dunstan's to sponsor an annual lecture devoted to More's teachings, philosophies, and life.

The gracious invitation to deliver the 2003 St. Thomas More memorial lecture at St. Dunstan's Church compelled me to study More's life⁷ with particular emphasis on the impact of his moral convictions on his professional decision-making. My research revealed the degree to which his historic confrontations with Henry VIII and Thomas Cromwell have continuing relevance to legal scholars and practitioners.⁸ This legacy, and

⁴ See Peter J. Galie & Christopher Bopst, *Great Political Trials of the Millennium*, 27 LITIG. 39, 41–44 (2001); Stanley L. Jaki, *Patterns Over Principles: The Pseudoscientific Roots of Law's Debacle*, 38 AM. J. JURIS. 135, 154 (1993); Milton R. Konvitz, *Civil Disobedience: Reflections on the Contribution of James Luther Adams*, 12 J.L. & REL. 9, 20 (1995–96); John T. Noonan, Jr., *A Catholic Law School*, 67 NOTRE DAME L. REV. 1037, 1039 (1992); Stephen F. Smith, *Cultural Change and "Catholic Lawyers,"* 1 AVE MARIA L. REV. 31, 53–54 (2003); David O. Stewart, *Shutting the Door*, A.B.A. J., Apr. 1992, at 42. See generally Edward McGlynn Gaffney, Jr., *The Principled Resignation of Thomas More*, 31 LOYOLA L.A. L. REV. 63, 72–73 (1997) (noting that More's demise was perpetuated by a firm resignation to his religious principles, despite the effectual defiance of Henry VIII's proclamations).

⁵ For a concise history of St. Dunstan's Church and its relationship to Thomas More, see generally REV. HUGH O. ALBIN, *THE PARISH CHURCH OF ST. DUNSTAN, CANTERBURY, KENT: A GENERAL HISTORY AND GUIDE* (1979); see also <http://www.hillside.co.uk/tour/d217.html> (last visited Sept. 16, 2004).

⁶ See ALBIN, *supra* note 5, at 5; REYNOLDS, *supra* note 2, at 381. See generally JASPER RIDLEY, *STATESMAN AND SAINT: CARDINAL WOLSEY, SIR THOMAS MORE, AND THE POLITICS OF HENRY VIII* 284 (1982); The Catholic Community Forum, *Saints: Thomas More*, at <http://www.catholic-forum.com/saints/saintt04.htm> (last visited Sept. 16, 2004) (citing the Roper Vault at St. Dunstan's Church, Canterbury, England, as the place of burial for More's head).

⁷ Numerous works present a thorough analysis of More's writings and beliefs. See generally Peter Ackroyd, *More and Theology*, 53 MERCER L. REV. 1055 (2002); Joseph Allegretti, *The Unity of Law and Religion: A Response to Ackroyd and Vining*, 53 MERCER L. REV. 1065 (2002); William G. Bassler, *More About More*, 41 CATH. LAW. 297 (2002); Gaffney, Jr., *supra* note 4; Stanley Hauerwas & Thomas L. Shaffer, *Hope in the Life of Thomas More*, 54 NOTRE DAME LAW. 569 (1979); Thomas L. Shaffer, *More's Skill*, 9 WIDENER J. PUB. L. 295 (2000).

⁸ See generally THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 170–75 (1985) (distinguishing between personal morals and professional morals and More's employment of both in confronting Henry VIII's proclamations); Gaffney, Jr., *supra* note 4, at 72–77 (contrasting different accounts of More's confrontations stemming from his religious beliefs); Hauerwas & Shaffer, *supra* note 7, at 573–81 (noting the struggles modern lawyers face in seeking hope and truth and balancing skill and power are identical to those faced by More); Jaki, *supra* note 4 (discussing the manner in which More dealt with the changing basis of the law); H. Jefferson Powell, *Who's Afraid of Thomas Cromwell?*, 74 CHI.-KENT L. REV.

the honor to deliver the St. Thomas More lecture, inspired this admittedly modest Article.

In my view, Thomas More's professional life, which is characterized most often by his refusal to endorse the objectives of King Henry VIII, exemplifies the recurrent conflict between a lawyer's personal beliefs or convictions and the professional expectations of the sovereign.⁹ I contend that these two value systems are in periodic conflict for many who practice law. Like More, most lawyers bring into their decision-making processes personal beliefs that are moralistic in character and endemic to their sense of personhood. These beliefs, which I also refer to as moral codes, often have their genesis in a higher, even Divine authority. This certainly was true for Thomas More, whose personal beliefs were grounded in ecclesiastical and theological principles.¹⁰

Personal beliefs are often tested in the legal profession. Adherence to these beliefs might prove difficult if professional expectations compel a counter-response.¹¹ A lawyer caught in this dilemma must choose one of

393, at 402-05 (1999) (addressing More's belief in the existential origin of law); Shaffer, *supra* note 7, at 298 (noting that More used hope as a skill in his practice of law); Smith, *supra* note 4, at 52-54 (describing More's incorporation of personal convictions into the practice of law); Michael E. Tigar, *Rationing Justice: What Thomas More Would Say*, 2 J. INST. FOR STUDY LEGAL ETHICS 187, at 192-95 (1999) (comparing More's dilemma concerning Henry VIII's proclamations with modern problems faced by the author and attorneys in general).

⁹ Part I of the Article provides a detailed background of Thomas More's historic refusal to accede to the wishes of his sovereign, Henry VIII, and examines closely the conflict between personally held convictions and pragmatic considerations related to professional convenience.

¹⁰ See CHAMBERS, *supra* note 2, at 395 (declaring More a "hero of the Catholic" faith who died for principles of unity and discipline); FOX, *supra* note 2, at 147 (discussing More's concern that orthodox beliefs and practices embody the right perception); GUY, *supra* note 2, at 154-55 (hypothesizing which beliefs More would have supported and which he would have rejected); KENNY, *supra* note 2, at 61 (chronicling More's fight for orthodoxy and against heresy); Ackroyd, *supra* note 7, at 1055 (citing More as "the greatest embodiment of law and theology assimilated"); see also MARIUS, *supra* note 2, at 331 (discussing More's arguments for the "sacred traditions of the Catholic Church").

¹¹ See Richard S. Markovits, *Taking Legal Argument Seriously: An Introduction*, 74 CHI.-KENT L. REV. 317, 329 (1999) (noting that Robert Bolt's More saw Cromwell as a pragmatist, using legal arguments only to achieve administrative effectiveness); Powell, *supra* note 8, at 393-94 (noting that Bolt's Cromwell saw religious convictions as a personal impediment to achieving administrative expedience); Shaffer, *supra* note 7, at 302 (describing the law as elastic and always subject to those with the power to impose changes); Smith, *supra* note 4, at 53 (noting the citizens' plain disregard of Catholic duties as Henry VIII's concerns were given preference over those of the Church); see also Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 930-31 (1997). Professor Bilder notes that the Act ending all appeals to the Pope and declaring Henry VIII the supreme head of the Church of England was justified by a declaration that appeals "were often brought for 'the delay of justice' and created

two alternatives: like Thomas More, she might adhere strictly to her beliefs and suffer the consequences from her failure to accommodate the sovereign's goals;¹² alternatively, she might take a more pragmatic stance that accommodates professional expectations without the complete abandonment of personal beliefs. Of course, compromise, depending upon the extent to which beliefs are abandoned, may lead to cognitive dissonance,¹³ which many, including presumptively More, could not tolerate.¹⁴

'great inquietation, vexation, trouble, cost and charges.'" *Id.* at 930 (quoting For the Restraint of Appeals Act, 1532, 24 Hen. 8, c. 12 (Eng.)). As history has shown, however, this was clearly a tool to distance the King from papal influence and effectuate his divorce from Catherine of Aragon. *But see* B.W. BECKINGSALE, THOMAS CROMWELL, 144–55 (1978) (noting that some biographers have described Cromwell as a religious reformer, devoted to the advancement of the Gospel).

¹² I employ the term "sovereign" to connote one who has authority over some grouping of individuals. Of course, this more liberal interpretation includes not only conventional, authoritarian figures such as monarchs, elected officials or other heads of government, but also those in positions of power over individuals such as employers, supervisors, and evaluators. For a discussion of the jurisprudential significance of the sovereign in terms of positive law, see *infra* notes 67–96 and accompanying text.

¹³ See Kenneth A. Sprang *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 141 (1995) (explaining the theory of cognitive dissonance as based on three premises: (1) a person is able to manipulate or modify his beliefs regarding certain circumstances or information so that those beliefs are compatible with the person's personal preferences; (2) people seek out information that will confirm or augment desired beliefs; and (3) once beliefs are formed in the context of cognitive dissonance reactions, they persist over time); Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1312, 1316 (1998) (observing that in seeking to maximize the internal consistency of his or her cognitive system composed of one's thoughts, attitudes, and beliefs, a person will minimize cognitive dissonance, the divergence between action and belief); see also James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735, 788 (1992) (opining that lawyers manage the cognitive dissonance created by their self-image of being a good lawyer versus a good person by setting aside personal morals to take up the professional amorality of the adversarial ethic); Kenneth A. Sprang, *Holistic Jurisprudence: Law Shaped by People of Faith*, 74 ST. JOHN'S L. REV. 753, 753 (2000) (opining that a lawyer often resolves the cognitive dissonance produced by a conflict between religious and professional morals by either rationalizing that there is no conflict, seeking a balance between the two, or even leaving the profession). For the cornerstone theorization on the effect of cognitive dissonance in predicting complex behavior, see generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). For an analysis of Festinger's theory and its historical and potential application, see generally JACK W. BREHM & ARTHUR R. COHEN, *EXPLORATIONS IN COGNITIVE DISSONANCE* (1962).

¹⁴ See REYNOLDS, *supra* note 2, at 364 (noting that at his trial, More voiced his refusal to accept the King's title as Supreme Head of the church because it contradicted with his belief in the Divine Law); see also Katherine Corry Eastman, Comment, *Sexual Abuse Treatment in Kansas's Prisons: Compelling Inmates to Admit Guilt*, 38 WASHBURN L.J. 949, 949–50 (1999)

The clash between personal beliefs and professional expectations has become a troublesome truism in the modern practice of law. For example, if a lawyer believes that certain acts contravene deeply held moral convictions, how could that lawyer in good conscience defend an individual who admittedly committed one of those acts?¹⁵ If asked to render a legal opinion that might stymie the will of the sovereign, would the reviewing lawyer's ultimate opinion reflect an objective interpretation of applicable rules, or will she manipulate those rules to ensure the fulfillment of the sovereign's expectations?¹⁶

Thomas More would have presumably advised attorneys facing these questions to remain true to their beliefs.¹⁷ This advice, however, may not

(analogizing More's refusal to swear to the Oath of Supremacy as contrary to his own moral convictions with the Kansas requirement that an inmate admit to a sexual offense in order to receive good time credits as contrary to the Fifth Amendment). See generally FOX, *supra* note 2, at 243–45 (noting More's final work, *De Tristitia Christi*, as a reflection on his desire for martyrdom and the inevitable sacrifice in the name of God); RIDLEY, *supra* note 6, at 263–77 (recounting More's adamant insistence on the persecution of heretics and persistence to religious convictions as described in his personal letters).

¹⁵ The adopted Rules of Professional Conduct for most states mirror those of the American Bar Association. These rules generally require an attorney to defend her client with reasonable diligence and competence, terminating that employment only for a narrow set of reasons or at the conclusion of all legal matters. MODEL RULES OF PROF'L CONDUCT R. 1.1–1.3 (2003). The District of Columbia, Iowa, Massachusetts, Nebraska, New York, Ohio and Oregon have adopted versions of the American Bar Association's Model Rule 1.1, which provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* R. 1.1; see also MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) [hereinafter "MODEL CODE"]. California and Maine, however, incorporate no requirement for continued representation and only require an attorney terminating representation to request permission of the governing tribunal (if required by that tribunal) and minimize prejudice to the client by giving adequate notice. See also 23A C.J.S. *Criminal Law* § 1235 (2002) (noting a defense counsel's duty to represent the accused within the bounds of the law); MODEL CODE OF PROF'L RESPONSIBILITY EC 2-29 (1981) (stating a defense counsel may not be excused from a court appointment in a criminal proceeding based on a belief that his client is guilty).

¹⁶ See SHAFFER, *supra* note 8, at 171 (noting the political, not theological, basis for the divergence between the perspectives of More and Thomas Cromwell); Hauerwas & Shaffer, *supra* note 7, at 579 (contrasting More's adherence to legal principles with Thomas Cromwell's compromising of those principles in order to achieve "convenience"); Powell, *supra* note 8, at 407 (contrasting More's view of the law as firm principles necessary to preserve societal stability with Cromwell's view of the law as a malleable device with which those in power may create a stable society); see also H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501, 507 n.24 (1986) (noting More's awareness of the pliability of the law as expressed in his most famous work "Utopia").

¹⁷ For a description of More's strict adherence to his system of beliefs, see generally

be adequate in every contemporary context. Reconciliation of the clash between personally held beliefs and professional expectations largely depends upon the strength of the individual's conviction, the costs associated with adherence to those convictions, and the feasibility of forging a compromise that accommodates professional expectations without the abandonment of personal beliefs. Appreciation of this triad of contingencies, coupled with analysis of Thomas More's now legendary story, should lead to more prudent decision-making as practitioners confront, and possibly resolve this dilemma of conscience.

Part I of this Article commences with a jurisprudential analysis of the competing value systems that led to Thomas More's confrontation with Henry VIII and Thomas Cromwell. More's strictly held belief in theological dogma suggests that he was a natural law thinker. These beliefs, which are closely linked to the concept of a deity, together with his keen understanding of theological rules¹⁸ and his adroit lawyering skills, made fulfillment of Henry VIII's and Cromwell's expectations virtually impossible. Part I also describes Henry VIII's Acts of Supremacy and Succession as positive laws, and Cromwell's pragmatic, contextual attempt to persuade More to endorse the King's Acts. The variant features of these competing beliefs explain, to some extent, More's historic clash of personally held beliefs and professional expectations. To demonstrate the modern day prevalence of conflicting beliefs, Part II of the Article presents a personal narrative from my career as a practicing lawyer. That experience, though admittedly not universal, demonstrates the contemporary reality of the conflict between personally held beliefs and professional expectations. Part II then employs cognitive dissonance theory to explain the decision-making influenced by conflicting beliefs. This analysis confirms that individuals attempt to reduce the dissonance associated with contradictory beliefs through various contextual remedies,

Ackroyd, *supra* note 7; Bassler, *supra* note 7; Hauerwas & Shaffer, *supra* note 7; Shaffer, *supra* note 7; and Gaffney, *supra* note 4.

¹⁸ Many of More's writings focused on his theological ideals and his view on the fate of heretics. See generally ST. THOMAS MORE, *A Dialogue Concerning Heresies*, in 6 THE COMPLETE WORKS OF ST. THOMAS MORE 1 (Thomas M.C. Lawler et al. eds., Yale Univ. Press, 1981) (1529) [hereinafter COMPLETE WORKS]; ST. THOMAS MORE, *A Dialogue of Comfort Against Tribulation*, in 12 COMPLETE WORKS 1 (Louis L. Martz & Frank Manley eds., Yale Univ. Press, 1976) (1534); ST. THOMAS MORE, *De Tristitia Christi*, in 14 COMPLETE WORKS 1 (Clarence H. Miller ed., Yale Univ. Press, 1976) (1535); ST. THOMAS MORE, *Responsio ad Lutherum*, in 5 THE COMPLETE WORKS OF ST. THOMAS MORE 1 (John Headley ed., Yale Univ. Press, 1969) (1523); ST. THOMAS MORE, *The Apology*, in 9 COMPLETE WORKS 1 (J.B. Trapp ed., Yale Univ. Press, 1979) (1533).

including compromise. The Article ultimately concludes that the search for truly effective dissonance-reduction remedies commences with a more complete understanding of what leads to a clash of beliefs, and the thought processes required to resolve this clash.

Many lawyers today periodically grapple with conflicts between personally held beliefs and expectations. I surmise that few possess Thomas More's ideological resolve and, thus, struggle to reconcile these conflicts, if reconciliation is indeed possible. Given this reality, my Article will not proffer ineffectual, formulaic solutions. Instead, it advocates a greater appreciation of both the prevalence of these conflicts and an understanding of the fundamental differences of contrary beliefs should contribute to more balanced decision-making by lawyers who confront troublesome dilemmas of conscience.

I. JURISPRUDENTIAL ROOTS OF THE CLASH BETWEEN PERSONAL BELIEFS AND PROFESSIONAL EXPECTATIONS

Comprehension of Thomas More's dilemma of conscience requires analysis of the fundamental differences between personally held moral beliefs,¹⁹ professional expectations and objectives,²⁰ and contextual

¹⁹ See Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 373 (1988) (citing *United States v. Seeger*, 380 U.S. 163 (1965), as an instance where the Court has interpreted humanistic and nonsectarian moralistic beliefs as religious beliefs). *But see* Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 477 (2002) (arguing that personal moral codes are separate from religious beliefs). *See also* SHAFFER, *supra* note 8, at 174 (noting the separation between an attorney's personal morality and the set of moral principles she draws on in the course of her professional life); Carrie Menkel-Meadow, *Can They Do That? Legal Ethics In Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305, 1315 (2001) (citing Thomas More and Atticus Finch as examples of practitioners who exhibit a commitment to personal beliefs); Grant H. Morris & Ansar Haroun, M.D., *God Told Me To Kill: Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 1013-14 (2001) (arguing that a criminal defendant's culpability is measured against society's standard of morality and not against the defendant's personal moral code).

²⁰ My reference to "sovereign" includes any individual who has command, power, or influence over an individual, to the extent that such command, power, or influence potentially affects the individual's judgment, choices, or behavior. An attorney's decision-making can be influenced by a sovereign in the position of a client. *See* Amy S. Moats, *Student Work, A Bermuda Triangle in the Tripartite Relationship: Ethical Dilemmas Raised by Insurers' Billing and Litigation Management Guidelines*, 105 W. VA. L. REV. 525, 533 (2003) (arguing that by limiting the number of billable hours allowed for a certain case, insurers often discourage or prohibit their attorneys from pursuing beneficial courses of action); *see also* Task Force on Lawyers as Dirs., ABA Comm. on Lawyer Bus. Ethics, *The Lawyer as Director of a Client*, 57 BUS. LAW. 387, 389 (2001) (noting that when an attorney representing an institutional client also

accommodations of a sovereign's goals or expectations.²¹ In my view, the

sits as a director for that client, financial dependence on the client could potentially influence that attorney's judgment as to the best possible course of action); Janet L. Polstein, Note, *Throwing Away The Key: Due Process Rights of Insanity Acquittees in Jones v. United States*, 34 AM. U. L. REV. 479, 509–10 (1985) (noting the client's desire to plead guilty rather than face the indefinite outcome of pleading insanity as superseding the attorney's judgment as to the best course of action). Attorney decisions may also be influenced by the government or the judicial system itself. See F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 209–10 (2002) (arguing that pressure from prosecutors, judges and court clerks to quickly resolve cases may influence a defense counsel to accept a plea agreement that is not really in his client's best interests); Kohei Nakabô & Yohei Suda, *Judicial Reform and the State of Japan's Attorney System: A Discussion of Attorney Reform Issues and the Future of the Judiciary, Part II*, 11 PAC. RIM L. & POL'Y J. 147, 159 (2002) (arguing that Japanese attorneys can truly help their local communities only when they are free from governmental influence and authoritarian pressure). A number of third parties may also have an effect. See *Report of the Working Group on the Influence of Third Parties on the Lawyer-Client Relationship*, 67 FORDHAM L. REV. 1841, 1843 (1999) (naming funding sources, regulators, boards of directors, employee unions, client groups, family members, special-interest groups, adversaries, and the needs of the community as possible third parties who influence the lawyer-client relationship). See generally Robert L. Nelson, et al., *Lawyers and the Structure of Influence in Washington*, 22 LAW & SOC'Y REV. 237 (1988) (arguing that Washington, D.C. lawyers serving as mediators between public interest groups and elected representatives may perpetuate rather than resolve the conflicts between the parties due to their strong ties to and handsome fees derived from the client group).

²¹ See HOWARD O. HUNTER, MODERN LAW OF CONTRACTS, § 8:4 (2003) (noting the contextual approach to contract interpretation as taking into account evidence extrinsic to the agreement); Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 755 (1994) (noting that the dominance of a contextual approach to law in China's contemporary legal practice is evinced by the continuing importance placed on social relations between parties to a dispute rather than the application of positive law); Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1076 (1994) (arguing that a contextual approach to dealing with issues of capacity in dealing with elderly clients necessitates the rejection of paternalistic or libertarian approaches); Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649, 653 (1995) (noting that a contextual approach to a legal problem is less likely to reach simple, far-reaching conclusions); Esther Vicente, *Feminist Legal Theories: My Own View From a Window in the Caribbean*, 66 REV. JUR. U.P.R. 211, 226–27 (1997) (noting that postmodern feminists have resorted to a contextual approach to the law, resulting in a pragmatic view of the "dynamic process of conflict resolution"); see also Mark S. Scarberry & Scott M. Reddie, *Home Mortgage Strip Down in Chapter 13 Bankruptcy: A Contextual Approach to Sections 1322(b)(2) and (b)(5)*, 20 PEPP. L. REV. 425, 426 (1993). The authors argue that a contextual approach to the question of whether mortgage strip-downs should be allowed under the Bankruptcy Code would necessitate the analysis of applicable sections in the context of other provision of the Code, legislative intent, the policies of the code, and other sources of law. They also argue their contextual approach would "avoid the 'overly technocratic' reading of Acts of Congress." *Id.* (quoting *In re Sauber*, 115 B.R. 197, 199 (Bankr. D. Minn. 1990)). But see William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 375–77 (1985) (disputing the idea of the "contextual approach to law" constituting a separate philosophy or theory, but praising the habits of

clash of these values arises because of their respective jurisprudential differences. Particularly in the case of Thomas More, beliefs, professional expectations, and contextual accommodations fit generally within the following jurisprudential categories: natural law, which is grounded in tenets of morality;²² positive law, which by definition is human generated;²³ and contextual laws, which facilitate contemporary societal needs or objectives.²⁴

The differing positions and objectives of the protagonists in More's historic drama are reflective of these jurisprudential categories of law and legal interpretation. Summarily stated, Thomas More's moralistic beliefs, which evince a strong nexus to theological dogma, appear closely associated with natural law.²⁵ Henry VIII's proclamation as Supreme Head of the Church as far as the law of God will permit,²⁶ and his 1534 Act of Succession that established his issue with Anne Boleyn as heirs to the throne,²⁷ function as positive law. Thomas Cromwell's quest to accommodate Henry VIII's proclamations and his commensurate desire for More to endorse the King's proclamations equate to rules formed from context.²⁸ As discussed below, these more western conceptualizations of law and legal interpretation²⁹ form the ideological bases for the clash experienced by More and, perhaps, many contemporary lawyers.

"think[ing] in terms of total pictures").

²² For more on natural law, see *infra* notes 39–66 and accompanying text.

²³ For more on positive law, see *infra* notes 67–96 and accompanying text.

²⁴ For more regarding law and context, which is also termed "contextualism," see *infra* notes 93–120 and accompanying text.

²⁵ Many of More's writings indicated the depth and breadth of his theological beliefs. See, e.g., sources cited note 18, *supra*.

²⁶ See ACKROYD, *supra* note 2, at 378 (noting the introduction of an Act of Supremacy in 1534 which proclaimed Henry VIII to be the Supreme Head of the Church of England); see also KENNY, *supra* note 2, at 80; MARIUS, *supra* note 2, at 379; REYNOLDS, *supra* note 2, at 326.

²⁷ See ACKROYD, *supra* note 2, at 356 (noting the passage of the Act of Succession in 1534, which proclaimed Henry VIII's marriage to Catherine of Aragon to be void and annulled); see also KENNY, *supra* note 2, at 70; MARIUS, *supra* note 2, at 458; REYNOLDS, *supra* note 2, at 296; ROUTH, *supra* note 2, at 201.

²⁸ See Powell, *supra* note 8, at 404 (noting Cromwell's efforts to "bend, break, or transform the law in [his] pursuit of an heir to the throne"). See generally BECKINGSALE, *supra* note 11 (noting Cromwell's satisfaction of the King's interests by winning the support of those below him necessary to carry out the King's royal policies). The author also notes Cromwell's persistent pursuit of power and his ability to manipulate that power to move up in the ranks of hierarchal authority. *Id.*

²⁹ The concept of western law, which typifies law observed in the United States, has been categorized in the three positions of natural law, positive law, and "law-in-context." See COSTAS DOUZINAS ET AL., POST MODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW 19

A. *More's Beliefs as Natural Law Conceptualizations*

Thomas More's personal beliefs appear well rooted in theological principles. His writings between 1499-1503 demonstrate the fervor with which he believed in, and was committed to, religious tenets and customs.³⁰ This is not to suggest that More's intellectual acumen was confined to theology.³¹ An exceptionally gifted student of several subjects, his writings include a number of respected pieces in the classics.³²

The study of ecclesiastical and theological doctrine, however, appears to have been More's true, consuming passion. His knowledge of church doctrine led to an appearance at the Church of St. Lawrence Jewry, where his lecture on St. Augustine's *De civitate Dei* impressed many theologians of the time.³³ There was little doubt that More was consumed with exercises of piety and belief in a higher Divine order of human existence.³⁴

(1991). For a more detailed description of western law and its relation to Eurocentric legal principles, see Kenneth B. Nunn, *Law As Eurocentric Enterprise*, 15 *LAW AND INEQ.* 323, 339 (1997).

³⁰ For a biographical treatise purportedly written around the time of More's lectures at St. Lawrence, see ST. THOMAS MORE, *LIFE OF PICO DELLA MIRANDOLA* (n.d.). See also ACKROYD, *supra* note 2, at 107-08 (arguing that the enthusiasm with which More treats the pious life of Pico della Mirandola reflects his own enthusiasm for that life); MARIUS, *supra* note 2, at 37 (arguing that More's lecture on Augustine's "The City of God" evinced his serious consideration of the priesthood and submersion in theology); REYNOLDS, *supra* note 2, at 32 (noting More's study of and admiration for the works of St. Thomas Aquinas); *id.* at 34 (noting More's letter to John Colet in which he expressed his anguish in dealing with his own spirituality).

³¹ See ACKROYD, *supra* note 2, at 41 (noting More's active study of the liberal arts while attending Canterbury College in Oxford); MARIUS, *supra* note 2, at 15 (noting More's study of the seven liberal arts that formed the basis for typical medieval education while at St. Anthony's School in London); REYNOLDS, *supra* note 2, at 27 (noting More's legal training at the Inns of Court in London).

³² See generally ST. THOMAS MORE, *The History of King Richard III*, in 2 *COMPLETE WORKS* 1 (Richard Sylvester ed., Yale Univ. Press 1963) (1513-18); ST. THOMAS MORE, *Utopia*, in 4 *COMPLETE WORKS* 1 (Edward Surtz & J.H. Hexter eds., Yale Univ. Press 1965) (1516).

³³ See ACKROYD, *supra* note 2, at 104 (noting that More was asked to lecture at St. Lawrence Jewry); CHAMBERS, *supra* note 2, at 82 (same); FOX, *supra* note 2, at 10 (discussing More's lectures in Grocyn's church); GUY, *supra* note 2, at 4 (stating that Grocyn invited More to lecture on St. Augustine's City of God); KENNY, *supra* note 2, at 7 (detailing how More "mastered ancient Latin literature so well that he was invited to give a course of lectures on St. Augustine's City of God"); MARIUS, *supra* note 2, at 75 (recounting More's lectures at the Church of St. Lawrence Jewry); REYNOLDS, *supra* note 2, at 31-32; RIDLEY, *supra* note 6, at 29; ROUTH, *supra* note 2, at 24 (describing the growth in More's reputation, evidenced by his lectures in the Church of Saint Lawrence).

³⁴ See ACKROYD, *supra* note 2, at 102 (arguing that More's devotion to the discipline of his piety and beliefs was exemplified by his insistence of wearing a hair shirt); MARIUS, *supra* note 2, at 231 (noting More had a chapel in his home at Chelsea where he and the members of his

So strong were his religious convictions that he contemplated entering the priesthood.³⁵ Erasmus, a close friend and confidante, commented on More's commitment to theology and the religious order:

[More] applied his whole mind to exercises of piety, looking to and pondering on the priesthood in vigils, fasts, and prayers and similar austerities. In which matter he proved himself far more prudent than most candidates who thrust themselves rashly into that arduous profession without any previous trial of their powers. The one thing that prevented him from giving himself to that kind of life was that he could not shake off the desire of the married state. He chose, therefore to be a chaste husband rather than an impure priest.³⁶

More's disappointment with corruption within monastical orders³⁷ failed to weaken moralistic beliefs that continually influenced his personal and professional life.³⁸

More's personally held beliefs, which were based upon theological dogma, have a clear nexus with natural law. Perhaps most probative of this point is natural law's commonly understood derivation from God, the

household would meet each evening for their prayers); *id.* at 232 (noting More's insistence on the family's punctual attendance at church on Sundays and holy days and his spawning of impromptu dinner discussions on the scriptures); RIDLEY, *supra* note 6, at 127 (noting More's rigorous austerities and habitual self-punishment including retreat to seclusion for prayer and self-flogging); Randy Lee, *Catholic Legal Education at the Edge of a New Millennium: Do We Still Have the Spirit to Send Forth Saints?*, 31 GONZ. L. REV. 565, 567 (1996) (citing More as a man of integrity and piety).

³⁵ See ACKROYD, *supra* note 2, at 111 (citing More's inability to accept chastity as a disincentive to pursuing the priesthood); REYNOLDS, THOMAS MORE AND ERASMUS 35-36 (1965) (citing a number of sources confirming More's consideration of the priesthood); see also REYNOLDS, *supra* note 2, at 33; RIDLEY, *supra* note 6, at 29; ROUTH, *supra* note 2, at 28. See generally MARIUS, *supra* note 2, at 34-43 (recounting More's difficult choice between priesthood and marriage and the historical context within which he considered his options).

³⁶ REYNOLDS, *supra* note 2, at 33 (quoting *Opus Epistolarum Des. Erasmi Roterodami* (letter 999) (P.S. Allen & H.M. Allen eds.)).

³⁷ See Ackroyd, *supra* note 2, at 209 (noting More's "fierce attack upon the follies of monasticism" in a letter to a monk named John Batmanson). But see WILLIAM H. HUTTON, SIR THOMAS MORE 27-28 (1895) (writing "it is absurd to assert that More was disgusted with monastic corruption . . . that he 'loathed monks as a disgrace to the Church.' He was throughout his life a warm friend of the religious orders, and a devoted admirer of the monastic ideal") (citations omitted).

³⁸ See Hauerwas & Shaffer, *supra* note 7, at 572 (describing More's life as a "Christian lawyer's life"); Jaki, *supra* note 4, at 154 (noting that More valued religious norms over legal norms); Powell, *supra* note 8, at 400 (describing More as "deeply nonpragmatic, systematically and even stubbornly other-worldly"); Shaffer, *supra* note 7, at 301 (arguing that More's hope, utilized as a lawyer's skill, was theologically based); Smith, *supra* note 4, at 54 (arguing that More's faith "constantly inform[ed] and enriched[ed] [his] professional activities").

Supreme Being.³⁹ Natural law, thus, reflects the will of God and, therefore, commands greater respect and obedience.⁴⁰ Natural laws are endemic to human nature.⁴¹ Given their genesis from the Supreme Being, which lies at the foundation of human existence,⁴² these laws sustain humanity and actually become components of human nature.⁴³ The symbiotic link between the Divinity and human nature represents the very essence of natural law.⁴⁴ That linkage also provides natural laws with presumptive validity, and commensurately compels greater deference for these more Divine prescriptions.⁴⁵

Other conceptualizations of natural law emphasize the need for social order and structure rather than a reflection of divine prescription.⁴⁶ The

³⁹ See DENNIS LLOYD, *THE IDEA OF LAW* 70–71 (1976) (providing, as a characteristic of natural law, that humankind and all matters of the universe are guided by gods and the spirits of the supernatural). It should be noted that the view of natural law that I use in the analysis of More's beliefs fits, for the most part, within Catholic tradition. Of course, other views of natural law, i.e., Aristotelian and the "new natural law," exist. See *infra* note 58 and accompanying text. Discussion in this article, however, will be confined to the traditional view of natural law as described in this section. Utilization of these alternate views of natural law to analyze More's beliefs will be reserved for future scholarship.

⁴⁰ DOUZINAS ET AL., *supra* note 29, at 4.

⁴¹ *Id.*

⁴² *Id.*; see also Douglas Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 223 (1995); Daniel Westberg, *The Relation Between Positive and Natural Law In Aquinas*, 11 J. L. & RELIGION 1–2 (1994–95) (noting the characteristic of natural law as human law so long as that law is "derived from the law of nature" and law that deviates from the law of nature cannot be considered natural law but a "perversion of law") (quoting ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, I–II, Q. 95, art. 2 (Fathers of the English Dominican Province trans., Benzinger Bros., 1947)). Compare the tenets of positive law as delineated more specifically *infra*, notes 67–96 and accompanying text.

⁴³ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 102–03 (1980); Douglas W. Kmiec, *Behind the "Empty Cloud" of Autonomous Reason—Or Why It Doesn't Matter if the Natural Law of Veritatis Splendor Is "Real Law"*, 39 AM. J. JURIS. 37, 41 n.19 (1994) (citing Robert P. George, *Natural Law and Human Nature*, in *NATURAL LAW THEORY* 34 (Robert P. George ed., 1992)); Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 AM. J. JURIS. 1, 23 (1995) (noting that natural law is rooted in perceptions of human nature).

⁴⁴ See Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 434 (1987) (stating that religion "became the source of inspiration.").

⁴⁵ See Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 980–82 (1991) (discussing the relationship between natural law and Christianity).

⁴⁶ See DOUZINAS ET AL., *supra* note 29, at 19 (describing natural law as the "regularities of the human and social order"); *id.* at 75 (claiming that "arguments for natural law do not have to be based on theology"); LLOYD, *supra* note 39, at 82–83 (arguing that natural law could exist even if God did not). For more regarding the change in the concept of natural law as it relates to

maintenance of order and discipline through structure and fulfillment of basic human needs become the fundamental goals of modern natural law.⁴⁷ The legal structures of the United States clearly demonstrate the merger of societal order and human rights. Perhaps the greatest paradigm of this principle is the Constitution of the United States, which, as natural law, "prescribes the right of self-preservation or life as well as the right to live and develop in community."⁴⁸ As a consequence, natural law assumes a higher authority that embodies both morality and rationality.⁴⁹ Rational, and perhaps more significantly, moral laws reflect a higher order.⁵⁰ Instead of nature, modern natural law focuses more upon ethics and morality.⁵¹

Morality and natural law are, however, symbiotic.⁵² Moral premises, as subsets of natural law, have strong connections to tenets of the Supreme Being.⁵³ While morality may not be the exclusive litmus test for societal

European history, more specifically the European enlightenment, see Nunn, *supra* note 29, at 339-44.

⁴⁷ See Nunn, *supra* note 29, at 339-40 (stating that natural law regulates human instincts and desires); Williams, *supra* note 44, at 435 (describing the "need to establish foundations for human values and knowledge independent of religion").

⁴⁸ Kmiec, *supra* note 42, at 222. Kmiec also recognizes the importance of the symbiosis between law and human nature in order for it to qualify as valid, natural law. *Id.* at 223. See generally Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993) (providing an overview of natural law as a theory that influenced the drafters of the Constitution).

⁴⁹ See PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 51-53 (1992) (explaining that natural law contains an objective element); Williams, *supra* note 44, at 435 (describing the Enlightenment's effect on religious views).

⁵⁰ See Westberg, *supra* note 42, at 2-3 (stating that "[t]he theory of natural law points to the existence of some body of moral norms which can be used as a standard in assessing the positive laws of a state").

⁵¹ See generally FINNIS, *supra* note 43, at 25-29 (discussing natural law as a foundation for moral judgment); Lloyd L. Weinreb, *The Natural Law Tradition: Comments on Finnis*, 36 J. LEGAL EDUC. 501, 502-04 (1986) (observing the connection between classical natural law theory and modern notions of morality and justice). This more modern movement away from nature in natural law has been adopted by the critical pragmatists. See Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 815 (1992) ("Critical pragmatism advocates a form of natural law without nature.").

⁵² See H.L.A. HART, *THE CONCEPT OF LAW* 151-52, 181 (1961) (opining that there is some nexus between law and morality). *But see* Rodney J. Blackman, *There Is There There: Defending the Defenseless with Procedural Natural Law*, 37 ARIZ. L. REV. 285, 287 n.3 (1995) (noting the traditional way of looking at natural law is as "a 'metaphysical theory of law [which] pretends to discover a natural law imminent in nature'" (alteration in original) (quoting HANS Kelsen, *PURE THEORY OF LAW* 77 (Max Knight trans., 1967))).

⁵³ See Anita L. Allen & Maria H. Morales, *Hobbes, Formalism, and Corrective Justice*, 77 IOWA L. REV. 713, 717-18 (1992) (noting Hobbes' theory of natural laws and listing the nineteen such laws that are reflective of the commands of God and morality).

norms,⁵⁴ it certainly becomes a strong barometer of the legitimacy of those norms. In terms of hierarchy, morality often takes priority over customs, traditions, and of course, human-made proclamations.⁵⁵

Natural law can check the legitimacy of human-made laws.⁵⁶ Human-made laws are moral, rational, and, therefore, legitimate under natural law principles if they promote human needs and foster a general state of well-being.⁵⁷ As a consequence, natural law, which preserves humankind and is Divinely conceived, is manifestly fair and commands obedience. In the alternative, laws or legal rules that are inapposite to human nature and the constructs of natural laws are invalid and should not be followed.⁵⁸ Of

⁵⁴ Other bases for societal norms include: God, positive law (law of the state), personalism, social contract theories, and wealth maximization. See Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1233–37.

⁵⁵ See James T. McHugh, *On the Dominant Ideology of the Louisiana Constitution*, 59 ALB. L. REV. 1579, 1587 (1996) (“Law is not properly speaking law unless it has a moral content.”) (quoting Shadia B. Drury, *The Resilient Core of Natural Law*, in LAW & POLITICS 5, 6–7 (Shadia B. Drury & Rainer Knopff eds., 1980)).

⁵⁶ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in PHILOSOPHY OF LAW 64 (Joel Feinberg & Hyman Gross eds., 1991) (stating that “[t]he existence of law is one thing; [but] its merit or demerit is another”) (quoting JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (1954)); see also Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 781 (1988) (opining that any given set of moral principles can be employed to judge the validity of legal rules). Civil laws generally constitute positive laws since they are created by people and enforced by a sovereign. See Chow, *supra* note 51, at 815–16; Westberg, *supra* note 42, at 2–3; *infra* notes 82–86 and accompanying text.

⁵⁷ See DOUZINAS ET AL., *supra* note 29, at 19; Kmiec, *supra* note 42, at 223; Nunn, *supra* note 29, at 338–40; see also *supra* notes 22–28 and accompanying text.

⁵⁸ See Peter Berkowitz, *On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet's "What Is Positive Law?"*, 100 YALE L.J. 701, 703 (1990) (explaining that Martin Luther King, Jr. refused to abide by civil laws that enforced racial segregation because such laws were null and void). For additional discussion of the limitations of natural law, see LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 1–12 (1987). I acknowledge that my admittedly brief conceptualization of natural law is more reflective of the Catholic tradition. The discussion of only this school of thought is not meant to suggest that it is the sole embodiment of natural law. Aristotelian notions of natural law recognize natural law as a universal law of nature that includes a natural justice and injustice that is binding on everyone. See Albert M. Rosenblatt, *The Fifty-Fifth Annual Cardozo Memorial Lecture: The Law's Evolution: Long Night's Journey into Day*, 24 CARDOZO L. REV. 2119, 2130–31 (2003) (describing what Aristotle meant by natural law); Carnes Lord, *Aristotle*, reprinted in HISTORY OF POLITICAL PHILOSOPHY 122–30 (L. Strauss et al., eds. 3d ed. 1987). Another view of natural law which has generated considerable discussion is the “new” natural law, which emphasizes basic, self-evident goods such as life, knowledge, play, aesthetic experience, friendship, religion, and practical reasonableness. See FINNIS, *supra* note 43, at 85–90; Nicholas Bamforth & David A.J. Richards, *Religion and Contemporary Constitutional Rights: A Critical Analysis of New Natural Law*, at 63–68 (March 11, 2004) (unpublished manuscript). For other conceptualizations of natural law, see EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN*

course, key variables in this checking function remain the personal beliefs, views, and perceptions of those who evaluate the validity of positive laws. The ultimate decision of validity, which depends upon the extent to which positive laws conform to natural law objectives, may vary depending upon the evaluator's interpretation of those laws.

If More's beliefs were rooted in natural law concepts of Divinity, morality and rationality, then he could not, in good conscience, accept rules which ran counter to those traits.⁵⁹ Henry VIII's proclamations, generated by the monarch himself, seemingly lacked a nexus with Divine prescription.⁶⁰ In fact, his Acts of Supremacy⁶¹ and Succession⁶² conflicted directly with ecclesiastical and theological canons that undergirded More's beliefs.⁶³ Given the natural law leanings of More's beliefs and natural law's theoretical superiority over "unnatural" laws, Thomas More had no cognitive choice but to withhold his endorsement of Henry VIII's proclamations.⁶⁴ As human-made prescriptions, the King's seemingly self-serving proclamations⁶⁵ were subjugated by More's beliefs based in natural

CONSTITUTIONAL LAW 9-23 (Great Seal Books 1955) (1928).

⁵⁹ Violation of beliefs that are morally and firmly entrenched in one's sense of self creates the discomfort commonly associated with cognitive dissonance. *See supra* note 13 and accompanying text (explaining cognitive dissonance).

⁶⁰ *See infra* Part I.B (providing additional analysis of Henry VIII's proclamations as human-made and, therefore, positive rather than natural law).

⁶¹ *See supra* note 26 and accompanying text (describing Henry VIII's Act of Supremacy).

⁶² *See supra* note 27 and accompanying text (describing Henry VIII's Act of Succession).

⁶³ *See supra* notes 10, 17, 30, 34-35 and accompanying text (describing More's commitment to theological principles and the religious order).

⁶⁴ More's beliefs prohibited him from accepting the notion that any persons, other than the Pope himself, could divest the Pope of his position as the Head of the Church. *See ROUTH, supra* note 2, at 225-26, (noting More's proclamation at his trial that the Parliament had no authority to pass the Act of Supremacy); *see also REYNOLDS, supra* note 2, at 368 (noting More's affirmation of an essential principle of the Church, namely that the authority of princes and states are set by Divine Law). More's stance against sovereign power began when he spoke out against Henry VII's feudal tax proposal while a junior member of the 1504 Parliament. *See MARIUS, supra* note 2, at 50-51. For other authors' accounts of this instance of More's defiance, *see CHAMBERS, supra* note 2, at 87; *REYNOLDS, supra* note 2, at 51-52; *RIDLEY, supra* note 6, at 33-34; *ROUTH, supra* note 2, at 25.

⁶⁵ *See ACKROYD, supra* note 2, at 339, 378-79. The author notes that the *Act in Restraint of Appeals* was passed to cut off appeals to the Pope in order to distance England from the influence of the church. This was a precursor for the Act of Supremacy, which proclaimed Henry to be the Head of the Church. *Id.* at 378-79. The motive behind the promotion of these parliamentary acts was to open the door for a declaration of Henry's marriage to Catherine of Aragon as null and void, an act the Pope would not perform. A *Treason Act* was subsequently passed, requiring the execution of any persons found guilty of accusing the King of heresy for his assumption of power in the Church or for refusing to acknowledge the King's power in that position. *Id.* at 379; *see*

law. The dominance of More's natural law-based beliefs over the King's proclamations, which were seemingly not Divinely inspired, reflected the Reverend Martin Luther King Jr.'s view that human-made laws that are incongruous with natural law prescriptions have dubious validity. As Dr. King had observed in his *Letter from Birmingham Jail 1963*:

A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. . . . [a]n unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.⁶⁶

B. *Expectations of the Sovereign—Henry VIII's Proclamations as Positive Law*

Human-made laws that theoretically augment natural law's goal of sustaining societal order generally constitute positive laws.⁶⁷ As human-made covenants that regulate certain aspects of society,⁶⁸ positive laws can provide a utilitarian functionality to natural law principles.⁶⁹

Henry VIII's proclamations, which Thomas More refused to endorse,⁷⁰ constituted rules that were "human-made," a fundamental characteristic of positive law. As previously noted, Henry VIII issued proclamations designed to restructure societal order. His Acts of Supremacy⁷¹ and Succession,⁷² as human-made laws, contrasted sharply

also CHAMBERS, *supra* note 2, at 248–51; MARIUS, *supra* note 2, at 215–16.

⁶⁶ Martin Luther King, Jr., *Letter from Birmingham City Jail 1963*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289 (James M. Washington ed., 1986); see also Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 79–82 (1998) (noting the natural law basis for many of Dr. King's writings and speeches, and his view that human-made laws are invalid if they contravene natural law principles).

⁶⁷ See Berkowitz, *supra* note 58, at 703 (noting the characteristic of positive law as being man-made and created by certain governing sections of society).

⁶⁸ See FINNIS, *supra* note 43, at 234–37 (noting that "a person treats something as authoritative when he treats it as . . . an exclusionary reason, i.e., a reason for judging or acting in the absence of understood reasons"); Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 319 (1988) (stating that positive law is derived from natural law); Westberg, *supra* note 42, at 1 (noting the distinction between derivation and determination of positive from natural law).

⁶⁹ See *infra* notes 87–95 and accompanying text.

⁷⁰ See *supra* notes 14, 61–63 and accompanying text (discussing Henry VIII's proclamations and Thomas More's refusal to acknowledge them).

⁷¹ See *supra* note 26.

⁷² See *supra* note 27.

with Thomas More's natural law-based beliefs which had their genesis in Divine order.⁷³

If Henry VIII's proclamations are not of Divine origin and, thus, are not "natural,"⁷⁴ then their legitimacy as positive law becomes arguably suspect. A close nexus between human-made laws and natural laws, which "preserve and foster the state of human kind," constitutes one form of positive law from a Hobbesian standpoint.⁷⁵ Therefore, laws that sustain the natural virtues of humankind are positive laws which have significant natural law overtones.⁷⁶

Henry VIII's proclamations appear more tied to personal and political ends than to a Divine order.⁷⁷ To some, however, this quality does not necessarily disqualify Henry VIII's proclamations as positive laws. From an Austinian perspective, the source of rules issued by a sovereign power has little to do with the designation of those rules as positive law.⁷⁸ Instead, a sovereign's will to encourage certain behavior constitutes positive law which the governed constituency is compelled to follow.⁷⁹ A sovereign's power to enforce compliance became the ultimate legitimizing factors of those rules.⁸⁰ This view of positive law arguably provides Henry VIII's proclamations with legitimacy. As the sovereign who issued the proclamations and possessed the requisite power to enforce compliance,

⁷³ For an analysis of More's writings and beliefs, see *supra* note 7. For more on the genesis of natural law-based beliefs, see *supra* notes 39–45 and accompanying text.

⁷⁴ See *supra* notes 39–45 and accompanying text (discussing the Divine genesis of natural law-based beliefs).

⁷⁵ See Allen & Morales, *supra* note 53, at 717 (explaining Hobbes's view of law, particularly natural law, as centered on the natural attainment of power, possessions and reputation, and the commensurate desire to employ any means to attain those values).

⁷⁶ *Id.* at 718. According to Thomas Hobbes, a scholar of jurisprudence, principles of natural law vested the sovereign with the power to issue rules that carry out those natural law principles. *Id.* at 717–18. Therefore, a more Hobbesian view of positive law focuses attention not so much on the laws themselves and who drafts those laws, but more upon those laws' facility to foster natural law-based principles. *Id.* at 718; see also GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 293, 442–43 (2d ed. 1995).

⁷⁷ See *supra* note 65 (explaining Henry VIII's underlying motives for his proclamations).

⁷⁸ See JOHN AUSTIN, THE AUSTINIAN THEORY OF LAW 1–3 (W. Jethro Brown ed., 1906).

⁷⁹ *Id.* at 1–2.

⁸⁰ *Id.* at 10–19; see also Chow, *supra* note 51, at 763 n.22 (1992) (stating that Austin believed that "law was a set of rules embodying the desire of the sovereign expressed in a command that others behave in a certain way, backed by the sovereign's power and will to sanction disobedience").

his Act of Supremacy and Acts of Succession constituted positive law in the Austinian sense.⁸¹

Whether viewed from a Hobbesian or Austinian perspective, it seems clear that human-made laws can have legitimacy regardless of their nexus with Divine prescriptions. Positive law, in and of itself, remains the law of will, and not necessarily the law as it should be under a natural law-based concept. Positive law functions more pragmatically rather than normatively.⁸² Thus, positive law need not reflect morality,⁸³ but should fulfill the more practical purposes of instilling respect for sovereign power and preserving civility.⁸⁴ The will, command, and authority of the human sovereign become the central focus, not Divinity.⁸⁵ Pursuant to this view, laws are moral by their very issuance. Positive laws presumptively command obedience since they constitute the legitimate dictates of the sovereign. Respect for these laws arises concomitantly from a deference to power, not from these laws' possible connection to any Divine order.⁸⁶

In addition to their manifestations as expressions of sovereign power, Henry VIII's proclamations had plausible validity. A key factor of this validity is the potential of these proclamations to further societal order—a key feature of positive law.⁸⁷ The apparent opportunism of the King's

⁸¹ In addition to the nexus to natural law-based principles (Hobbes) and the will and power of the sovereign to issue and enforce legal rules (Austin), positive law may also gain its legitimacy through politics that could define and determine the extent of enforcement of certain rules. See HART, *supra* note 52, at 49–120 (debunking sovereign power as the legitimizing source of law and proposing the complexity of societal norms and organizations as the principle foundation of modern legal systems).

⁸² See AUSTIN, *supra* note 78, at 96–116; see also HART, *supra* note 52, at 49–76.

⁸³ See *supra* note 19 (explaining personal moral beliefs); *supra* notes 52–55 and accompanying text (describing the symbiotic properties of morality and natural law).

⁸⁴ See Westberg, *supra* note 42, at 6–8 (explaining that laws are aimed at the external life rather than internal virtue).

⁸⁵ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 11 (Isiah Berlin et al. eds., 1954) (1832); see also Westberg, *supra* note 42, at 6 & nn.11–12 (explaining the Thomist view of positive law as doctrine born of “human authority, not from natural or moral law”).

⁸⁶ See Nunn, *supra* note 29, at 340; see also Rodolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455, 456 (1995) (depicting positivism in totalitarian countries). Other scholars also question the notion that positive laws affirm state power. See HART, *supra* note 52, at 181–207; Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 18, 26–37 (David Kairys ed., 1982); Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353 (1995).

⁸⁷ See DOUZINAS ET AL., *supra* note 29, at 19, 75 (explaining the origins and evolution of natural law); LLOYD, *supra* note 39, at 82–83. For more regarding the change in the concept of natural law as it relates to European history, specifically to the European enlightenment, see Nunn, *supra* note 29, at 339–44. See also JEREMY BENTHAM, *AN INTRODUCTION TO THE*

proclamations did not completely overshadow the potential functionality of these laws within British society at that time.

Note that the resultant Acts of Supremacy and Succession were issued by a monarch who had been tutored in the classics, and likely had some instruction in clerical education.⁸⁸ Henry VIII presumably had a measure of knowledge of religious doctrine, which might have entered his thinking as he proffered his proclamations.⁸⁹ This factor might have countered, to some extent, the presumptive conclusion that the King's proclamations were totally devoid of a natural law basis. Moreover, the King's knowledge of religious doctrine contributed to the rationalized legitimacy of his proclamations. Henry VIII's marriage to Catherine of Aragon, required special exception to the longstanding Church rule that one should not marry his brother's widow.⁹⁰ The Church's willingness to grant an exception to this rule stemmed from a political objective to strengthen the ties between the Royal Houses of England and Spain, Catherine's native country.⁹¹ Henry VIII initially saw his marriage to Catherine as an obligation that he ultimately surmised was a violation of Church law as stated in the Bible.⁹² To correct this violation, he sought to dissolve his marriage to Catherine in order to marry Anne Boleyn. The Church's refusal to grant this request—a decision based on the goal to maintain English and Spanish ties—likely heightened the King's awareness of certain corruption in the church during that time.⁹³ This apparent corruption served as a pragmatic catalyst for, at the very least, his Act of Supremacy.⁹⁴ Given these contextual realities of the Church and society

PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1970); DAVID HUME, A TREATISE OF HUMAN NATURE (Archon Books 1965) (1911). For a more comprehensive explanation of positive law and other jurisprudential tenets, see generally WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 (1998).

⁸⁸ J.J. SCARISBRICK, HENRY VIII 5 (1968) (noting that Henry VIII was tutored by poet-laureate John Skelton, received instruction in the classics, and, according to Lord Herbert, "received the beginnings of a clerical education").

⁸⁹ See LACEY BALDWIN SMITH, HENRY VIII: THE MASK OF ROYALTY 100-01 (1971) (stating that Henry VIII's faith was "ready made" and resulted from many prior generations and "sanctioned by the weight of history.").

⁹⁰ Prior to her marriage to Henry VIII, Catherine of Aragon had been married to Arthur, Henry VIII's older brother. Robert Bolt, A MAN FOR ALL SEASONS vii (1968).

⁹¹ *Id.*

⁹² *Id.* at viii.

⁹³ *Id.* at vii-viii.

⁹⁴ SCARISBRICK, *supra* note 88, at 246 (noting that the Church's need for reform during

during that time, the King's proclamations, thus, had potential utility and legitimacy, despite their facially self-serving nature. As positive laws issued by a sovereign seeking societal order, these proclamations commanded respect and obedience.⁹⁵

Viewed as Austinian positive laws, however, Henry VIII's proclamations, despite the monarchy's rationalizations of their legitimacy,⁹⁶ inevitably clashed with Thomas More's natural law-based beliefs. To More, Divinely derived law, which was the foundational essence of Church rules, ranked supreme among the hierarchy of legal rules. He seemingly viewed the King's proclamations as human-made edicts that had an insufficient nexus to Divine order. He, therefore, could neither follow nor endorse Henry VIII's proclamations, irrespective of their arguable legitimacy under positivist norms. Despite the consequences, More's only cognitive option was to remain true to his natural law-based principles.

C. *Contextualism—The Search for Accommodation or Compromise Between Conflicting Beliefs and Expectations*

As previously discussed, Thomas More's personal natural law-based beliefs conflicted with Henry VIII's goals and expectations.⁹⁷ This clash contributed substantially to More's inevitable dilemma of conscience. Of course, More resolved this dilemma when he rejected Henry VIII's proclamations, favoring strict adherence to personal beliefs grounded in natural law.⁹⁸ However, conflict between beliefs and sovereignly issued edicts need not result in stark absolutes, i.e., the complete rejection of sovereign will or abandonment of personally held beliefs. Some semblance of compromise *might* appease the sovereign without retreating completely from personal beliefs.

Henry VIII's time was "manifest," and prompted the King to take some action against the scandals that plagued the Church); see also H. MAYNARD SMITH, *HENRY VIII AND THE REFORMATION* 53–54 (1948) (stating that Henry VIII knew that the Church had attempted to draft new canons in response to the scandals that had occurred during that time).

⁹⁵ See Nunn, *supra* note 29, at 340.

⁹⁶ See *supra* notes 59–65 and accompanying text (discussing More's belief system as based on natural law-based principles).

⁹⁷ See *supra* note 64 and accompanying text (explaining More's reasons for refusing to endorse Henry VIII's proclamations).

⁹⁸ Rejection of Henry VIII's proclamations appeared to be More's action. See *supra* note 64 and accompanying text (noting More's failure to endorse Henry VIII's proclamations). However, his failure to endorse yet not openly reject the King's wishes points more toward appeasement.

Achievement of a sometimes delicate compromise typically comes in the form of some type of contextual accommodation. The search for compromise as a mechanism to avoid this conflict appears closely associated with a form of jurisprudential law defined by context or "contextualism."⁹⁹ As explained in more detail below, Thomas Cromwell, who, as Henry VIII's secretary,¹⁰⁰ attempted to obtain Thomas More's endorsement of the King's actions, appears as a broker of compromise.

Laws, rules, and their interpretations are derived from context. Contextualism recognizes the realities and dynamics of human interaction as integral elements in the creation of legal rules and the foundation of reasoned decision-making.¹⁰¹ Legal rules result from an amalgam of policies, ideological assumptions and circumstances that give rise to problems which those rules attempt to address.¹⁰² Contextual decision-making, both in terms of the drafting and interpretation of legal rules, relates strongly to realism, which encourages holistic application of rules to social controversies.¹⁰³ To some, context is so endemic that decision-making cannot be seen as totally objective. Social circumstances and the impact of those circumstances upon human judgment make context an unavoidable facet of reasoned decision-making.¹⁰⁴ Contextualism, with its emphasis on the actual circumstance to which laws apply and are

⁹⁹ See *infra* notes 101–109 and accompanying text.

¹⁰⁰ See BECKINGSALE, *supra* note 11, at 106.

¹⁰¹ See Twining, *supra* note 21, at 372–77.

¹⁰² See *id.* at 373–74 (describing laws borne of context, yet eschewing the word "contextualism" as an amorphous exercise).

¹⁰³ Legal realism gained significant credibility in the early twentieth century, and constituted the antithesis of formalism and conceptualism as reflected in the United States Supreme Court case of *Coppage v. Kansas*, 236 U.S. 1, 26 (1915), *overruled in part by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 717 (1941) (allowing workers to contract with their employees without state interference). As a generalization, realism implores the recognition of the use of social condition as a variable in decision-making, in lieu of mere reliance on legal rules, which may advance outdated or dysfunctional policies. See G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 821 (1986). In effect, realism commands that rules be applied contextually in light of the effect of those rules on such factors as wealth, class, and condition. For more discussion of the western conceptualization of law and context, see Nunn, *supra* note 29, at 342–43.

¹⁰⁴ See Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 178 (1992); see also Anthony J. Sebok, Note, *Judging the Fugitive Slave Acts*, 100 YALE L.J. 1835 (1991) (explaining the different results in the *Plessy* and *Brown* decisions through the impact of context on judicial decision-making).

interpreted, also relates to such critical theories as interpretivism¹⁰⁵ and humanism.¹⁰⁶

From the standpoint of contextualism, laws, rules, and the interpretation of those rules are significantly influenced by social conditions.¹⁰⁷ Laws and rules are intertwined with human experiences, and those experiences become factors used to evaluate the efficacy of rules.¹⁰⁸ Pursuant to this rationale, legal rules gain legitimacy and functionality through their ability to adapt to, and address, the problems which arise from those human experiences. This relational aspect of contextualism appeals to both postmodernists and pragmatists.¹⁰⁹

Contextualism had particular applicability to the factual scenario that produced Thomas More's dilemma of conscience. Thomas Cromwell served Henry VIII in several key political offices that provided him unique insight into the effectiveness of government and the need for reforms.¹¹⁰

¹⁰⁵ See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1209–17 (1987) (providing a probative explanation of interpretivism); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1104–06 (1989) (concluding that interpretivism promotes thinking about similarities and dissimilarities in social contexts).

¹⁰⁶ Humanism, as explained by natural law, incorporates human history and circumstance, into the explanation of legal rules and their application. See Angela P. Harris, *The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 215 n.26 (1996).

¹⁰⁷ See Mensch & Freeman, *supra* note 45, at 932–33 (providing a detailed example of context as it relates to decision-making and the consequences related to that decision-making); Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER, 359, 361 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988) (stating that judges' decisions are not based on deductive reasoning, but rather on social norms).

¹⁰⁸ See Alexander Somek, *From Kennedy to Balkin: Introducing Critical Legal Studies from a Continental Perspective*, 42 U. KAN. L. REV. 759, 766 (1994); see also DOUZINAS ET. AL., *supra* note 29, at 20; FITZPATRICK, *supra* note 49, at 6–7 (opining that rules of law derive their meaning and significance from society).

¹⁰⁹ See Mensch & Freeman, *supra* note 45, at 1083. For more on postmodernism, see Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046 (1994), and Minda, *supra* note 86. Postmodernism has a close nexus with pragmatism. See Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 544 (1993). Pragmatism, which can be more feasibly described than defined, stresses faith in the need for community and seeks to supplant the formalist conception of rules with more realistic interpretive practices. Pragmatism has a central theme: the furtherance of social progress. See ROBERT L. HAYMAN, JR. & NANCY LEVIT, *JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES* 452–87 (1994).

¹¹⁰ See NEVILLE WILLIAMS, *HENRY VIII AND HIS COURT* 179 (1971) (stating that the various offices Cromwell held while in Henry VIII's service provided him with a "unique

Serving as Secretary to the King, Cromwell doggedly sought to appease Henry VIII. He not only supported the King's proclamations,¹¹¹ but also sought Thomas More's open endorsement of those proclamations.¹¹² Cromwell, labeled a "pragmatic craftsmen," took a contextual approach to the conflict between More and Henry VIII.¹¹³ He allegedly saw the law as "nothing but an instrument or a weapon."¹¹⁴ So pragmatic was Cromwell, that some found him devoid of any legal conviction.¹¹⁵

To dismiss Thomas Cromwell simply as an unprincipled pragmatist without conviction, however, is somewhat superficial, if not extreme. Cromwell was the quintessential contextualist, who likely viewed law as a facilitator of social order. He believed that Henry VIII's dominion over the Church would serve to unite England under one sovereign, and contribute to an orderly society replete with pooled resources to minimize poverty and waste, maximize wealth, and provide more citizens with a sense of dignity and purpose.¹¹⁶ Towards this end, laws apparently designed to further such utilitarian goals were generously interpreted.¹¹⁷

position at the centre of the administration, and he could see the existing system as a whole, compare anomalies, understand procedures and reach sensible conclusions about needed reforms").

¹¹¹ See *supra* notes 26–27.

¹¹² See ACKROYD, *supra* note 2, at 360 (citing Cromwell as sitting on the panel of authorities known as the Lambeth Commissioners before whom More was required to appear and assent to the proclamations by his giving of the accompanying oath); REYNOLDS, *supra* note 2, at 318 (noting that even after More's imprisonment, Cromwell allowed More's daughter Margaret to enter the tower with the hopes of persuading him to take the oath); see also MARIUS, *supra* note 2, at 453–54.

¹¹³ See Markovits, *supra* note 11, at 328–29 (noting Powell's analysis of Robert Boltz's *A Man for All Seasons*, where Powell refers to Thomas Cromwell as one who takes law seriously in "only the pragmatic-craftsmen and 'social importance' senses").

¹¹⁴ *Id.* at 329 (quoting Powell, *supra* note 8, at 405).

¹¹⁵ See *id.* (describing Powell's analysis of Cromwell as a died-in-the-wool pragmatist who sees legal arguments as "a grab-bag of conventional linguistic tricks") (quoting Powell, *supra* note 8, at 406).

¹¹⁶ See MARIUS, *supra* note 2, at 380 (opining that Thomas Cromwell sought the King's dominion over the church in, what he believed, would be the general betterment of society).

¹¹⁷ BECKINGSALE, *supra* note 11, notes Cromwell's contextualist ideals and his utilization of the law to defeat the King's adversaries:

The advantage which Cromwell enjoyed over his opponents was that he had realised his view of the realm as an Empire in law. . . . Fisher and More did not have to be defeated in argument, merely convicted by the law. . . . It was through the enforcement of the law that Cromwell was able to argue his case.

Id. at 39. See *supra* notes 97–109 and accompanying text (citing to the definition of contextualism).

Cromwell seemingly believed that the maintenance of social order related also to the fulfillment of the sovereign's will, a belief that compelled strategic action in furtherance of the will of the sovereign. Assertion of the King's supremacy over the Church appeared to create a greater sense of national sovereignty that might bring about greater societal good.¹¹⁸ Cromwell's decision to view Henry VIII's proclamations as guarantors of social order manifested the humanism that is such an integral feature of contextualism.¹¹⁹ Blind faith in the sovereign's will as insurer of societal order remained a speculative, and, perhaps, risky judgment.

As history and Bolt's play document, Cromwell's contextual approach attempted to persuade More to accommodate Henry VIII's proclamations.¹²⁰ He sought to achieve a compromise between More's dominant, personally held beliefs, and the King's expectations. In fact, Cromwell allegedly tried vainly to persuade More against any direct denunciation of the King's proclamations, and "would rather have seen his own son beheaded than be a witness to More's refusal."¹²¹ More's defiance, of course, underscored the depth of his natural law-based beliefs.¹²² His rejection of Cromwell's approach, however, had far greater

¹¹⁸ See BECKINGSALE, *supra* note 11, at 40 (noting that the Act of Supremacy's potential to create a national sovereignty required rejection of papal authority).

¹¹⁹ This humanistic approach to decision-making within context also underscores the possible failings of a contextual approach. If Thomas More's judgment that the King's proclamations furthered societal order was erroneous, then all of his legal interpretations become somewhat spurious. This contingency however, should not diminish the applicability of contextualism. Even in the context of judgments on natural law, human judgment often times can be fallible. Therefore, it is much more important to judge the overall intent of the decision-maker, i.e., fulfillment of societal order, rather than the idiosyncratic views of motives associated with the definition of order. This point is critical in the case of Cromwell, whose behavior, while generated by concerns for societal order and good, were also tinged with self-interest. See SMITH, *supra* note 94, at 47 (stating that Cromwell was practical, yet craved power and respect).

¹²⁰ See ACKROYD, *supra* note 2, at 387 (noting More's silence when asked to take the Oath of Supremacy). The author also uses the simile of a "double-edged sword"; on one edge damnation of More's soul, and on the other, damnation of his body. *Id.*; see also MARIUS, *supra* note 2, at 461 (citing More as the first to refuse to take the oath); REYNOLDS, *supra* note 2, at 300 ("[Y]et unto the oath that there was offered me I could not swear, without the jeoparding of my soul to perpetual damnation.") (quoting More); RIDLEY, *supra* note 6, at 274 (noting More's refusal to accept Cromwell and the other Commissioners' invitations to take the Oath of Supremacy); *supra* notes 97–109 and accompanying text (defining contextualism). See generally BOLT, *supra* note 3, at 88–89.

¹²¹ ACKROYD, *supra* note 2, at 363 (documenting Cromwell's desire that More not counter Henry VIII's goals and expectations).

¹²² More's beliefs contributed to his dogmatic loyalty to the rule of natural law. Powell, in his analysis of Robert Bolt's *A Man for All Seasons*, summarizes the strength of this belief system when he notes More's views: "Law . . . [is] a social bond that unites us even when we

philosophical significance. To More, laws, not context, formed social bonds that sustained society.¹²³ Cromwell's contextualism did not preserve social order, but instead detracted from society's more fundamental need to adhere to law as a conviction rather than social convenience.¹²⁴ More, therefore, could not embrace any contextual response that caused individuals to stray from the true letter of law, particularly Divinely related law.

D. *More's Tacit Embrace of Contextualism*

Discussion thus far might suggest that Thomas More, in adherence to his natural law-based beliefs, repudiated Henry VIII's positivist proclamations. A careful review of his actions, however, indicates that his repudiation may not have been absolute. Prior to his conviction for treason, More never publicly denounced the King's proclamations.¹²⁵ He

invoke it to resolve our disputes." "Society . . . constitutes itself in part, in and through the law." Markovits, *supra* note 11, at 329 (alteration in original) (quoting Powell, *supra* note 8, at 404, 405).

¹²³ *See id.*

¹²⁴ *See id.* Of course, views regarding Cromwell's more contextual approach to the law vary. Some find Cromwell's pragmatic approach disingenuous to say the least. Most strident in this group is Professor Jeff Powell, who discusses More's dismissal of Cromwell as a "pragmatist, the merest plumber." *See* Powell, *supra* note 8, at 399-401. Powell further opines that practitioners who freely embrace Cromwell's pragmatic and contextual approach to the law have contributed to a cynicism in the profession among those practitioners, and a willingness on the part of many judicial decision-makers to "reach the 'right' result at whatever cost to the legal principle . . ." Markovits, *supra* note 11, at 330 (quoting Powell, *supra* note 8, at 408). While the complete abandonment of legal conviction can be problematic, I fail to see Cromwell's position as solely related to total abandonment. Law, which is born of context, actually requires that situational and societal norms and human experiences be considered when law is interpreted. The very essence and efficacy of the law depends upon its applicability within a complex matrix of human existence. *See* Morant, *supra* note 66, at 103-04 (1998) (arguing that contextual realities are inevitable criteria in thoughtful and reasoned decision-making). I, therefore, posit that the embrace of contextualism is not in and of itself tantamount to the abandonment of legal or moral conviction. Contextual references are inevitable in any kind of thoughtful decision-making. The true evaluation of the merit of contextualism is related more to degree rather than its actual implementation. As a result, contextual interpretations and applications of the law may become more suspect when those interpretations deviate substantially from the essence of the law or rules interpreted. Perhaps then a better way to surmise More's objections to the Cromwellian approach is that in endorsing the King's proclamation, Cromwell deviated substantially from those natural law principles that made up More's beliefs system.

¹²⁵ Note that More never stated openly that the King's proclamations were wrong or counter to his natural law-based beliefs. He merely stated that he could not endorse those proclamations. Only at More's trial, and after he had been convicted, did he publicly address the validity of the King's proclamations. *See* ACKROYD, *supra* note 2, at 397 ("Seeing that I see ye are determined

expressed privately, not publicly, his protest to the King's proclamations.¹²⁶ As a contextual tactic, this unwillingness to openly oppose the King arguably constituted a minimal accommodation. Public silence, which did not violate More's natural law-based beliefs,¹²⁷ might have functioned to appease the sovereign and fulfill some measure of will.

Yet More's behavior intimates the tacit adoption of a contextual strategy during his struggle with Henry VIII and Cromwell. While More never endorsed the King's proclamations, he refrained from *open* rejection until after his conviction for treason.¹²⁸ Given the strength of his beliefs,¹²⁹ and the King's clear violation of the natural law principles that were central to those beliefs, one might surmise that More would have publicly rejected the proclamations at the outset of the controversy. If natural laws are integral to humanity,¹³⁰ then they encourage actions that best foster humanity. Certainly public rejection at the time Henry VIII's proclamations were presented for ratification would have constituted an act most congruent with More's natural law-based beliefs. More's initial abstinence from overt rejection of the Acts of Supremacy and Succession symbolizes his possible attempt at compromise with the King. While More could not be labeled a true contextualist,¹³¹ his protracted public silence certainly signifies a marginal embrace of the contextual compromise between personal beliefs and professional expectations.¹³²

to condemne me (God knoweth howe) I will nowe in discharge of my conscience speake my minde plainlye and freely touching my Inditment and your Statute withall.") (quoting More).

¹²⁶ More would often confide in his daughter Margaret as to the reasons why he could not take the Oath of Supremacy. See ACKROYD, *supra* note 2, at 374 (stating that More made it clear to his daughter that he could not "be swayed from the dictates of his conscience"). For more authority noting More's insistence on reserving his protest of Henry's Acts of Succession and Supremacy to private conversations, see generally BOLT, *supra* note 3, at 48–56, 77–79; CHAMBERS, *supra* note 2, at 311; FOX *supra* note 2, at 111–14; KENNY, *supra* note 2, at 72–87; MARIUS, *supra* note 2, at 470–71, 492–99; REYNOLDS, *supra* note 2, at 302–03; ROUTH, *supra* note 2, at 216–19.

¹²⁷ See *supra* notes 59–65 and accompanying text (discussing More's beliefs in natural law).

¹²⁸ See *supra* note 125 and accompanying text.

¹²⁹ See *supra* note 14 (documenting the strength of More's convictions).

¹³⁰ See *supra* notes 39–45 and accompanying text (explaining that natural law is connected to humanity because natural law is created by the Supreme Being, the foundation of human existence).

¹³¹ A study of More's history leads to the inescapable conclusion that his natural law-based principles were the most significant and dominant influences on his judgments, choices, and actions. For a summary of the historical facts which document the strength of More's beliefs, see *supra* notes 14, 17, 34–35 and accompanying text.

¹³² Of course, More's attempted "compromise" or "accommodation" by silence was unsuccessful from the standpoint of his personal life. See *supra* note 4 and accompanying text

Perhaps More's compromise through initial silence demonstrates the virtual inevitability of contextual decision-making. An adjudicator, even one who adheres strictly to natural law-based principles, would utilize some measure of context as she applies those principles to humanistic circumstances. The application of legal rules to specific problems or controversies remains a contextual exercise.¹³³ Thus, even the most stalwart natural law proponents cannot avoid context as a variable in the interpretation of legal rules and prudent decision-making.

An adjudicator who is strongly influenced by natural law, however, might restrict the reality of context to that which preserves world order in accordance with her natural law-based norms. Such a limited contextual application signals the dominance of natural law in decision-making. This rationale explains, to some extent, More's initial, contextual strategy of public silence. Societal order during that time would not have been served by a public debate on his crusade to the seeming illegitimacy of the King's proclamations. Private protest of these proclamations furthers a cognitive balance between beliefs grounded in natural law and its tendency to foster humankind and further societal order, and expectations of the sovereign which are expressed in terms of positive law. Those like Thomas More naturally gravitate toward contextual compromise that can balance competing values.

(noting that decapitation was the result of More's silent "compromise"). However, even if he had succeeded in avoiding the King's wrath through silence, I dare say that cognitive dissonance would have still plagued More because he failed to openly oppose that which was in total contravention of his natural law-based beliefs. *See supra* note 125.

¹³³ *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 398 (1985) (arguing that application of law to fact equates to moral reasoning by decision-makers engaged in this exercise). *See generally* Morant, *supra* note 66, at 103-04 (arguing for a more contextual interpretation and application of contract rules). A number of scholars have acknowledged the importance of a contextual approach to the scrutiny of legal problems. *See* David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 158-59 (1988) (noting that judicial decisions must be analyzed by examining whether justice is realized in particular legal situations); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-82 (1987) (stating that, in interpreting statutory and common law, judges consider the current social, political and legal context); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 373-78 (1990) (discussing the force of evolution considerations in judicial statutory interpretations). For a discussion of the importance of race as a contextual element in legal pedagogy, *see generally* Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511-13 (1991).

II. THE RELEVANCE OF THOMAS MORE'S DILEMMA TO THE CONTEMPORARY PRACTICE OF LAW

Perhaps a seminal issue in this discussion remains the contemporary relevance of More's dilemma of conscience. I posit that the conflict More confronted more than 450 years ago resonates with many present-day practitioners. Like Thomas More, today's lawyers bring to the practice of law personally held beliefs.¹³⁴ While they may not be as theologically oriented as those of More, these beliefs nonetheless constitute strong cognitive influences on all forms of decision-making,¹³⁵ including the prioritization of cases or controversies and the legal reasoning required to resolve them. The following specific examples highlight the potential impact of beliefs on decision-making: Would the lawyer who believes that abortion is morally unjust represent physicians who routinely perform abortions?¹³⁶ Can the prosecutor who believes that the death penalty violates personally held beliefs associated with terminating human life, zealously prosecute someone accused of capital murder?¹³⁷ Would an

¹³⁴ See *infra* Part II.B (discussing the pervasiveness of personally held beliefs in decision-making); see also *infra* note 193 (noting, from a psychological perspective, the extraordinary influence of personal beliefs on decision-making).

¹³⁵ See *infra* note 197 and accompanying text.

¹³⁶ See Teresa Stanton Collett, *Speak No Evil, Do No Evil: Client Selection and Cooperation With Evil*, 66 *FORDHAM L. REV.* 1339, 1339 (1998). The author argues that a Catholic attorney's religious convictions should play a determinative role her selection of clients. *Id.* at 1339–40. The author also notes the Tennessee Bar Association's decision that "a pro-life Catholic lawyer has a professional obligation to accept court appointed representation of a minor seeking an abortion." *Id.* at 1359 n.80. See also David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 371, 431–32 (2000) (arguing that the pro-choice lawyer owes a duty to herself to not represent a client who wants to picket an abortion clinic); Lynn D. Wardle, *The Quandary of Pro-life Free Speech: A Lesson from the Abolitionists*, 62 *ALB. L. REV.* 853, 880–81 (1999) (noting Harvard Law Professor Robert H. Mnookin's belief that young lawyers representing the state in challenges to anti-abortion legislation often fail to offer a vigorous defense when armed with conflicting personal belief that abortion should not be restricted).

¹³⁷ See Jill Jones, *The Christian Executioner: Reconciling "An Eye for an Eye" With "Turn the Other Cheek"*, 27 *PEPP. L. REV.* 127, 135 (1999) ("[I]t would be difficult for the prosecutor who questions the moral validity of capital punishment to zealously prosecute a capital case and argue for imposition of the death penalty."); Jason M. Schoenberg, Note, *Making the Constitutional Cut: Evaluating New York's Death Penalty Statute in Light of the Supreme Court's Capital Punishment Mandates*, 8 *J.L. & POL'Y* 337, 380–82 (1999) (arguing that, in New York, the lack of standards guiding a prosecutor's discretion to seek the death penalty may lead to arbitrary imposition and different sentences for similarly situated defendants in different jurisdictions, depending on the individual beliefs of the prosecutor); cf. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 *MD. L. REV.* 1502, 1509–10 (1998) (noting an African-American district attorney's refusal to seek the death penalty because of his belief that it is intrinsically racist).

attorney whose beliefs are strongly rooted in religion and who regularly represents those whose civil liberties have been abridged except as a client and zealously represent an atheist who challenges school prayer?

Dilemmas of conscience also surface in less sensational, more mundane legal situations. For example, what advice would an attorney give a major corporate client whose business practices routinely violate state and federal environmental regulations? How would an associate in a law firm respond when the partner demands she cease work on a project due to the client's failure to pay, notwithstanding the merit of the client's claim?

There are no universal answers for these rather prevalent ethical questions. The differing strengths of belief systems, together with the individualized perceptions of professional expectations, ensure differing responses from the attorneys who face these problems. Perhaps more important than answers is an appreciation of the impact of conflicting values on decision-making focused on the search for possible solutions.

A. Adherence to Conviction Versus Accommodation of the Sovereign—A Contemporary Narrative

Contemporary lawyers, at certain times during their careers confront dilemmas of conscience.¹³⁸ The following narrative from and to some extent, my early years of practice not only proves the prevalence of this dilemma, but also underscores the complexity of decision-making required to resolve it.

As a lawyer in the United States Army Judge Advocate General's Corps (J.A.G. Corps.), I was assigned to the Office of the Staff Judge Advocate of the 18th Airborne Division at Fort Bragg, North Carolina. In addition to the 18th Airborne Corps, Fort Bragg also served as the host installation for the 82nd Airborne Division and the Special Forces Operation more commonly known as the Green Berets.¹³⁹ These highly specialized, combat-ready units routinely conducted exercises in wooded areas located on the installation. Dominated by pine trees and scrub

¹³⁸ See *supra* notes 136–37 (providing examples of these dilemmas).

¹³⁹ See generally XVIII Airborne Corp & Fort Bragg, Announcements, at <http://www.bragg.army.mil/18abn/> (last visited Sept. 23, 2004) (identifying the 18th Airborne Corps and the 82nd Airborne Division as part of Fort Bragg, N.C.).

growth, these wooded areas were populated by various fauna, including the endangered red-cockaded woodpecker.¹⁴⁰

Military exercises, which usually included artillery fire and the sizeable movement of personnel and materiel in wooded areas of the installation, disturbed the red-cockaded woodpecker's habitat. This development became my first, and perhaps most polemic, assignment as a licensed attorney: Determine whether commanders, pursuant to military¹⁴¹ and federal regulations,¹⁴² had a legal duty to modify training procedures in order to secure the habitat of the red-cockaded woodpecker.

While my assignment lacked the dramatic urgency of Thomas More's consideration of King Henry VIII's proclamations,¹⁴³ it did pose strikingly similar ethical issues. I was acutely aware that post commanders, who also were my superior officers, would have been chagrined by a suggestion to interrupt or modify training operations, irrespective of reasons related to environmental concerns. Like Thomas More, who perhaps knew that refusal to endorse Henry VIII's proclamations might lead to reprisal,¹⁴⁴ I perceived that command displeasure with a legal opinion that insisted upon a change in operations could have adversely impacted my military career. Also similar to More, my personal beliefs influenced, to some degree, my approach to decision-making. Aside from the belief that rare living species must be preserved,¹⁴⁵ I firmly respected the rule of law.¹⁴⁶ Although that

¹⁴⁰ For a description of the red-cockaded woodpecker and the southern states' modification of its habitat, see generally ROBERT W. MCFARLANE, *A STILLNESS IN THE PINES: THE ECOLOGY OF THE RED-COCKADED WOODPECKER* (1992); see also National Wildlife Federation, *Redcockaded Woodpecker*, at <http://www.nwf.org/wildlife/redcockadedwoodpecker/> (last visited Sept. 23, 2004) (noting the current endangered status of the red-cockaded woodpecker).

¹⁴¹ For military guidelines regarding endangered and threatened species, see generally DEP'T OF THE ARMY, *ARMY REGULATION 200-3, NATURAL RESOURCES—LAND, FOREST AND WILDLIFE MANAGEMENT*, ch.11 (1995). For the current federal guidelines governing the military's implementation of the Endangered Species Act see Interagency Cooperation—Endangered Species Act of 1973, 50 C.F.R. § 402 (2003).

¹⁴² For current federal laws regarding the conservation of endangered species, see generally Endangered Species Act of 1973, 16 U.S.C. § 1536 (a) (2000). This Act was in effect in 1979 and governed the military's interaction with the habitat of endangered species at that time. *Id.*

¹⁴³ Thomas More's refusal to endorse Henry VIII's proclamations to become head of the church and to vest his issue of Anne Boleyn as his successes is heavily documented. See generally ACKROYD, *supra* note 2, at 347–393; CHAMBERS, *supra* note 2, at 236–39; GUY, *supra* note 2, at 113–20; KENNY, *supra* note 2, at 62–90; MARIUS, *supra* note 2, at 371–493; MARTZ, *supra* note 2 at 5; REYNOLDS, *supra* note 2, at 226–371; ROUTH, *supra* note 2, at 168–236.

¹⁴⁴ See ACKROYD, *supra* note 2, at 347–58 (noting the King's anger after learning of More's refusal to endorse his proclamations).

¹⁴⁵ One might surmise that an intense belief in the preservation of life of any form has a theological basis. See *supra* notes 39–42, 130–31 and accompanying text. Of course, the fervor

cognition might not have matched More's depth of fervently held personal beliefs,¹⁴⁷ it nonetheless, remained an indelible and dominant factor in my review of subsequent legal matters. I was, thus, confronted with a dilemma similar in character—if not in scope or import—to that of Thomas More: Should I review this matter with the intent to fulfill the expectations of post commanders, or render an objective legal opinion without regard to these expectations and the possible consequences?

Unlike Thomas More's dilemma of conscience, however, the conflict of values I confronted did not carry life-threatening consequences. Yet the eventual legal opinion's potential impact on my career factored heavily in my decision-making.

with which one holds those beliefs would impact the willingness and compulsion to adhere to those beliefs.

¹⁴⁶ While my view of "rule of law" focuses on conformity with established legal rules and precedent, I readily acknowledge the many other conceptualizations of the doctrine. See Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 133 n.27 (1994) (quoting INTERPRETING STATUTES 535 (D. Neil MacCormick & Robert S. Summers eds., 1991)). The author describes the Rule of Law as an internally complex doctrine that promotes the proper exercise of legislative power by stressing clear ex ante legislation, banning or restricting retrospections, and stipulating reasonable generality, clarity and constancy in the law. See also Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943, 949 (1958) ("[I]n the United States the emphasis is placed primarily on the control of the federal and state legislatures by the rule of law as expressed in the Constitution, while in Great Britain and France the interest is centered almost entirely on the control of the executive."); Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 268–69 (1993) (noting Geoffrey de Q. Walker's defense of the Rule of Law as promoting the balance of law and power); Laurie Anne Whitt, *Indigenous Peoples, Intellectual Property & The New Imperial Science*, 23 OKLA. CITY U. L. REV. 211, 247–48 (1998) (noting that rule of law doctrines such as the observance of precedent and faithfulness to historical practices result in the incorporation of a conservative bias into the law); Thomas M. Riordan, Comment, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675, 717 (1994) (arguing that "the rule of law works only if the citizens maintain an attitude of legality," however, civil disobedience is not inconsistent with respect for the law, but rather a "manifestation of the prophylactic function of the attitude of legality"); Sandra Lynne Tholen & Lisa Baird, Comment, *Con Law Is As Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, n.577 (1995) (noting that under California's rule of law doctrine, the rule necessary to decide a case conclusively establishes the rule in that case as well as the rights of the parties in any retrial or appeal of that case).

¹⁴⁷ Jeff Powell, who analyzed Robert Bolt's play, *A Man for All Seasons*, summarized the strength of More's conviction in the principle or rule of law which functions "as doctrine and tradition [that] makes political community possible among people with divergent interests and perspectives who wish to be citizens—not subjects." Markovits, *supra* note 11, at 329 n.22 (quoting Powell, *supra* note 8, at 408).

Applicable federal and military regulations, which can be characterized as positive law,¹⁴⁸ compelled an objective evaluation of the legal controversy.¹⁴⁹ The expectations of post commanders, however, loomed as a powerful constraint on objectivity.¹⁵⁰ The language of regulations, both military and federal, appeared to limit actions that adversely impacted endangered species.¹⁵¹ Operations that directly impinged on the habitat of threatened species such as the red-cockaded woodpecker required modification, if not termination.¹⁵² These legal rules and my belief in the rule of law initially dominated my decision-making. The resultant draft opinion advised commanders to find alternative sites for various military operations. Knowledge of the post commanders' expectations, and the possible repercussions from a legal opinion that frustrated those expectations, prompted my closer scrutiny of the opinion's first draft.

I, thereafter, reexamined the regulations to discover a plausible alternative to the complete cessation of military drills in wooded areas where the red-cockaded woodpecker proliferated. This search for an alternative solution represented a contextual compromise that, to some degree, might accommodate post commanders' expectations. Such a compromise, if well crafted, would not have offended my belief in the rule

¹⁴⁸ Because they are issued by a sovereign, the legislature, or a legislative or executive agency, statutes and regulations constitute prototypical positive law. *See supra* notes 78–81 and accompanying text (providing one definition of positive law as being prescriptions given by the sovereign).

¹⁴⁹ *See supra* notes 79–81. My more pluralistic definition of the term, “sovereign” complicates the positive law aspects of this particular legal assignment. The regulations governing endangered species constituted archetypical positive law, given their genesis from traditional sovereign power, the legislature or its agency. *See supra* note 20.

¹⁵⁰ Note that the expectations of the post commanders, who under my more pluralized definition, were tantamount to sovereign will. *See supra* note 20 (providing my more broad definition of the term “sovereign”).

¹⁵¹ Section 11-2(b) of Army Regulation 200-3 requires the Army, in compliance with section 7(a)(2) of the Endangered Species Act, to refrain from any operations “likely to jeopardize the continued existence of any listed [endangered] species or result in the destruction or adverse modification of critical habitat.” ARMY REGULATION 200-3, *supra* note 137, at ch.11-2(b). In the event the Army anticipates any such operation, the regulation sets forth the specific requirements mandated by the Endangered Species Act as to the formal consultations with the Fish and Wildlife Service necessary to determine the impact on the habitat of those species.

¹⁵² *See* Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000).

Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.

of law. In this case, the compromise constituted an addendum which recommended an adjustment to the timing of certain drills, and training modifications that would reduce noise pollution.¹⁵³

Similar to More's initial compromise of public silence,¹⁵⁴ my minimalist compromise, focused on scheduling changes and noise reduction tactics, failed to appease my military sovereigns. They believed that any disruption to unit operations, regardless of degree or reason, constituted an unreasonable infringement on military operations. Unlike Henry VIII, who faulted Thomas More for his refusal to endorse his objectives, my military sovereigns did not hold me responsible for the ultimate opinion that affected drills on post. They, instead, blamed those who drafted the applicable regulations.

Despite the lack of a discernable negative impact of this review on my career, the *potentiality* of impact became a recurrent and pervasive consideration in future assignments. Moreover, conflicts between personal beliefs and professional expectations resurfaced periodically throughout my legal career.

The applicability, to some extent, of Thomas More's dilemma to the modern practice of law raises a critical question: Can lawyers successfully reconcile the periodic conflict between personal beliefs and professional expectations? Perhaps there is no definitive, universal answer to this question. I nonetheless submit that a greater understanding of the influence of this conflict on decision-making constitutes a critical and useful step toward the discovery of a solution.

¹⁵³ Compromise constitutes one tactic which could reduce the dissonance associated with contradictory beliefs. For a general discussion of dissonance-reduction strategies, see *infra* note 163 and accompanying text. It should be noted that contemporary J.A.G. Corps officers who review military actions for conformity with certain environmental laws will likely encounter less troublesome dilemmas of conscience than I. President George W. Bush relaxed various environmental requirements for the military in H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004, which was passed by Congress and codified in Public Law No. 108-136 on November 24, 2003. Section 318(B)(i) of the statute, titled Military Readiness and Conservation of Protected Species, limits the Secretary of the Interior's ability to "designate as critical habitat any lands . . . owned or controlled by the [DOD], or designated for its use, that are subject to an integrated natural resources management plan . . ." National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 318, 117 Stat. 1433, 1433 (2003) (amending 16 U.S.C § 1533(a)(3)).

¹⁵⁴ See *supra* notes 132-33 and accompanying text (explaining how Thomas More's refusal to openly oppose or criticize Henry VIII's proclamations was tantamount to a tacit attempt at compromise between his personally held beliefs and accommodation of professional expectations in the form of the sovereign's will).

B. *The Psychological Implications of Dilemmas of Conscience—
Cognitive Dissonance and the Psychology of Choice*

Perhaps the quest to resolve conflicting beliefs and expectations should commence with an understanding of the tensions created when those conflicts actually occur. Beliefs, as a cognitive norm, function as mental guideposts during any decision-making process.¹⁵⁵ The strength of an individual's commitment to their beliefs will ultimately govern the extent to which those beliefs will control behavior. Thomas More's historical narrative clearly demonstrates his powerful personal belief system, which was so endemic to his personhood that it dominated every facet of his life, including his approach to legal reasoning.¹⁵⁶ Alternatively, my inherent belief in the rule of law, while a normative construct of my decision-making, could be tempered occasionally by interpretations which attempt to balance competing contextual factors in a legal problem.¹⁵⁷ Thus, contextual variables may prompt behavior modification, or even the abandonment of beliefs, when the individual's commitment to those beliefs lacks fervor or strength.¹⁵⁸ For example, an individual's fundamental belief that one must be truthful might be abandoned in order to spare another person's feelings.¹⁵⁹ Principles of social psychology offer considerable insight into the stimulus for this behavior.

Once forced to confront competing value systems or attitudes, an individual may experience cognitive dissonance.¹⁶⁰ Dissonance results when an individual holds two or more cognitions, i.e., beliefs, ideas,

¹⁵⁵ See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 5–8, 117–20 (1995); see also MICHAEL ARGYLE, *THE PSYCHOLOGY OF INTERPERSONAL BEHAVIOUR* 188 (5th ed. 1994) (stating that “[v]alues and ideals function as restraints which control and inhibit certain spontaneous patterns of behaviour”). See generally Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 419 (1997); Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129 (1956).

¹⁵⁶ See *supra* notes 64–65 and accompanying text (noting the fervor with which More held his personal beliefs, which were rooted in natural law-based, moral principles).

¹⁵⁷ See *supra* note 151–52 and accompanying text (describing my search for a contextual compromise that would allow post commanders to conduct limited operations in areas that served as the habitat for the endangered red-cockaded woodpecker).

¹⁵⁸ See ARONSON, *supra* note 155, at 159 (noting that “subtle situational variables” may have a strong impact on behavior).

¹⁵⁹ See ARGYLE, *supra* note 155, at 188 (stating that while truth has value in many cultures, those very same cultures may also find it important not to hurt people's feelings or to please the listener, both of which prompt abandonment of truth).

¹⁶⁰ See *supra* note 13 and accompanying text (defining cognitive dissonance).

attitudes, or opinions, which are contradictory.¹⁶¹ The failure to resolve this conflict results in a cognitive imbalance that produces tension, stress, or some similar emotional response.¹⁶² The resulting discomfort usually prompts the sufferer to work diligently to reduce this dissonance.¹⁶³ To achieve dissonance reduction, an individual may modify her beliefs or attitudes. These modifications tend to validate behavior resulting from the clash of beliefs.¹⁶⁴

The theory of cognitive dissonance might be best understood through the following example. S, who has been a diligent worker for over twenty-five years and has always been prudent financially, has surmised that pensions and social security alone would not provide sufficient income during retirement. She further adopts the view that an individual must save as much discretionary income as possible to supplement retirement income. Thus, for more than twenty-five years, S has deposited her federal tax refund check into an individual retirement account (IRA). To maximize her yearly deposits in the IRA, S purposely has withheld from her weekly paycheck a greater than sufficient amount of federal income tax payments. On her fiftieth birthday, a time at which she feels an elevated sense of mortality, S decides to forgo saving this year's refund check. She instead uses the refund to supplement a down payment for a new Mercedes convertible, which she believes would cure the malaise over her age.

The divergence of the tax refund from her annuity to a payment for a luxury car will likely produce dissonance for S.¹⁶⁵ Rather than adhere to her belief in saving, she engages in behavior motivated by a contrary belief that spending assuages negative feelings related to age. To reduce the dissonance caused by her conflicting beliefs, S may employ one of three procedures. She might instead modify her original belief that an individual

¹⁶¹ See ARONSON, *supra* note 155, at 178; NICKY HAYES, PRINCIPLES OF SOCIAL PSYCHOLOGY 99 (1993).

¹⁶² See HAYES, *supra* note 161, at 99 (defining cognitive dissonance as a "cognitive imbalance" which is inherently stressful); ANN L. WEBER, INTRODUCTION TO PSYCHOLOGY 235 (1991) (noting that Leon Festinger, widely regarded as the originator of cognitive dissonance theory, found that dissonance occurs when there is a "mismatch" between attitudes and behavior that creates "disharmony"); see also ARONSON, *supra* note 155, at 178 (noting that holding two contradictory beliefs "flirt[s] with absurdity").

¹⁶³ See ARONSON, *supra* note 155; WEBER, *supra* note 162, at 235.

¹⁶⁴ See WEBER, *supra* note 162, at 235 (explaining that individuals change their attitudes so that they are harmonious with recent behavior in order to reduce tension created by conflicting attitudes).

¹⁶⁵ See *supra* notes 13, 160-64 and accompanying text.

must save *all* discretionary income for retirement. She would then opine that one must occasionally allocate some surplus revenue for unexpected necessities or exigencies. Of course, this modification also requires S to justify the purchase of a Mercedes as necessary or exigent.¹⁶⁶ Another dissonance reduction tactic is the supplementation of beliefs. If S employs this strategy, she might add a cognition that is congruent with her use of the tax refund to purchase the Mercedes.¹⁶⁷ Thus, she might heighten the utility of a Mercedes, opining that a new car is safer and more reliable than her present vehicle. Perhaps more important, a new car, particularly a high performance vehicle, makes S feel better about herself and, thus, assuages any depression attributed to her fear of growing older.

S might also attempt to reduce dissonance through the compromise of her contradictory beliefs. One such compromise might involve the allocation of discretionary income tax refund needs that conform to both beliefs. Thus, S might save a portion of the refund, and use the remainder to fund the down payment for the new car.

The hypothetical involving S basically reveals the thought processes that occur when contradictory beliefs clash. Harboring contradictory beliefs not only produces tension, but also suggests to S that her choices, perhaps even her life, are absurdities.¹⁶⁸ These overwhelming cognitive results compel S to reduce dissonance through belief modification, cognitive addition, or compromise. Implementation of one or more dissonance-reduction tactics may relieve S's tension and confirm that her choices are not absurd.¹⁶⁹

Cognitive dissonance theory offers predictive insight into behavior influenced by conflicting beliefs, and forms the catalyst to search for a contextual accommodation that resolves the conflict between beliefs and

¹⁶⁶ See Valerie Fointiat, *Rationalization in Act and Problematic Behaviour Justification*, 28 EUR. J. OF SOC. PSYCHOL. 471 (1998) (arguing that rationalization is "achieved either by a post-readjustment of the cognitive representations to make them conform to the reality of the behaviour just accomplished—cognitive rationalization—or by performing another behavior, more problematic than the one that aroused the dissonance—rationalization in act").

¹⁶⁷ See ARONSON, *supra* note 155, at 178–79.

¹⁶⁸ See *id.* (stating that holding contradictory ideas "flirt[s] with absurdity").

¹⁶⁹ *Id.* More detailed explanations of cognitive dissonance and dissonance reduction strategies, particularly with examples, are available. See *id.* at 179–83 (using as an example the individual who smokes despite the belief that smoking causes cancer); HAYES, *supra* note 157, at 100 (describing Festinger et al. studies of religious cult members and subjects asked to perform boring tasks for pay); WEBER, *supra* note 158, at 235–36 (employing as an example shift in product preferences related to taste and pricing).

expectations. It accordingly has probative relevance to Thomas More's dilemma of conscience.

Moralistic principles rooted in theology dominated More's personally held beliefs.¹⁷⁰ Ancillary to these beliefs was his sense of duty and loyalty to the sovereign¹⁷¹ to whom a lawyer should remain loyal.¹⁷² More's natural law-based beliefs¹⁷³ and his duty to Henry VIII, his sovereign, whose acts were contrary to those beliefs,¹⁷⁴ likely contributed to some measure of cognitive dissonance. The totality of his conduct reveals a complex paradox of behavior with psychological overtones. As previously described in this Article, prior to his actual denunciation of the King's acts, More sought an accommodation by silence. While he disapproved of the King's Acts—particularly the Acts of Succession—he chose to withhold any comment on these proclamations.¹⁷⁵ He saw this “policy of silence” as a contextual accommodation or compromise.¹⁷⁶ That action—perhaps more accurately termed “inaction”—may have marginally reduced the discomfort associated with countering the King's proclamations.¹⁷⁷ It also caused More some degree of dissonance, given that the King's acts were so entirely incongruous with his theologically based beliefs. The strength of his beliefs and the blatant illegality of these Acts should have prompted More to shout their invalidity from the rooftops. Instead, he attempted to appease the King, and himself, through this code of silence. That action, though mild and designed to reduce the dissonance associated with frustrating the expectations of the King to whom he owed a duty, must

¹⁷⁰ See *supra* notes 30, 35–36 and accompanying text.

¹⁷¹ See ACKROYD, *supra* note 2, at 320–21 (noting More's dedication and loyalty as the King's servant); see also MARIUS, *supra* note 2, at 361–62.

¹⁷² See ACKROYD, *supra* note 2, at 295–96 (documenting More's dedication to duty as a lawyer in promoting justice upon the foundation of the law of reason); MARIUS, *supra* note 2, at 361–62; see also MODEL CODE, *supra* note 15, at Canon 4 (“A Lawyer Should Preserve the Confidences and Secrets of a Client”); *id.* at Canon 5 (“A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client”); *id.* at Canon 6 (“A Lawyer Should Represent a Client Competently”); *id.* at Canon 7 (“A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”).

¹⁷³ See *supra* notes 39–66 and accompanying text (describing More's personally held beliefs as natural law principles).

¹⁷⁴ See *supra* notes 64–65 and accompanying text.

¹⁷⁵ See *supra* notes 120, 125–33, 155 and accompanying text (explaining More's initial silence regarding Henry VIII's proclamations as a contextual approach to his dilemma of conscience).

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* note 169 and accompanying text (explaining dissonance reduction in the form of modification of beliefs or addition of cognition).

have caused More some measure of dissonance. He undoubtedly suffered discomfort from his silence on such a blatant violation of his core beliefs. This discomfort must have been considerably more tolerable than the dissonance associated with an open endorsement of the King's proclamation—the latter constituting a clear abandonment of his personally held beliefs. Modification of these natural law-based beliefs, even to accommodate a significant duty to a sovereign, would have arguably resulted in substantially greater discomfort for More.¹⁷⁸

Of course, during his trial—and once the policy of silence failed—More finally expressed publicly the illegality of the King's proclamations and ultimately acted in accordance with his personally held beliefs.¹⁷⁹ That final denunciation, which comported squarely with his personal beliefs, must have reduced any dissonance associated with his failure to appease the sovereign.¹⁸⁰

Cognitive dissonance also explains, to some extent, the decision-making related to my review of the military's conformity with applicable environmental regulations.¹⁸¹ Similar to More, I experienced dissonance when my personal beliefs—rule of law, supplemented by an ancillary belief in the preservation of endangered species—conflicted with the will of the military sovereign—continuity of military drills that might adversely impact the species habitat.¹⁸² Yet unlike More, I attempted to reduce that dissonance through belief modification¹⁸³ and compromise.¹⁸⁴ I broadened

¹⁷⁸ See HAYES, *supra* note 161, at 101 (opining that those with strong beliefs tend to be more resistant to information that is contradictory to those beliefs, and that those individuals will defend against that contradictory information).

¹⁷⁹ Nothing more dramatically emphasizes Thomas More's devotion to his natural law-based beliefs than a line from the screenplay, *A Man For All Seasons*, in which More, facing death for his refusal to endorse Henry VIII's proclamations, states: "I die his majesty's good servant, but God's first." *A MAN FOR ALL SEASONS* (Columbia Pictures 1966), *supra* note 3. For more details regarding the 1966 motion picture, see VIDEOHOUND'S GOLDEN MOVIE RETRIEVER 533 (Martin Connors & Jim Craddock, eds., 1998).

¹⁸⁰ See HAYES, *supra* note 161, at 101 (noting that those whose beliefs are strong have a tendency to defend those beliefs by discrediting the contradictory information or its source). In the screenplay for the film, *A Man For All Seasons*, More rejects Henry VIII's proclamations when, during his post-trial statement, he declares that "[t]he act of Parliament is directly repugnant to the law of God, His Holy Church, the Supreme Government . . ." *A MAN FOR ALL SEASONS* (Columbia Pictures 1966), *supra* note 3. For more discussion of More's rejection of Henry VIII's proclamation, see *supra* notes 64–65 and accompanying text.

¹⁸¹ See *supra* notes 138–53 and accompanying text (describing my legal review of the Army's interaction with the habitat of the red-cockaded woodpecker at Fort Bragg).

¹⁸² See *supra* notes 144–50 and accompanying text.

¹⁸³ See *supra* note 164 and accompanying text (discussing modification as a method to decrease dissonance).

my personal belief in the rule of law to include what I perceived were significant objectives of the sovereign—uninterrupted military drills. I, therefore, opined that regulations applicable to endangered species were not absolute, and instead were subject to contextual interpretation.¹⁸⁵ This modification permitted a more pragmatic interpretation of the applicable regulations.¹⁸⁶ My recommended solutions changed from absolute cessation of any military actions in areas inhabited by the red-cockaded woodpecker, to temperance of operations that impact that endangered species.¹⁸⁷

As previously explained, the compromise between competing beliefs may reduce dissonance.¹⁸⁸ Compromise has considerable appeal as a dissonance-reducer since it does not require complete abandonment of either contrary belief. In the review of actions affecting the red-cockaded woodpecker, my final recommendation to either alter the timing or character of military operations conforms to the rule of law, and accommodates the sovereign's objective of continued drills. This compromise potentially balances my competing beliefs in the rule of law and duty to one's sovereign—or client. Despite its conceptual appeal and potential effectiveness, compromise can produce mixed results.

Regardless of the credibility of cognitive dissonance theory,¹⁸⁹ it seems clear that the compelling nature of professional expectations can easily prompt an adjustment, or even abandonment, of personally held beliefs. As presented in the narrative related to my review of military operations in areas populated by the endangered red-cockaded woodpecker, the post commanders' expectation of uninterrupted, undisturbed training operations caused me to revise my original legal opinion that strictly interpreted the governing federal and military regulations.¹⁹⁰ This accommodation of the sovereign's expectations constitutes a compromise that *potentially* reconciles the clash between

¹⁸⁴ See *supra* note 153 and accompanying text (explaining compromise as a measure against dissonance).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *id.* (describing compromise as a dissonance-reduction tool or technique.)

¹⁸⁹ See ARONSON, *supra* note 155, at 229–37 (presenting cogent criticism of cognitive dissonance theory).

¹⁹⁰ See *supra* notes 150–53 and accompanying text (explaining my decision to alter the original legal review of military drills to permit some limited form of operations in the areas where the red-cockaded woodpecker inhabited).

beliefs and expectations. As the psychological literature documents, the efficacy of compromise depends upon the strength of personally held beliefs and the compelling nature of expectations of the sovereign.¹⁹¹

Thomas More's struggle with Henry VIII and my review of military operations in the areas inhabited by an endangered species highlight the difficulties associated with compromise. In Thomas More's dilemma, his natural law-based beliefs were too strong to permit a significant accommodation of Henry VIII's objectives. He, therefore, could only offer public silence, a relatively benign tactic that failed to appease the monarch.¹⁹² My professional dilemma differed from More's, in that my belief in the rule of positive law would permit a reasonable interpretation that accommodates contextual variables such as the continuity of military operations. I therefore could fashion a more significant accommodation or compromise which consisted of the modification of drills conducted in the red-cockaded woodpecker's habitat. Although my belief system permitted a somewhat significant accommodation, the post commanders initially thought their objective of uninterrupted drills was too compelling to allow compromise.¹⁹³

Perhaps the complexity of the dilemma of conscience and the resultant attempts to alleviate any associated dissonance¹⁹⁴ relate to the respective strengths and consequences of competing beliefs. Beliefs, particularly those that are contradictory, figuratively exist at opposite ends of a continuum. Within the space of this continuum are potential solutions that reconcile the clash created by conflicting beliefs. These solutions, which include belief modification¹⁹⁵ and compromise,¹⁹⁶ often function dually to relieve cognitive dissonance, and fulfill, to some extent, professional expectations. The pull toward either end of this continuum

¹⁹¹ See *supra* notes 97–99 and accompanying text (discussing compromise as a contextual modification between personal beliefs and sovereign edicts).

¹⁹² See *supra* notes 125–132 and accompanying text (discussing More's abstinence from public rejection of Henry VIII's proclamations as a tacit compromise offered to resolve the conflict between his natural law-based beliefs and the King's expectations).

¹⁹³ See *supra* notes 139–42 and accompanying text (providing the factual background of my attempt to accommodate post commanders' desire for uninterrupted drills). I should mention that, despite initial rejection of my compromise, post commanders ultimately modified their operations to minimize adverse impacts on the red-cockaded woodpecker.

¹⁹⁴ See *supra* notes 160–64, 169–88 and accompanying text (explaining the relevance of cognitive dissonance).

¹⁹⁵ See *supra* note 164 and accompanying text (discussing modification as method to decrease dissonance).

¹⁹⁶ See *supra* note 153 and accompanying text (explaining compromise as tactic to reduce dissonance).

depends upon the comparative strengths of personally held beliefs and professional expectations. Personally held beliefs *generally* have greater cognitive dominance given their inherent, natural, and default-like employment during decision-making.¹⁹⁷ Thus, in the case of Thomas More, notorious commitment to his dominant, natural law-based beliefs explain his extraordinary adherence to those beliefs, and his ultimate rejection of any appeasement of the King's and Cromwell's expectations. The extraordinary strength of More's personally held beliefs prevented any demonstrative movement on the continuum toward the sovereign's expectations.

If, however, the strength of the belief in the appeasement of the sovereign's expectations is equal to, or exceeds, that of contrary, personally held beliefs, an individual might choose one of the following options within the continuum: (1) fulfillment of professional expectations despite the resultant conflict with personally held beliefs; (2) modification of personally held beliefs to accommodate, to some extent, professional expectations; or (3) implementation of a compromise between personally held beliefs and professional expectations, with the assessment of consequence as a possible catalyst for that compromise. These alternatives move the individual toward that end of the belief continuum associated with appeasement of the sovereign.

Other variables in the continuum of beliefs and expectations are the attendant consequences from one's choice of behavior. One's estimation

¹⁹⁷ In some ways, personally held beliefs function similar to heuristics, a cognitive process in which are shortcuts used to process information efficiently. See ARONSON, *supra* note 155, at 5-8, 117-120 (providing examples of the impact of social influences on cognitive processes). See generally Hal R. Arkes, *Costs and Benefits of Judgment Errors: Implications for Debiasing*, 110 PSYCHOL. BULL. 486 (1991) (noting generally the efficiency in streamlining informational processes, which ultimately affects behavior); Langevoort & Rasmussen, *supra* note 151, at 419 (discussing how, in decision-making, people use mental shortcuts because of limited time, information, and cognitive capacity, which sometimes lead to miscalculations); Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129, 133-34 (1956) (dealing with people's decision-making when faced with multiple goals asserting that rational behavior is closely related to perception and cognition). As a result, beliefs become automatic response mechanisms, unless individuals consciously disregard or modify those beliefs. See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1974); Steven J. Sherman & Eric Corty, *Cognitive Heuristics*, in HANDBOOK OF SOCIAL COGNITION 189-286 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984) (providing examples of how test subjects prior views on death penalty affected consideration of subsequent evidence).

of the severity of consequences resulting from the choice between beliefs and expectations may influence movement along the continuum.

In More's case, he must have envisioned the potentially harsh retribution that would have resulted from his refusal to endorse Henry VIII's proclamations. This consequence, coupled with his duty to serve the King, likely strengthened the polarity of expectation on his continuum. Perhaps more compelling, however, was the consequence associated with the abandonment of his natural law-based beliefs. To More, such an abandonment was tantamount to losing one's sense of self, one's personhood. Bolt vividly dramatized More's feelings on this issue in *A Man for All Seasons*. In one of the play's latter scenes, More, imprisoned for his refusal to endorse the King's proclamations, stated to his daughter, Margaret Roper: "When a man takes an oath, he's holding his own self in his own hands like water. And if he opens his fingers then, he needn't hope to find himself again . . ." ¹⁹⁸ Thus for More, losing one's personhood, which was a consequence of the abandonment of personal beliefs, was more compelling than the inevitability of death, the consequence of frustrating Henry VIII's expectations. That assessment of consequence likely contributed to More's inability to compromise in a manner that required endorsement of the King's proclamations.

Of course, the weighing of beliefs and expectations and assessment of their resultant consequences remain essentially personal exercises. More found the consequences associated with the abandonment of personally held beliefs compelling, and commensurately found the consequence of frustrating the King's expectation more acceptable. However, others who attempt to resolve their personal dilemmas of conscience might reach a different result.

This analysis of beliefs and expectations has significant relevance to my review of military operations conducted in the habitat of the red-cockaded woodpecker. Despite my strong belief in the enforcement of regulations promulgated to protect endangered species, I had an equally compelling commitment—both as a lawyer and military officer—to fulfill the post commanders' expectation of uninterrupted drills. The relative strengths of my competing beliefs permitted movement toward compromise within my continuum. ¹⁹⁹ As a result, my actions contrasted sharply with those of More, whose overwhelmingly strong natural law-

¹⁹⁸ A MAN FOR ALL SEASONS (Columbia Pictures 1966), *supra* note 3.

¹⁹⁹ See *supra* note 153 and accompanying text (describing the compromise I forged in the attempt to reconcile the potential conflict between regulations governing endangered species, and appeasement of military commanders' expectation of uninterrupted drills).

based beliefs prevented little movement on the continuum from those convictions.²⁰⁰ He could only manage the tacit compromise of public silence, which was ultimately breached once he was convicted of treason.²⁰¹

I also considered to some extent the *possible* consequences associated with frustrating the expectations of my military sovereigns. Like More, my assessment of those consequences essentially constituted an assessment of risk. Could my original opinion that advocated the complete cessation of drills have led to such ramifications as the loss of the professional confidence of my military sovereigns, the devaluation of legal opinions I would render in other matters, or my military sovereigns' reluctance to seek legal advice before engaging in future missions? Of course, the reality of these risks was speculative given my inability to determine accurately the degree of dissatisfaction my original opinion might have generated. It nonetheless remained an influential factor that, when combined with the comparable strengths of beliefs and expectations, dictated movement along my continuum of beliefs and expectations.²⁰²

The tension between beliefs and expectations and the assessment of their respective consequences compel lawyers to adopt a rather unique strategic focus as they confront dilemmas of conscience. In lieu of a rigid, absolutist choice between adherence to beliefs or capitulation to sovereign will and expectations, lawyers must appreciate the almost innate tendency to achieve cognitive balance along the continuum of competing beliefs. This quest for balance may not produce a model solution. However, it should foster a greater understanding of the genesis, nature, and influence of conflicting beliefs, in turn leading to more thorough and holistic decision-making.²⁰³

²⁰⁰ See *supra* notes 34–35, 64–65 and accompanying text (explaining the strength of Thomas More's personally held beliefs).

²⁰¹ See *supra* notes 125–32 and accompanying text.

²⁰² The assessment of consequences often constitutes a predictive judgment. For More, the probability of death as a result of frustrating Henry VIII's expectations was palpable. That said, his, nonetheless, remained a calculated risk. In my case, the risk of consequence appeared more speculative than that of More. I could only imagine the repercussions of a disfavored legal opinion. It should be noted that my assessment of the consequences of my review remained merely speculations. My military sovereigns adhered to the legal advice I rendered, and my career in the J.A.G. Corps continued to flourish. I served proudly in coveted assignments until my decision to leave military service for a career in the private sector.

²⁰³ For an excellent discussion of the factors lawyers must balance as they provide competent representation with professionalism, see Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 117–19 (2001).

CONCLUSION

If we lived in a state where virtue was profitable, common sense would make us saintly. But since avarice, anger, pride and stupidity commonly profit beyond charity, modesty, justice, and thought, perhaps we must stand fast a little, even at the risk of being heroes.²⁰⁴

Thomas More's life, celebrated at St. Dunstan's Church, Canterbury, England, symbolizes the strength of personal conviction and character to which most lawyers arguably aspire. Perhaps the more compelling observation from More's extraordinary story remains the dilemma of conscience that resulted from his struggle to reconcile the tension between his beliefs and sovereign expectations. More's dilemma has become emblematic for contemporary lawyers who confront similar conflicts at some point in their careers. Adherence to personally held beliefs is a somewhat generic observation. The more probative points from More's narrative are the lawyer's critical need to understand the basis for conflicting beliefs and the subsequent duty to incorporate that understanding into a search for solutions. Heightened awareness of the impact of this conflict on reasoning constitutes the first and, perhaps, most significant step toward discovery of effective solutions. These tacit, more universally beneficial suggestions remain Thomas More's most profound professional legacy.

²⁰⁴ A MAN FOR ALL SEASONS (Columbia Pictures 1966), *supra* note 3 (providing Thomas More's response to his daughter, Margaret Roper, who attempted to persuade More to take a more contextual approach to his differences with Henry VIII).

