

MORAL DUTY AND THE RULE OF LAW

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In his immortal play *A Man for All Seasons*, Robert Bolt provides a fictional account of an argument between Sir Thomas More, who served as the Chancellor of England and would later become the patron saint of lawyers and judges, and his son-in-law, William Roper.¹ Their argument is about the demands of fidelity to both law and morality. In the course of that argument, More pleads, “The law, Roper, the law. I know what’s legal not what’s right. And I’ll stick to what’s legal.”²

Roper then makes two provocative charges against More. First, Roper asserts to More, “Then you set man’s law above God’s!”³ More responds in the negative:

No, far below; but let me draw your attention to a fact—I’m *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can’t navigate. I’m no voyager. But in the thickets of the law, oh, there I’m a forester. I doubt if there’s a man alive who could follow me there, thank God . . .⁴

Later Roper charges, “So now you’d give the Devil benefit of law!”⁵ To that charge, More responds in the affirmative and asks a question of Roper: “Yes. What would you do? Cut a

* Circuit Judge, United States Court of Appeals for the Eleventh Circuit. The text of this address, delivered at the Twenty-Sixth Annual National Federalist Society Student Symposium, is drawn in large part from two previous addresses: William H. Pryor Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1 (2003) [hereinafter Pryor, *Christian Duty*]; William H. Pryor Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL’Y REV. 347 (2006). The text also borrows, in small part, from a third address: William H. Pryor Jr., *The Murder of Father James Coyle, the Prosecution of Edwin Stephenson, and the True Calling of Lawyers*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 401 (2006).

1. ROBERT BOLT, *A MAN FOR ALL SEASONS* (Vintage Int’l 1990) (1960).
2. *Id.* at 65.
3. *Id.*
4. *Id.* at 65–66.
5. *Id.* at 66.

great road through the law to get after the Devil?"⁶ Roper then falls into the trap when he answers, "I'd cut down every law in England to do that!"⁷

More then offers the most memorable lines of the entire play:

Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.⁸

Robert Bolt's portrait of Saint Thomas More offers lawyers and judges the right role model. I have been asked to contribute to this Symposium on Law and Morality by reflecting on my personal experiences of being embroiled in controversies about the potential conflict of moral and legal duties, both as a former state attorney general and a nominee for a federal judgeship. The stakes of those controversies, thankfully, were not nearly as high as those that led to the execution of Saint Thomas More, but they were high drama in the contemporary arena of American law and politics. In each instance, the law offered me the right path to follow.

My first experience came in June 2003, two months after the President nominated me to serve as a United States Circuit Judge. That nomination was controversial for several reasons, among them my public statement as a politician that *Roe v. Wade*⁹ was "the worst abomination of constitutional law in our history,"¹⁰ my defense as attorney general of an Alabama law that made sodomy a crime,¹¹ and even my decision as a parent to plan a family vacation at Disney World so as not to coincide with the Gay Day fes-

6. *Id.*

7. *Id.*

8. *Id.* (stage directions omitted).

9. 410 U.S. 113 (1973).

10. William F. Buckley Jr., *On the Right*, NAT'L REV., July 14, 2003, at 54, 55 (quotation marks omitted); see also Byron York, *The Nominee Who Won't Back Down*, NAT'L REV. ONLINE, June 12, 2003, <http://www.nationalreview.com/york/york061203.asp>.

11. See Brief of the State of Alabama et al. as Amici Curiae in Support of Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

tivities at the park.¹² During my confirmation hearing,¹³ a few members of the Senate Judiciary Committee raised questions about my “deeply held” beliefs¹⁴ and whether I was “asserting an agenda of [my] own, a religious belief of [my] own, inconsistent with [the] separation of church and state.”¹⁵ When the Committee Chairman, Senator Orrin Hatch, responded to these statements by asking about my Catholic faith¹⁶ and then asserting that “in every case” he could see, I had “followed the law regardless of [my] . . . religious beliefs,”¹⁷ two other Senators objected to Chairman Hatch’s reference to my religion.¹⁸

Later that summer, an interest group sponsored political advertisements that described opponents of my confirmation to the federal bench as engaged in discrimination against me based on my Catholic faith.¹⁹ The advertisement portrayed a sign that read, “Catholics need not apply,” hanging on a door to a federal courthouse.²⁰ That advertisement created a furor in the Senate and a lively debate in national newspapers and magazines.²¹

12. Buckley, *supra* note 10, at 55; Kathryn Jean Lopez, *The Disney Smear*, NAT’L REV. ONLINE, June 17, 2003, <http://www.nationalreview.com/lopez/lopez061703.asp>.

13. *Confirmation Hearing on the Nominations of William H. Pryor, Jr. To Be Circuit Judge for the Eleventh Circuit and Diane M. Stuart To Be Director, Violence Against Women Office, Department of Justice Before the S. Comm. on the Judiciary*, 108th Cong. (2003).

14. *Id.* at 11–12 (statement of Sen. Charles Schumer, Member, S. Comm. on the Judiciary); *id.* at 92 (statement of Sen. Edward Kennedy, Member, S. Comm. on the Judiciary).

15. *Id.* at 90 (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary); *see also id.* at 76 (statement of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary).

16. *Id.* at 104–05 (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

17. *Id.* at 106 (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

18. *Id.* at 107–08 (statements of Sen. Patrick Leahy and Sen. Arlen Specter, Members, S. Comm. on the Judiciary).

19. Charles Hurt, *Pryor’s religion triggers debate: Democrats target Catholic’s beliefs*, WASH. TIMES, July 24, 2003, at A1.

20. *Id.*

21. *See, e.g.*, Richard John Neuhaus, *The Public Square*, FIRST THINGS, Oct. 2003, at 78, 91–92; Charles Krauthammer, Editorial, *A Judge Prejudged*, WASH. POST, Aug. 29, 2003, at A23; John Mallon, Op-Ed., *Bias and judicial nominees: Catholic is as Catholic does*, WASH. TIMES, Aug. 12, 2003, at A15; Robert Novak, Editorial, *Unmasking religious code words*, CHI. SUN-TIMES, Aug. 11, 2003, at 37; Ami Eden, *Confirmation Debate Morphs into Bitter Religious Battle*, FORWARD.COM, Aug. 8, 2003, <http://www.forward.com/articles/confirmation-debate-morphs-into-bitter-religious-b/>; Terry Eastland, *Catholic Baiting*, DAILY STANDARD, Aug. 6, 2003, <http://www.theweeklystandard.com/Content/Public/Articles/000/000/002/957edgkx.asp>; Jonah Goldberg, *Dems Want to Bench Judges of Faith*, TOWNHALL.COM, Aug. 6, 2003, http://www.townhall.com/columnists/JonahGoldberg/2003/08/06/dems_

My second experience came at the end of that same summer when Roy Moore, who was then the Chief Justice of Alabama, refused to obey an injunction of a federal district court that required the removal of a monument of the Ten Commandments from the rotunda of the Alabama Judicial Building.²² As attorney general, I publicly disagreed with Chief Justice Moore and assisted the associate justices of the Supreme Court of Alabama in ensuring compliance with the injunction.²³ After the Alabama Judicial Inquiry Commission then filed charges of misconduct against Chief Justice Moore, I personally prosecuted the charges in the Alabama Court of the Judiciary, which unanimously granted my request to remove Chief Justice Moore from his judicial office.²⁴

Throughout these experiences, my perspective on the potential conflict of legal and moral duties has been that I should follow the example of Saint Thomas More. My Catholic faith is the foundation of my worldview, and my judicial duty is governed, from beginning to end, by the law. Faith properly informs the religious lawyer or judge, and morality is not in tension with fidelity to the law.

I will first address my perspective about the controversy that affected my judicial nomination: the role of religion in judging. Religious faith properly informs me, as a judge, in my fidelity to my judicial duty in at least four ways: in my understanding of my oath of office, in my moral duty to obey lawful authority, in my responsibility to work diligently, and in my responsibility to work honestly. Each of these ways is motivational; that is, each concerns the judge's duty to perform his work well. None involves using religious doctrine to decide a case in conflict with the law.

The most fundamental way that faith properly matters to me as a judge is in my understanding of my judicial oath of office. In Article VI of the Constitution, the Framers required that

want_to_bench_judges_of_faith; Hugh Hewitt, *The Catholic Test*, DAILY STANDARD, Aug. 5, 2003, <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/956qpnnx.asp>; Editorial, *Playing the Religion Card*, N.Y. TIMES, Aug. 4, 2003, at A12; Michael Novak, "Deeply Held" Feelings, NAT'L REV. ONLINE, Aug. 4, 2003, <http://www.nationalreview.com/novak/novak080403.asp>.

22. See *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), *aff'd*, 335 F.3d 1282 (11th Cir. 2003); *Moore v. Judicial Inquiry Comm'n*, 891 So. 2d 848 (Ala. 2004).

23. See Pryor, *Christian Duty*, *supra* note *.

24. *Moore*, 891 So. 2d at 862.

every officer of our government “be bound by Oath or Affirmation, to support th[e] Constitution.”²⁵ In the next part of that clause, they provided that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”²⁶ The Framers thought that the particular religious beliefs of the judge should not matter, but that it was crucial for the judge to have his conscience—as informed by those beliefs—bound by the Constitution.

Many of the states had different rules. Delaware, for example, in article 22 of its Constitution of 1776, required officers to “profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore,” and to “acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.”²⁷ Vermont, in chapter 2, section 9, of its Constitution of 1777, required legislators to declare, “I do believe in one God, the Creator and Governor of the universe, the rewarder of the good and punisher of the wicked. And I do acknowledge the scriptures of the old and new testament to be given by divine inspiration, and own and profess the protestant religion.”²⁸ I am especially grateful that last line of the Vermont Constitution did not become part of the Federal Constitution.

During the ratification process, some Americans objected to the ban on religious tests, as many Protestants feared the election or appointment of Catholics to federal office. James Iredell, a delegate to the North Carolina convention, provided my favorite rejoinder to these objections when he rose to defend the ban on religious tests on July 30, 1787. His words were especially memorable for Catholics. Iredell said,

I met by accident with a pamphlet this morning, in which the author states as a very serious danger, that the Pope of Rome might be elected President. I confess this never struck me before, and if the author had read all the qualifications of a President, perhaps his fears might have been quieted. No man but a native, and who has resided fourteen years in America, can be chosen President. I know not all the qualifi-

25. U.S. CONST. art. VI, cl. 3.

26. *Id.*

27. DEL. CONST. of 1776, art. 22, reprinted in 4 THE FOUNDERS’ CONSTITUTION 633, 634 (Philip B. Kurland & Ralph Lerner eds., 1987).

28. VT. CONST. of 1777, ch. 2, § 9, reprinted in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 27, at 634.

cations for a Pope, but I believe he must be taken from the college of Cardinals, and probably there are many previous steps necessary before he arrives at this dignity. A native of America must have very singular good fortune, who after residing fourteen years in his own country, should go to Europe, enter into Romish orders, obtain the promotion of Cardinal, afterwards that of Pope, and at length be so much in the confidence of his own country, as to be elected President. It would be still more extraordinary if he should give up his Popedom for our Presidency. Sir, it is impossible to treat such idle fears with any degree of gravity.²⁹

“The Framers’ general understanding was that proscribing religious tests did not necessarily remove the religious significance of the general oath.”³⁰ James Madison, the Father of the Constitution, explained in a letter to Edmond Pendleton dated October 28, 1787, that an oath should make a religious test unnecessary. Madison wrote,

Is not a religious test as far as it is necessary, or would operate, involved in the oath itself? If the person swearing believes in the supreme Being who is invoked, and in the penal consequences of offending him, either in this or a future world or both, he will be under the same restraint from perjury as if he had previously subscribed a test requiring this belief. If the person in question be an unbeliever in these points and would notwithstanding take the oath, a previous test could have no effect. He would subscribe it as he would take the oath, without any principle that could be affected by either.³¹

Madison’s argument, expressed by others as well, was that a religious believer would take an oath seriously without need of a religious test and that a religious test could be declared by an unprincipled atheist without fear of punishment after death. Either way, a religious test was unnecessary.

When I placed my left hand on the Holy Bible and swore to “perform all the duties incumbent upon me as United States

29. THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO 906 (Bernard Bailyn ed., 1993).

30. Matthew Spalding, *Oaths Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 295 (Edwin Meese III et al. eds., 2005).

31. Letter from James Madison to Edmund Pendleton (Oct. 28, 1787), in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 27, at 639.

Circuit Judge under the Constitution and laws of the United States” and swore “that I [would] well and faithfully discharge the duties of the office on which I [was] about to enter[,] [s]o help me God,”³² my conscience was and remains affected by my religious beliefs. Were it not so, what would be the point of placing my hand on the Bible or ending the oath with the declaration, “So help me God”? Taking a false oath is a violation of the Second Commandment not to take the name of the Lord in vain.³³ As the *Catechism of the Catholic Church* explains, “[t]aking an oath or swearing is to take God as witness to what one affirms. It is to invoke the divine truthfulness as a pledge of one’s own truthfulness. An oath engages the Lord’s name.”³⁴ My entire understanding of my judicial duty flows from taking my oath seriously; James Madison and the other Framers of the Constitution expected nothing less.

My religious faith also informs my perspective on my judicial duty to obey lawful authority; I have a moral obligation to obey our government and its laws. Before I became a judge, this perspective informed my decision, as the attorney general of Alabama, to obey the federal injunction that required the removal of a monument of the Ten Commandments in the Alabama State Judicial Building.³⁵ My moral duty to obey the law pertains to my judicial duty now just as it pertained to my executive duty then.

My faith informs my judicial duty in a third way, by inculcating me with a belief in the moral duty to work. I believe that

32. The words of the oath for judicial officers are taken from two statutes: 5 U.S.C. § 3331 (2000) and 28 U.S.C. § 453 (2000). The oath reads as follows:

I, [name], do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [office] under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

The Oath for Judicial Officers (on file with Author).

33. CATECHISM OF THE CATHOLIC CHURCH ¶ 2150 (1994); see also *Exodus* 20:7.

34. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 33, ¶ 2150.

35. Pryor, *Christian Duty*, *supra* note *. See generally *Moore v. Judicial Inquiry Comm’n*, 891 So. 2d 848 (Ala. 2004).

work is, in a real sense, a form of prayer.³⁶ This religious belief motivates my commitment to my oath to “well and faithfully discharge the duties of the office”³⁷ of a circuit judge.

The final way my faith informs my performance as a judge is by teaching me to be honest. The moral duty of honesty requires both truthfulness in communication and reasoning and respect for the property of others. This duty is reflected in the commandments against bearing false witness and stealing, respectively.³⁸ Regarding the former, the *Catechism* has the following strong words about the necessity for truth in a judicial system:

When it is made publicly, a statement contrary to the truth takes on a particular gravity. In court it becomes false witness. When it is under oath, it is perjury. Acts such as these contribute to condemnation of the innocent, exoneration of the guilty or the increased punishment of the accused. They gravely compromise the exercise of justice and the fairness of judicial decisions.³⁹

Although my religion properly informs and motivates me to be faithful to my oath of office, to be faithful to my moral duties to obey the government and its laws, and to work both diligently and honestly, there is a limit to the relevance of religion in the performance of my judicial duty. That limit is defined by the very nature of my judicial authority. Properly understood, the exercise of my authority as a federal judge is governed by the law alone, and that understanding is where the real controversy exists in the contemporary debate about judicial authority.

As a judge, I am not given the authority to use a personal moral perspective to update or alter the text of our Constitution and laws. The business of using moral judgment to change the law is reserved to the political branches, which is why the officers of those branches are regularly elected by the people. A judge’s task is limited to serving, in Chief Justice Roberts’s words, as an “um-

36. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 33, ¶ 2427.

37. The Oath for Judicial Officers, *supra* note 32.

38. *Exodus* 20:15–16.

39. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 33, ¶ 2476 (footnotes omitted).

pire,"⁴⁰ so that controversies between citizens and officers of their government may be resolved based on the law. For that limited task, a federal judge is granted a privilege designed to secure his independence: life tenure with no reduction in salary.⁴¹

An officer of a political branch is free to propose changes in the law that conform to his perspective of morality, as informed by his religion. For centuries, members of Congress have supported a variety of new morality-based laws concerning whether to abolish slavery, withdraw troops from foreign wars, abolish child labor, guarantee civil rights, provide assistance to the poor and sick, protect marriage, and prohibit the sale of intoxicating liquors. The changing of laws enacted by political authorities is not a judge's task; the duty of a judge is the application of those laws in controversies within the jurisdiction of the courts.

I do not mean to suggest that the task of judging is either mechanical or easy. The meaning and application of the law is sometimes difficult to discern, which is why judges in good faith sometimes disagree. The duty to administer justice requires the exercise of judgment, but not the employment of religious doctrine as a source of authority to supplant or evade the law when judging becomes difficult or a decision's outcome may be undesirable. A judge who is motivated by moral duties to fulfill his oath and obey the law must strive to be as objective as possible using traditional methods of construction, reliance on precedent, and legal reasoning.

This limited understanding of the judicial role has served our nation well for more than two centuries. It has allowed the judiciary, as a separate branch, to perform, when necessary, its vital role of demanding compliance with the Constitution. In short, the rule of law that flows from the separation of powers has preserved our freedom.

With that understanding of my moral and legal duties in mind, I will relate my experience as the attorney general of Alabama to illustrate how my understanding of these duties guided me. In the days following the removal of his monument

40. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

41. See U.S. CONST. art. III, § 1.

of the Ten Commandments, Chief Justice Moore and his most prominent supporters advanced three arguments against those of us who complied with the federal injunction. They argued, first, that we had a moral duty to acknowledge God that required us to disobey the injunction.⁴² Second, as they surrounded the State Judicial Building with the hope of preventing the removal of the monument, Chief Justice Moore's supporters compared their struggle with that of the civil rights movement led by Dr. Martin Luther King, Jr.⁴³ In turn, they compared those of us who complied with the federal injunction to the defenders of racial segregation. Finally, Chief Justice Moore argued that we had a duty to disobey the injunction, just as we would have had a duty to disobey an injunction that allowed slavery.⁴⁴

42. See Sallie Owen & Karen Tolkinen, *The Monument is Moved Away*, MOBILE REG. (Ala.), Aug. 28, 2003, at 1A (quoting Chief Justice Roy Moore as saying, "I am profoundly disappointed with our governor, our attorney general and the associate justices of the Alabama Supreme Court who have allowed the basis of our justice system to be undermined by a federal judge who says that we cannot acknowledge God"). One of Chief Justice Moore's leading supporters even compared the Senior Associate Justice of the Supreme Court of Alabama, Gorman Houston, Jr., to Judas, the betrayer of Jesus. See Todd Kleffman, *Moore Won't Move Display*, MONTGOMERY ADVERTISER (Ala.), Aug. 15, 2003, at 1A ("The Rev. Rick Scarborough likened Houston to Judas. 'I wonder if Houston kissed him on the way out the door,' Scarborough said."); see also Alvin Benn & Jannell McGrew, *Lack of Support Stuns Visitors*, MONTGOMERY ADVERTISER (Ala.), Aug. 23, 2003, at 1A. Both Justice Houston's son, a Methodist minister, and Justice Houston's pastor objected to religious criticisms mounted against Justice Houston, who serves as a Sunday school teacher and keeps a prayer kneeler in his office. See Sallie Owen & Kristen Campbell, *Supreme Court Justice Sought Son's Counsel*, MOBILE REG. (Ala.), Aug. 22, 2003, at 4A.

43. Stan Bailey, *Capitol Rally: Thousands Show Support for Commandments Monument*, BIRMINGHAM NEWS (Ala.), Aug. 17, 2003, at 15A ("[The Rev. Rick] Scarborough; the Rev. Jerry Falwell of Lynchburg, Va; former U.N. diplomat Alan Keyes and other speakers compared the battle for public display of the Ten Commandments to the civil rights movement that began here nearly five decades ago. They compared Moore's role to that of the Rev. Martin Luther King Jr."). On this issue, Chief Justice Moore was equivocal. Compare Stan Bailey, *Justices Overrule Moore; Monument Ordered Out*, BIRMINGHAM NEWS (Ala.), Aug. 22, 2003, at 1A (quoting Chief Justice Moore as saying that the example of Dr. Martin Luther King "is proof enough that great men do follow the rule of law and not the rule of man"), with Roy S. Moore, Op-Ed., *In God I Trust*, WALL ST. J., Aug. 25, 2003, at A10 ("My decision to disregard the unlawful order of the federal judge was not civil disobedience, but the lawful response of the highest judicial officer of the state to his oath of office.").

44. See Richard Land, *FIRST PERSON: Commandments Controversy: Two Issues, Not One*, BAPTIST PRESS, Aug. 25, 2003, <http://www.bpnews.net/bpnews.asp?ID=16553> (quoting Moore as saying, "I hear others talk of a rule of

I disagreed with Chief Justice Moore.⁴⁵ I argued that I had a moral duty, as a Christian, to obey the federal injunction. There was no moral justification for civil disobedience. My oath to uphold the U.S. Constitution required me, as attorney general of Alabama, to obey the injunction without regard to whether I agreed with the basis for that injunction. My moral duty was not in conflict or even in tension with my legal duty. Instead, my Christian duty provided the foundation for my public duty.

During the controversy, I explained that the Christian duty to obey the government and its laws is clearly expressed in the New Testament. In Saint Matthew's Gospel, Jesus gave a provocative lesson about the moral duty to obey the government: "Then give to Caesar what is Caesar's, but give to God what is God's."⁴⁶ In his Epistle to the Romans, the Apostle Paul taught, "Let every person be subordinate to the higher authorities, for there is no authority except from God, and those that exist have been established by God."⁴⁷ And in his first Epistle, Peter wrote, "Be subject to every human institution for the Lord's sake, whether it be to the king as supreme or to governors as sent by him for the punishment of evildoers and the approval of those who do good."⁴⁸

During the several years that I served as attorney general, I defended the constitutionality of depicting the Ten Commandments in a courthouse.⁴⁹ I assisted Governor Bob Riley in creating a display of several foundations of our law, including the Ten Commandments, in the old Supreme Court library of the State Capitol.⁵⁰ I also publicly agreed with the opinion written by the late Chief Justice Rehnquist that the Ten Commandments "have made a substantial contribution to our secular legal codes."⁵¹

law. If the rule of law means to do everything a judge tells you to do, we would still have slavery in this country.").

45. See Pryor, *Christian Duty*, *supra* note *, at 3.

46. *Matthew* 22:21 (New American Bible).

47. *Romans* 13:1 (New American Bible).

48. 1 *Peter* 2:13–14 (New American Bible).

49. See *State ex rel. James v. ACLU of Ala.*, 711 So. 2d 952 (Ala. 1998); Brief for the State of Alabama et al. as Amici Curiae, in Support of Petition for a Writ of Certiorari, *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (No. 00-1407); Bill Pryor, Op-Ed., *Religious Display Proper*, USA TODAY, Apr. 11, 1997, at 14A.

50. See Stan Bailey, *Commandments Plaque Put on Display by Riley*, BIRMINGHAM NEWS (Ala.), Sept. 10, 2003, at 1A.

51. *City of Elkhart*, 532 U.S. at 1061 (Rehnquist, C.J., dissenting from denial of certiorari); Pryor, *Christian Duty*, *supra* note *, at 6; see also *Stone v. Graham*, 449 U.S. 39,

Nevertheless, in the controversy about Chief Justice Moore, I was both morally and legally obliged to obey the injunction of the federal court. My legal duty to ensure removal of the monument of the Ten Commandments from the courthouse did not require me or any other official to violate a moral duty. Christ did not command anyone to maintain a monument of the Ten Commandments in the rotunda of a courthouse. The legality of a monument in the rotunda of Caesar's courthouse is a question for Caesar.

What about the second accusation? Did compliance with the injunction violate the civil rights of Christians? Were the protesters outside the State Judicial Building engaged in rightful civil disobedience? Was Chief Justice Moore the new Dr. King, and I the modern day Bull Conner? The writings of Dr. King suggest the contrary. The authoritative text on this issue is the letter written by Dr. King from the Birmingham City Jail on Easter weekend 1963.⁵² The letter was addressed to liberal white clergy of Birmingham who opposed segregation but did not support Dr. King's nonviolent protests against racial discrimination. The white religious leaders argued that, as a Christian, Dr. King had a duty to obey the government.⁵³

Dr. King responded that he was not obliged to obey an immoral or unjust law. He argued, based on the writings of Saint Augustine and Saint Thomas Aquinas, that "[a]n unjust law is a human law that is not rooted in eternal law and natural law."⁵⁴ Dr. King contended that "segregation statutes are unjust because

45 (1980) (per curiam) (Rehnquist, J., dissenting) ("It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."); *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (upholding display of Ten Commandments in a county courthouse); *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003) (upholding depiction of Ten Commandments in official seal of county court); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) (upholding display of Ten Commandments monument at entrance of city-county courthouse); *State v. Freedom from Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995) (en banc) (upholding Ten Commandments monument on grounds of State Capitol).

52. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 77 (1963).

53. For an excellent recounting of the history of this letter and the controversy, see TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 737-45 (1988).

54. KING, *supra* note 52, at 85.

segregation distorts the soul and damages the personality.”⁵⁵ He explained, “A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law.”⁵⁶ He concluded that a law is unjust when it is used “to deny citizens the First-Amendment privilege of peaceful assembly and protest.”⁵⁷ Dr. King’s case was that segregation treated black persons as though they were less than citizens and gave them no political recourse with which to remedy their injury.

Dr. King then explained the difference between unjust defiance and just civil disobedience. He wrote,

In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.⁵⁸

Dr. King’s letter belies any comparison of the civil rights protests of 1963 in Birmingham and the 2003 protests of Chief Justice Moore and his supporters in Montgomery. The injunction to remove the monument did not distort the Christian soul or personality because Christianity is not dependent upon the presence of a monument in a government building. The injunction did not represent a government denial of political recourse for Christians; Christians still enjoy the constitutional rights to vote, hold office, speak, exercise their faith, and assemble. Indeed, the election of Chief Justice Moore and the peaceful protests for two weeks outside the State Judicial Building, complete with extensive freedom of the press, illustrated the vitality of the civil rights of Christians.

The most fundamental distinction between Dr. King’s example and Chief Justice Moore’s example is the difference between defiance of the law and civil disobedience. Dr. King expected the law he called unjust to be enforced against him, but Chief Justice

55. *Id.*

56. *Id.* at 85–86.

57. *Id.* at 86.

58. *Id.*

Moore and his supporters said that they expected our state officials not to enforce the injunction. Dr. King was a private citizen who, in his words, “lovingly” accepted the punishment of an unjust law, but Chief Justice Moore was a public official who refused to obey the law and sought to evade any punishment or responsibility for his actions. A private citizen may, in extreme circumstances, engage in civil disobedience and accept the punishment of an unjust law, but a public official has no such option. A public official is sworn to uphold the law.

Perhaps the greatest irony was the reaction of Chief Justice Moore’s supporters following the removal of the monument from the rotunda. When we complied with the injunction, the supporters of Chief Justice Moore called on me to resign.⁵⁹ As a public official, if I am ever *unable* to fulfill my oath and obey the law, then I should resign.

The duty of a public official brings me to my response to Chief Justice Moore’s final contention: that we were obliged to disobey the injunction in the same way that we would be obliged to disobey an order allowing slavery. After the associate justices unanimously ordered the building manager to comply with the injunction, Chief Justice Moore said, “If the rule of law means to do everything a judge tells you to do, we would still have slavery in this country.”⁶⁰ This assertion is contrary to the American history of the abolition of slavery, especially the example set by the Great Emancipator, Abraham Lincoln.

An infamous decision of the Supreme Court, of course, promoted slavery. In 1857, the Supreme Court ruled in *Dred Scott v. Sandford*⁶¹ that the Missouri Compromise, which prohibited slavery in Western territories, was unconstitutional and that blacks were not citizens. Abraham Lincoln argued that *Dred Scott* was wrongly decided and must be opposed.

But Lincoln’s perspective about the proper response to *Dred Scott* is instructive. In October 1858, Lincoln explained, in one of his famous debates with Stephen Douglas,

59. See Bob Jones, *Pryor Commitment*, WORLD MAG., Sept. 13, 2003, at 14; Bill Rankin, *Commandments Stand Costs Pryor*, ATLANTA J. & CONST., Aug. 31, 2003, at A1.

60. Land, *supra* note 44.

61. 60 U.S. (19 How.) 393 (1857).

We oppose the Dred Scott decision in a certain way We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. . . . We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.⁶²

Lincoln explained that there were two ways of opposing a decision of a court allowing slavery. One method of opposition was illegitimate and to be avoided. The other method of opposition was legitimate and necessary.

The illegitimate opposition was defiance of a final order of a court. Lincoln recognized that Article III of the Constitution created a federal judiciary to resolve disputes, particularly those involving the interpretation of the Constitution. In Lincoln's view, upon the resolution of their dispute, the parties to the lawsuit were obliged to follow the orders of the court, and nonparties were obliged to respect the resolution of that dispute. Public officials sworn to uphold the constitutional framework for resolving disputes were obliged to enforce the final orders of the judicial process as between the parties, without regard to the public officials' opinion of the correctness of the ruling.

The legitimate method of opposition, according to Lincoln, was political. Voters should support candidates who would work to end slavery. Elected representatives should enact laws to end slavery. And the judiciary should, in proper cases, reverse its erroneous decisions that promoted slavery.

Lincoln also supported another more provocative method of opposition. Lincoln refused to allow the *Dred Scott* decision to bind his administration. For example, Lincoln required his administration to issue a passport to a black student and a patent

62. Abraham Lincoln, Speech at the Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953).

to a black inventor.⁶³ Lincoln supported government policies that challenged the continued application of *Dred Scott* because he considered those policies constitutional notwithstanding the erroneous precedent established in *Dred Scott*. As Lincoln explained in his inaugural address,

[T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.⁶⁴

When the judiciary interprets the Constitution erroneously, the American people can exercise many of the lawful tools of political opposition that President Lincoln employed. The American people can campaign for different policies. The American people can elect candidates who will enact their favored policies. Elected officials can appoint judges faithful to the rule of law. The American people can bring new cases before the courts and urge the overruling of erroneous precedents. If necessary, the American people can even amend the Constitution. Defiance of the law, however, is not a remedy under the Constitution.

Contrary to Chief Justice Moore's arguments, slavery did not end through the defiance of an injunction by a public official. Slavery was abolished, following our bloody civil war, with the adoption of the Thirteenth Amendment to the Constitution. The rebellion of the southern states set the wrong example of defiance.

Many might say, and I would agree, that it is easy to see why Chief Justice Moore was wrong to take the law into his own hands. Because our liberty depends on the rule of law, we are all bound to obey even when we disagree with the decisions of our courts. As

63. See *Passports for Colored Citizens*, in 5 THE WORKS OF CHARLES SUMNER 497–98 (1872); *Denial of Patents to Colored Inventors*, in 6 THE WORKS OF CHARLES SUMNER 144 (1872).

64. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

Saint Thomas More said, “The law, Roper, the law. I know what’s legal not what’s right. And I’ll stick to what’s legal.”⁶⁵

But the controversy surrounding Chief Justice Moore raises another question: What about those who applaud or publish glowing editorials when other judges place their own different notions of morality above the law? That wrong can be done from either the right, as in the case of Chief Justice Moore, or the left. The law is not a mirror that will always reflect our individual notions of right and wrong. For courts, questions about morality, including issues like the death penalty, marriage, and family, are to be resolved based on the law, not based on what a majority of lawyers or judges thinks the law should be. Legislators and voters may change the law and be informed by morality in that endeavor, but none of us has the authority to defy or subvert the law in the name of morality.

Faced with a conflict of law and morality, we should follow the example of Saint Thomas More, who resigned as Lord Chancellor after King Henry VIII left his wife, Catherine, for relations with Anne Boleyn, and the clergy surrendered the property of the Church in England to the King. When the English Parliament passed the Act of Succession, which made Anne Boleyn’s issue first in succession to the Crown, Saint Thomas More said he would swear to the succession for it was the law of the land, but he refused to declare the supremacy of the King over the Church. Saint Thomas More recognized clearly his duty to render to God what belongs to Him, while rendering to Caesar what belongs to him.⁶⁶ In his devotion to duty, Saint Thomas More paid the ultimate price. As More succinctly explained a moment before his execution, he “died the King’s good servant and God’s first.”⁶⁷

Saint Thomas More lovingly accepted the punishment of an unjust law, just as Dr. King did centuries later in America. Both Saint Thomas More and Dr. King rejected the path of defiance, evasion, and subversion of the law. They recognized that such

65. BOLT, *supra* note 1, at 65.

66. See *Matthew* 22:18–22.

67. JOHN FARROW, *THE STORY OF THOMAS MORE* 241 (1954); see also Matthew Mehan, *Getting to Know Thomas More*, NAT’L REV. ONLINE, Aug. 25, 2005, <http://www.nationalreview.com/comment/mehan200508250824.asp>.

a path would lead, in Dr. King's words, to "anarchy," when moral duty instead requires "the highest respect for the law."⁶⁸

Those who would, like William Roper or Chief Justice Moore, cut down the law to get after the Devil risk falling into his trap. When the Devil turns around, where will they hide, the laws all being flat? For me, I will strive to follow Saint Thomas More's example and give even the Devil the benefit of law for my own safety's sake.

68. KING, *supra* note 52, at 86.