THE TRIAL OF THOMAS MORE
AND THE MODERN-DAY ROLE OF
OATHS & ETHICS

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Disclaimer: Barbara J. Panza is a Staff Attorney for the Texas Fifth District Court of Appeals at Dallas. This presentation does not reflect nor should it be construed to reflect, the views of the Texas Fifth District Court of Appeals or any of the Justices on the Court.
SYNOPSIS OF HIS TRIAL

Part I

PRE-ARREST

When Henry VIII became more determined to obtain a divorce from Catherine of Aragon and became head of the church in England, More eventually resigned his position as Lord Chancellor.

Initially he remained friends with Henry VIII, but after 2 years, Henry became set on More’s death.

More used every legitimate legal trick he could to stay free while at the same time actively striving to defend the Church. Most notably, More remained silent. But that was a silence that spoke very loudly due his excellent reputation. At that time, legally, silence meant consent.

Things became worse for More when an oath was required by the Act of Succession. Nobles attempted to intimidate him into taking the oath.

ARREST

Henry sought More’s indictment from the House of Lords three times before More was imprisoned. On April 17, 1534, More was arrested and imprisoned in the Tower of London for his refusal to take the oath of Succession. In November 1534, More was found guilty by Bill of Attainder of misprision of treason for refusing to take an oath that Parliament had just formulated (!post facto violation). Sentenced to life in prison and his property confiscated.
INDICTMENT

Subsequent to the Bill of Attainder convicting him of misprision of treason, More was charged with 4 counts of treason: He had maliciously refused to accept the King’s supremacy over the Church in England;

He had conspired against the King by writing treasonous letters to Fisher;

He had stirred up sedition by describing the Act of Supremacy as a two-edged sword, i.e., a law that if disobeyed would mean bodily death, and if obeyed would mean spiritual death; and

He had “maliciously, traitorously, and diabolically” denied Parliament’s power to declare the king to be head of the Church in England.

TRIAL

Finally, on July 1, 1535, a trial was held.

More appeared before a Commission of 12 Councilors and 7 Justices

According to the custom of the time, More did not have counsel or a written account of the charges against him.

After listening to the indictment in Latin, More entered his “Not Guilty” plea.

Immediately after his plea, a 12-member jury was impaneled. It was specified that they would be from among “the inhabitants of the Tower,” which meant no searching at large for candidates.

More dispenses with the first 3 charges easily showing there was no offense because: Silence was not a crime and, under the law, it meant consent.
None of his letters to Fisher touched on matters of state, they no longer existed (they had been burned), and the only person who had read them was Fisher – so no evidence.

He never said the Act of Succession was a two-edged sword, rather he was answering a question hypothetically and without malice.

The justices appeared to agree with More because they focused only on the 4th charge.

The 4th charge was based entirely on a single conversation between More and Solicitor General Richard Rich (a prosecutor in the trial).

Rich testified that when he removed More’s writing materials and books from More’s cell, More explicitly denied Parliament’s authority to make Henry the supreme head of the Church in England.

More denied it and stated that Rich was committing perjury.

More demonstrated Rich’s lack of credibility.

Then, More pointed out that it was unlikely, having stayed silent for so long, that he would share the secrets of his conscience with a man of Rich’s reputation when he had declined to reveal it to the King or any of his councilors.

More stated that, even if they believed he had said such things, there could be no malice, which had a precise legal meaning, since it was a hypothetical private conversation.

Finally, More established his own credibility.

Rich realized More had discredited his testimony and called Sir Richard Southwell and Master Thomas Palmer who were present during the alleged conversation to testify.
Neither man would participate in the perjury. Palmer stated he was too busy putting More’s books away and took no heed of their talk.

Southwell stated “because he was appointed only to look to the conveyance of his books, he gave no ear.”

The jury found More guilty in 15 minutes.

The justices tried to pronounce judgment quickly, denying More the right to speak, but More stops them.

Then, More made a post-verdict motion in arrest of judgment, by showing the indictment was insufficient.

The judges pronounced judgment against More, convicting him of treason for refusing to affirm the King’s Supremacy as Head of the Church, and sentenced him to death.

Finally, More revealed his mind of the matter of the supremacy, but stated that the real reason is because he has been unwilling to consent to Henry’s marriage to Anne Boleyn.

More was beheaded on July 6, 1535.
ROLE OF OATH IN MORE’s TRIAL
Part III
INTRODUCTION

Throughout history, the oath has been used as a tool of political, religious, and social oppression.

On hearing that Archbishop Cranmer annulled Henry VIII’s marriage to Catherine of Aragon, Thomas More expressed the fear that an oath would be used for such purposes when he said to his son-in-law, Roper: God give grace, son, that these matters within a while not be confirmed with oaths. More’s fears proved to be warranted.

More refused to take the oath in support of the Act of Succession because it included a repudiation of papal supremacy. We do not know the exact wording of that oath. The purpose of that oath was central to More’s trial.

But it was not the only oath involved.

Oaths were also taken by:
- Lawyers
- Witnesses
- Jurors
- Judges
- King’s coronation oath
THE OATH, GENERALLY

The Role of the Oath in Thomas More’s Trial

THE OATH

There is a great deal of scholarship on legal oaths.

Basic overview of:
. the evolution of the oath;
. the various oaths implicated in More’s trial; and
. the English oath tradition

EVOLUTION OF THE OATH

The oath is an integral part of our legal system.
It is a secular and religious means of ensuring truth.

On its most basic level, it is a self-curse, carrying with it the sanction of divine punishment should the taker deliberately deceive. It calls on God to witness the event, reminding the taker that God will punish him if he takes a false oath and invoking God’s punishment if the taker speaks falsely.

Punishment: Either in time or eternity
Oath ≠ Promise; Oaths reinforce promises. Oath is a solemn attestation of the truth of one’s statement. May be an assertion of fact; or promise to act or refrain from acting.

All forms of oath are based on truth; but “truth” supported by the oath is not always the same

Two common themes of “truth” An expression of solidarity or power; and affirmation of faith or objective facts

The different types of “truth” are reflected there

Oath as expression of solidarity: Genesis 24:2-9 – oath taken on the male genitalia, placing the self-curse on then generative power of man, possible as an expression of adherence to one’s clan. Genesis 31:53-54 – Jacob takes an oath by the “fear of his father Isaac”
Affirmation of faith: Deuteronomy 6:14 and 10:21, Isaiah 48:1, and Psalms 63:11 – Bible recognizes the oath as an affirmation of faith, permitting only an oath that invokes God because it is an expression of faith in God and His power. Also a religious tradition for abstaining from taking an oath As seen in Exodus 20:7 and Deuteronomy 5:11, the Old Testament prohibits taking unnecessary oaths.

In various cultures, the oath has had different purposes which reflect the different “truths” attested to. Germanic tradition, and Roman civil and canon law traditions.

**GERMANIC TRADITION OF THE OATH**

To keep one’s oath was an expression of power

Men swore to matters of which they had no knowledge

A man took an oath to express solidarity with the group he wished to prevail Assertive Oath – carried with it the promise that it will prevail, i.e., the “truth” is the successful assertion of one’s cause

Decisive Oath – an expression of power, its strength depending on the social power of the oath-taker and his family or clan support

These oaths required oath-helpers or compurgators, who were members of the oath-taker’s clan They swore as a group that the taker’s oath was “pure and not perjurious.” They strengthened the initial oath by taking a secondary oath that the initial oath was good

Note: The oath did not support testimonial evidence. Rather, the witnesses supported the oath.

Over time, compurgators were no longer required to be members of the oath-taker’s clan and were required to swear individually. By the end of the Middle Ages, compurgators converted into witnesses and were required to have actual knowledge of the act.

**ROMAN CIVIL AND CANON LAW TRADITIONS OF THE OATH**

Initially, the oath itself was proof because it was believed the event invoked would occur if the oath was false. As a result, the oath was binding on the judge and not subject to the court’s evaluation.

The party oath decided issues and took two forms:

Decisory Oath (Roman civil law tradition)

Given by the oath taker to another party to resolve a dispute

It served as a substitute for judicial judgment
It is compared to the modern-day pretrial settlement

Suppletory Oath
In the Roman civil law tradition, it involved a concept of mathematical ratios of proof. If the evidence was entitled to weight but insufficient, the judge could permit the party he had confidence in to take an oath which supplied the missing portion of the proof. In the canon law tradition, it was permitted when only partial proof was presented and other proof unavailable. However, it was not permitted in criminal cases. Eventually the oath developed into evidence and the judge was free to evaluate its weight.

GERMANIC AND ROMAN TRADITIONS - PERJURY LAWS
. In the Germanic tradition, perjury laws were designed to protect the purity of the oath. The false invocation of God was the essence of a crime.
. In the Roman tradition, perjury laws sought to aid the person affected by the false testimony.

ENGLISH OATH HISTORY
England adopted both the Germanic and Roman oath traditions. Early English proceedings recognized:
. the witness oath
. the party oath (with or without compurgators)
. the ordeal battle

Accordingly, the “truth” sworn to could be either an expression of social power, objective reality, or a combination of both.
THE OATHS IMPLICATED IN MORE’S TRIAL
The Role of the Oath in Thomas More’s Trial

THE LAWYER’S OATH At this inn of court, one of the best and oldest law schools in England, More actively participated (as did his father) throughout his life as student, then lecturer, then as governing officer. Photograph by Tommy Heyne. © 2010 The Center for Thomas More Studies at The University of Dallas

LAWYER’S OATH
Traditionally, professions have been characterized by esoteric knowledge, formal education, elevated status, self-regulation, monopoly over the provision of professional services, role-morality, and public service. The traditional professions were: law, medicine, the clergy, the military, and university teaching. It is argued that the law’s claim to professional status has historically never been questioned.

The standards of conduct for lawyers have a theme of 6 core duties:
- Litigation fairness;
- Competence;
- Loyalty;
- Confidentiality;
- Reasonable fees; and
- Public service or service to the poor

These core duties were the primary duties of medieval English lawyers and remain the central duties of modern-day lawyers. The principle source for these duties is the lawyer’s oath.

The First Statute of Westminster 1275 is considered first formal regulation of English lawyers. Appears lawyers took some version of the following oath:
That he shall well and truly serve the king’s people as one of the serjeants of the law. That he shall truly counsel them, that he shall be retained with after his cunning. That he shall not defer, tract, or delay their causes willingly, for covetousness of money, or other thing that may tend to profit. That he shall give due attendance accordingly.

The 1280 London Ordinance provided a detailed set of ethical standards. These duties included respect for the court and other litigants, competence, to avoid conflicts of interests, and to not engage in champerty (i.e., frivolous litigation). In about 1285, the Mirror Des Justice, a more informal source outlined ethical standards.

It contained an oath, swearing the lawyer “will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrongdoing.”

In 1402, Parliament attempted to address the concern that there was a large number of incompetent attorneys. The 1402 act regulated admission of attorneys, including: Judicial examination of all attorneys; and maintenance of a roll of attorneys. It did not establish standards of conduct, but did require an oath.

Attorneys reportedly took some version of the following oath:

You shall doe [sic] no Falsehood nor consent to any to be done in the Office of Pleas of this court wherein you are admitted an Attorney. And if you shall know of any to be done you shall give Knowledge thereof to the Lord Chief Baron or other his Brethren that it may be reformed you shall Delay no Man for lucre Gain or Malice you shall increase no fee but you shall be contented with the old Fee accustomed. And further you shall use your self in Office of Attorney in the said office of Pleas in this Court according to your best learning and discretion. So help you God.

Note: some of these oaths refer to truth or falsehood

- 1275 First Statute of Westminster – required a lawyer to swear “That he shall well and truly serve the king’s people”
- 1402 act – required a lawyer to be “sworn to truly serve in their offices.”
- Mirror Des Justice – required a lawyer to swear “he will not knowingly maintain or defend wrong or falsehood.”
- The more detailed oath taken as early as 13th century states “You shall doe [sic] no Falsehood nor consent to any to be done in the Office of Pleas of this court wherein you are admitted an Attorney.”
Note: The oaths do not appear to be an expression of power or a lawyer’s solidarity with others of his profession, his clients, or the Crown.

- 1275 First Statute of Westminster – required a lawyer to swear “That he shall well and truly serve the king’s people”
- 1402 act – required a lawyer to be “sworn to truly serve in their offices.”
- Mirror Des Justice – required a lawyer to “abandon his client immediately that he perceives his wrongdoing”
- The more detailed oath taken as early as 13th century required a lawyer to report any falsehood, stating “and if you shall know of any [falsehood] to be done you shall give Knowledge thereof to the Lord Baron or others his Brethren.”

THE JUROR’S OATH
The origin of the jury has been traced to the Anglo-Saxon oath swearers. The general composition of the jury as a 12-member body rendering unanimous verdicts was clearly established by 1377, the time of Edward III. It appears that the Biblical number 12 influenced the number of jurors.

Medieval jurors were the witnesses who came to speak rather than listen. In Norman times, jurors were self-informed, usually already having knowledge in the case or by investigating the case themselves. By the 15th century, the jury was essentially an oath-taking body that resembled compurgators, with the exception that the defendant did not determine the jury’s composition. By the middle of the 15th century, jurors became dependent on in-court testimony for their knowledge of the case and great importance was placed on the evidence of sworn witnesses.

Around 1015, during the reign of King Ethelred, it was required that jurors “shall swear, with their hand on a holy thing, that they will condemn no man that is innocent, nor acquit any that is guilty.” In 1164, under Henry II, the Constitution of Clarendon was enacted, which provided that “[t]he sheriff shall cause 12 legal men of the neighborhood . . . To take an oath in the presence of the bishop that they will declare the truth.”

It has also been recorded that jurors took an oath to “faithfully discharge the duties of their office, and not suffer an innocent man to be condemned, nor any guilty person to be acquitted.”

Note:
- References to the guilty and innocent man suggest the oath refers to truth, rather than solidarity or power.
- But the similarity between early English jurors and compurgators casts a shadow on any certainty.
THE WITNESS OATH

Two purposes: (1) it gives weight to witness’s testimony; and (2) it reminds the witness of the gravity of his undertaking and the penalty associated with dishonesty.

In the Germanic oath tradition a party submitted his oath to the opposing party, not the court.

Although Jewish and Christian authorities agree there is no warrant in the Bible requiring a witness oath, Constantine institutionalized the testimonial oath, requiring witnesses to be sworn. This was incorporated into the Code of Justinian and adopted by all of European Christendom.

In 16th century criminal procedure, the accuser’s allegations were sworn, but the accused’s denial was not. Although the accused could speak at trial and present his version of events, he could not take the oath or call witnesses on his behalf. When an accused was permitted to call witnesses, their testimony was unsworn.

The justice system appeared to place greater concern on the peril a false oath placed on the soul of: the accused who may lie to protect himself; and his witnesses whom the system feared might lie to protect the guilty. It was not until the 18th century that the witnesses called by the accused were permitted to take the oath. It was not until the second half of the 19th century that an accused was permitted to testify under oath.

The practice of allowing the accused to appear by attorney was a legal reform introduced by Thomas More when he was head of the Chancery and Star Chamber.

JUDGE’S OATH

The Bracton oath (1220s or early 1230s) applied to justices. It has three main parts:
- “that they will do right justice to the best of their ability in the counties in which they are to hold eyres, to both the poor and the rich”
- “to keep the assize in accordance with the chapters below written”
- “to perform all duties and jurisdiction belonging to the crown of the lord king”
Although the Bracton oath advised that the justice does not take an oath “to act for profit of the king,” after he took his oath, he was reminded to keep it in mind. This has been interpreted to mean that the justice had no ethical duty to balance the interests of the king with those of his subjects.

Letters of appointment to the Common Bench in 1234 refer generally to the judge’s oath “to faithfully attend the king’s business in the Bench”; and “to faithfully attend the king’s business and activities”

Letters of appointment to the Exchequer of the Jews sent before 1260 mention an “oath that [the justice] will faithfully serve the king in the said office.”

Material from November 1278 of the Close Roll 1277-78 indicate that the justices of eyre took an oath They would “serve the king well and loyally in the office of justice in your eyre” Followed by the promise of equal justice contained in the Bracton oath.

Around 1257 a third clause was added: “you will not prevent or delay justice by any trick or device against right or against the laws of the land, whether because of high status or wealth, nor for any benefit, gift or promise made by anyone to you or which could be made, but that without regard for position or person you will loyally have right done to all in accordance with the laws that have been customary.”

The fourth clause contained the general promise “not to receive anything from anyone.” It is believed that royal justices took a similar oath.

Chapter 25 of the First Statute of Westminster, enacted in 1275, established rules and sanctions for the king’s officials, including justices. It prohibited: “maintaining [general term, meaning giving any kind of support to] pleas, cases or business in the king’s court” Punishment was at the king’s discretion.

Chapter 49 of the Second Statute of Westminster, enacted in 1285, prohibited: “any church or advowson [i.e., patronage] of a church agreement or in some other manner, if the property concerned was the subject of a plea before the king or any of the king’s officials from receiving any other reward” Punishment was at the king’s discretion.
In 1290 the judicial oath was revised to include a promise not to receive anything from anyone without the king’s permission; the king is reported to have given permission for justices to accept food and drink, but only enough to supply them for a single day. A new clause was added that prohibited justices from assenting to any wrongdoing on the part of their colleagues and to attempt to prevent it if possible. If unable to prevent it, then report it to the king’s council, and if the council failed to take appropriate action, then to the king.
THE OATHS IN MORE’S TRIAL
The Role of the Oath in Thomas More’s Trial

“TRUTH” OF THE OATH IN MORE’S TRIAL

More swore to same oaths as the lawyers and judges in his trial. He also would have been aware of the King’s coronation oath, the witness oath, and the juror’s oath.

More’s own comments during his trial suggest he saw the purpose of the oath as a means of affirming one’s faith and establishing objective fact. When denouncing Richard Rich’s testimony, More took an oath stating, “And if this oath of yours, Master Rich, be true, then pray I that I never see God in the face.” He questioned whether it was plausible he would disclose his views to such a man and asked the judges “Can this in your judgments, my lords seem likely to be true?”

Toward the conclusion of his trial, when the Duke of Norfolk accused him of malice, he responded with another oath calling on God as his witness when he replied that “it was not malice but solely the obligation of conscience that compelled him to declare his mind—God knew this to be true”

Remember: an accused was not permitted to testify under oath!

Rich provides the best support for the belief that the other participants in More’s trial used their oaths to show solidarity with Henry VIII, furthering his objectives. At the trial of Bishop John Fisher, Rich was the only witness called stating the Bishop has said that the king was not the supreme head of the Church of England. Fisher did not deny the statement, but said Rich had guaranteed him immunity if he answered the king’s confidential question as to the supremacy issue. Rich admitted giving this assurance.
ADHERENCE TO LAWYER’S AND WITNESS OATHS:
Rich was both solicitor general and sole witness against More, and Rich testified under oath. More leaves no doubt as to what he thought of Rich’s testimony when he responded “In good faith, Master Rich, I am sorrier for your perjury than for my own peril.”

Advocate-Witness rule prohibiting trial counsel from acting as an advocate and a witness in the same proceeding appears in temporal proximity to Rich’s testimony

ADHERENCE TO JUROR’S OATH
The jury consisted of the King’s courtiers, including Sir Thomas Palmer, Henry’s dicing partner, and John Parnell, a Lutheran who had already filed corruption charges against More. The jurors deliberated for 15 minutes before returning their verdict. Earlier, in the trial of Bishop Fisher, the jurors were subjected to threats. Also, in another similar trial, the jury was unable to reach a guilty verdict and an enraged Cromwell was reported to have threatened them until they did.

It has been noted that Cromwell did not need to repeat those events in More’s trial. All this suggests the jurors failed to keep their oath.

ADHERENCE TO JUDGE’S OATH
There were 15 judges in More’s trial.

These judges included Lord Chancellor Audley, Royal Secretary Cromwell, the Duke of Norfolk, and Anne Boleyn’s father, brother, and uncle. These men had a strong interest in seeing More convicted. These men probably never considered resigning. But More gently compared St. Paul’s presence and consent to the judgment against St. Stephen with the judges’ consent to his condemnation.

More said he prayed he may “yet” meet the judges in heaven. Does this imply there was reason they might not?