

## **THOMAS MORE LAWYERS' GUILD\***

**Justice Peter D. Lauwers**

**June 17, 2014**

We commemorate Thomas More today. His feast day is shared with Bishop John Fisher, who was executed on June 22, 1535. More followed him on July 6.

I was in London last July. I was walking back to the hotel near the Tower Hill Tube Station, and came across a parkette. I was shaken to find a plaque there marking the execution site of Fisher, More and many other English martyrs. It was not hard to imagine the scaffold and the spectators arrayed there, so long ago.

Thomas More kept the faith when it was physically lethal. In this part of the world, our challenge is to keep the faith in a secular age that may be spiritually lethal. How do we do that, we who are called by Jesus Christ to be salt and light to the world<sup>1</sup>?

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<sup>1</sup> Matthew 5:13-16

I am going to speak to you today, as a Catholic who happens to be a judge, about: the challenges we face, the modern disease that saps us, its origin in secularization, its transmission through education, the leap of faith we are yet called to make, how this relates to the work of judges, and, finally the importance of cultivating not only the virtues but also the disposition needed to be authentic witnesses to our faith.

## **The Challenges**

The great Jesuit theologian and philosopher, Bernard Lonergan, said this about our age. We:

...are faced with a problem similar to that met by Aquinas in the thirteenth century. Then, Greek and Arabic culture were pouring into Western Europe and, if it was not to destroy Christendom, it had to be known, assimilated, transformed. Today modern culture, in many ways more stupendous than any that ever existed is surging around us. It too has to be known, assimilated, transformed.

Are we up to the challenge? Are we ready to know, assimilate and transform modern culture? Or, are we destined to be known, transformed and assimilated by it?

### **The Modern Disease**

We are afflicted by a modern disease. The French philosopher, Paul Ricoeur, asserts that our dominant existential stance is suspicion:

This process of suspicion which started several centuries ago has already changed us. We are more cautious about our beliefs, sometimes even to the point of lacking courage; we profess to be only critical and not committed. I would say that people are now more paralyzed than blind.<sup>2</sup>

Why then, are we so paralyzed?

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<sup>2</sup> Paul Ricoeur, *Lectures on Ideology and Utopia*, (1986) New York, Columbia University Press, p. 313.

## Secularization

A critical element is secularization, a process so well explored by Canadian philosopher and political scientist, Charles Taylor, in his magisterial book, *A Secular Age*.

Over the last four centuries in the West, we have moved, says Taylor, from being “a society where belief in God [was] unchallenged and indeed, unproblematic,” to a society where belief in God “is understood to be [just] one option among others, and frequently not the easiest to embrace.” This is, he says, a society in “which faith, even for the staunchest believer, is [but] one human possibility among others.”<sup>3</sup> We can see this, can’t we, among our friends, even in our own families.

And then there is the aggressive version of secularism, which is anti-religious. It sees, says Taylor, “secularism [as] an instrument

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<sup>3</sup> Charles Taylor, *A Secular Age*, (Cambridge: The Belknap Press of Harvard University, 2007) [Taylor, ASA] at 3.

to be used in the emancipation of individuals.”<sup>4</sup> Putting it in Rousseau’s shocking terms, people must be “forced to be free.”<sup>5</sup>

This is the hard edge of a familiar attitude. As Taylor remarks: “It just follows that you can’t be fully into contemporary humanist concerns if you haven’t sloughed off the old beliefs. You can’t be fully with the modern age and still believe in God.”<sup>6</sup> There is, Taylor notes, a patronizing “coming to adulthood” narrative about religion:<sup>7</sup> “Now in milieux in which this stance dominates, it can seem very hard to understand why anyone can believe in God.”<sup>8</sup>

That stance is quite pronounced in the academic and professional worlds, isn’t it?

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<sup>4</sup> Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press, 2011), at 29-30.

<sup>5</sup> The phrase comes from J-J. Rousseau, “The Social Contract” Book 1, c. 6: “...whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free...” in *The Social Contract and Discourses* (London: J.M. Dent & Sons Ltd., 1973) at 177.

<sup>6</sup> Taylor, ASA at 572.

<sup>7</sup> Taylor, ASA at 580.

<sup>8</sup> Taylor, ASA at 591.

## The Influence of Liberal Education

We are the products of our education, and that education has a certain grain in it, like wood. It makes us weird. What do I mean by that?

Neuropsychologist Jonathan Haidt argues that members of the cultural elite, including lawyers, judges and politicians, share certain general characteristics. We are Western, educated, industrialized, rich and democratic (the acronym is WEIRD). We tend to be liberal secularists. Our shared habits of thought skew the way that most of us view the world.<sup>9</sup>

Haidt cites social science research to show that there are three “moral clusters” that underpin moral thinking: the ethic of autonomy, the ethic of community, and the ethic of divinity.<sup>10</sup>

Liberal secularists, Haidt claims, usually focus on the ethic of

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<sup>9</sup> Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, (Pantheon Books: New York, 2012) [Haidt] at 96. The resulting acronym that Haidt uses is WEIRD. He argues that the WEIRD elite do not share the views of the majority, for whom community and divinity continue to be salient.

<sup>10</sup>Haidt at 99-100.

personal autonomy, and tend to ignore the ethics of community and divinity.<sup>11</sup> Many don't really get community or religion.

Whatever our suppositions were when we started our liberal education, we have been thoroughly colonized by these secularist views. All has been put into doubt. All has been discounted, if not derided. We are tempted to equivocate about our faith. We are put to the test daily.

### **The Leap of Faith**

We can scarcely be salt and light if, as mature adults, we fail to appropriate anew the verities of our religion. But that requires real commitment. And many people find the moment of commitment to be especially difficult. Hence Ricoeur's description; we are not blind, but paralyzed.

He makes what strikes me as an irrefutable claim:

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<sup>11</sup> Haidt at 297.

We cannot eliminate from a social ethics the element of risk. We wager on a certain set of values and then try to be consistent with them; verification is therefore a question of our whole life. No one can escape this. Anyone who claims to proceed in a value-free way will find nothing... I do not see how we can say that our values are better than all others except that by risking our whole life on them we expect to achieve a better life, to see and to understand things better than others.<sup>12</sup>

The important point to attend to is this: whether we like it or not, each one of us stakes our own life each time we make a fundamental choice. When people assert that they cannot or will not choose, they are choosing, and they are staking their lives on that choice.

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<sup>12</sup> Ricoeur, page 312.



A decision in favour of the existence of God is a leap of faith. Ricoeur, probably intentionally, echoes Blaise Pascal's famous wager.

Pascal was a mathematician, scientist, and inventor. He was also the author of a spiritual classic entitled, "Pensees."<sup>13</sup> He pondered how to make the faith attractive to people of his own mathematical and scientific mindset. That mindset is widespread, if not dominant, today, isn't it? From this emerged what has become known as "Pascal's wager". It goes like this:

"Either God is or he is not." But to which view shall we be inclined? Reason cannot decide this question. Infinite chaos separates us. At the far end of this infinite distance a coin is being spun which will come down heads or tails. How will you wager? Reason cannot make you choose either, reason cannot prove either wrong.

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<sup>13</sup> My references are to the Penguin Books Edition, 1966, at page 309.

Do not then condemn as wrong those who have made a choice, for you know nothing about it....

To the objection that “the right thing is not to wager at all,” Pascal offers this response:

Yes, but you must wager. There is no choice, you are already committed. What will you choose then? Let us see, since choice must be made, let us see which offers you the least risk. You have two things to lose: the true and the good; and two things to stake: your reason and your will, your knowledge and your happiness: and your nature has two things to avoid: error and wretchedness. Since you must necessarily choose, your reason is no more affronted by choosing one rather than the other. That is one point cleared up. But your happiness? Let us weigh up the gain and the loss involved in calling heads that God exists. Let us assess the two cases: if you win you win everything, if you lose

you lose nothing. Do not hesitate then; wager that He does exist.”<sup>14</sup>

And on it goes. You may be with Pascal at least that far: God exists. But Pascal demands more. He demands not only intellectual assent, but passionate engagement. This is where you might flinch, in your paralysis:

Now what harm will come to you from choosing this course? You will be faithful, honest, humble, grateful, full of good works, a sincere, true friend...It is true you will not enjoy noxious pleasures, glory and good living, but will you not have others?

I tell you that you will gain even in this life, and that at every step you take along this road you will see that your gain is so certain and your risks so negligible that

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<sup>14</sup> Pascal, pp. 150-1.

in the end you will realize you wagered on something certain and infinite for which you have paid nothing.<sup>15</sup>

This remarkable wager has become part of our spiritual heritage as Christians, and it still resonates.

### **An Aside on Judging**

So, let's say we make the commitment Pascal calls us to make. How do we live in the secular world, particularly those of us who hold public office and are sworn to uphold the law? I can only speak for myself.

It is worth recalling the instruction of Jesus, which is, like so many of his instructions, at once beguilingly simple and remarkably difficult: "Render unto Caesar the things that are Caesar's, and unto God the things that are God's".

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<sup>15</sup> Pascal, p. 153.

I have been a judge for almost six years, and I can say that I have never had an occasion on which these two have collided. Nor do I expect such an occasion to arise.

Why is that? I accept, without reservation, the Rule of Law.

Judges are not free to do whatever they want. We are not free to indulge our personal notions of what justice is, or to impose our religious or moral views on the parties to the litigation before us. I swore an oath, on the Bible, to “faithfully, impartially and to the best of my knowledge and skill, execute the duties of a Judge of the Court of Appeal for Ontario.” I take that oath seriously, as do my colleagues.

My own judicial mantra goes like this: Do the right thing, for the right reason, in the right way, at the right time, and in the right words.

This is, of course, an aspiration, but I know of no judges who lack this aspiration. We all fall short, being human. That is what appellate courts are for, I’m told.

Let me then unpack this mantra, each element of which is pregnant with meaning.

### **Do the Right Thing**

Most people would equate doing the right thing with doing justice in the particular case. The relevant rights and obligations of the parties are defined by the law, either in the common law made by judges, or in the law made by other instruments of the state with status in policy, regulation, statute or the Constitution. This is the rule of law in action.

The law defines the available rights and obligations, and the available outcomes. The principled approach is to consider the facts, apply the law, and reach the just result. That said, the meaning of the word “justice” has been a central preoccupation of western civilization. It ought to trouble us always.

### **For the Right Reason**

In the play, “Murder in the Cathedral”, T.S. Eliot recounts the martyrdom of St. Thomas à Beckett, who was the Archbishop of

Canterbury. He had incurred the enmity of King Henry, his former friend, and had gone into exile. After some years the Archbishop returned and was on his way to Canterbury. One of his followers suggested that he do something to provoke martyrdom, to which the Archbishop replied: "The last temptation is the greatest treason, to do the right thing for the wrong reason." His crucial insight was that the wrong motive for an action corrupts the outcome.

The secular variant would be the well worn expression that hard cases make bad law.

### **In the Right Way**

Process matters. A judge could get to the right result, for the right reason, but its legitimacy might well be undermined if the process was improper, for example, when a court asserts jurisdiction where there is none, even if the order could have been obtained in a different way.

Evidence matters too. People get a sense of real injustice when a judge makes an error in the admission of evidence. The losing party wonders whether that evidence played a crucial role. Letting in bad evidence, or excluding good evidence, can be deeply problematic.

### **At the Right Time**

Justice delayed is justice denied. Judges must get their decisions out as quickly as they can, consistent with prudence in decision-making.

Another dimension is the concept of ripeness. Is this the case in which it would be wise to make a common law move? Or would it be better to decide the case on the narrowest possible basis and leave the development of the law to another case? This calls for prudent judgment and judicial humility.



## In the Right Words

At new judges' school, and there is one, we were asked to answer a serious question: "Who is the most important person in the courtroom?"

It is certainly not the judge. Nor the members of the jury. Nor is it one witness or another. And it is not, curiously enough, the victor.

The most important person in the room, the one for whom we write, is the loser. The loser is entitled to know why the decision was reached, and why his or her evidence and arguments were rejected: *R. v. Sheppard*<sup>16</sup>

And judges must recognize, too, that words can be weapons. In criminal cases, where deterrence is an important element, the denunciation of criminal behaviour can be reflected in the judge's words.

But strong words can cause damage. In family cases, where the relationships must continue, burdening one side or the other with

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<sup>16</sup> [2002] 1 S.C.R. 869 per Binnie J. at para. 55.

soul-destroying comments, solves no problems. It creates them. Nor do parties who come to court expect to see their lives turned into the basis for artful judicial prose that attracts press attention.

How does any of this relate to religion? Is there a point of intersection?

### **It's About Character**

In my view, religion has an important role in forming character, and a well-formed character is essential to good judging. I am not asserting, by the way, that one cannot be good without God. I can only speak of my own path, one that many others have shared.

Christianity calls each one of us to be a person whose faith and life are integrated, not a person whose faith is limited to Sunday services. We are called to manifest, at every instant, the cardinal virtues of fortitude, justice, prudence and temperance, and the theological virtues of faith, hope and charity. People in positions of power also need humility, which does not come easily to high achievers.

The successful cultivation of these virtues is the daily work of a lifetime. There is nothing in this cultivation that is inconsistent with the public responsibility of being a judge; there is nothing wrong with exercising these virtues in all of the judicial functions that I outlined. They are essential to justice.

### **It's Also About Disposition**

There are three biblical instructions that I find particularly inspiring, and to which I return often, because backsliding is so human. I commend them to you.

The first is this: "Rejoice always" (1 Thessalonians 5:16). Some of you may have seen the HBO series on John Quincy Adams. Adams is walking in a field with his son, in his older age; he exclaims "Rejoice evermore" – that's from Paul." He then says that he wishes he had heard the expression earlier in his life, because he might then have done things differently, been less cantankerous, and, perhaps, much happier.

Rejoice Always! That's a basic stance towards the world that I recommend highly to you, even though I am not always successful in following it. But daily life is filled with little epiphanies, of moments of awe and wonder, if you are open to them. "Rejoice always." And give thanks.

The second biblical instruction is this: "Test everything, embrace the good." (1 Thessalonians 5:21) This stance towards the world is fundamentally open. Our normal approach, as trained lawyers, is to search out the negatives and guard against them, not to identify and embrace the good. But I have found, under the steady hands of many mentors, that testing everything and embracing the good is the best way to proceed. Try it yourself. See if you can't take the negatives in what you write and say, and express them as positives. You will be surprised. You might even become positive in your orientation, without losing your effectiveness. Imagine that.

The third biblical instruction comes in the words of St. Peter: “Always be prepared to give an answer to everyone who asks you to give the reason for the hope that you have.” (1 Peter 3:15). Who would ask you for such an account if that hope were not both evident and inspiring? People should sense that salt and light in you.

### **Concluding Remarks**

What are Christians today, in what Walker Percy called these “dread latter days of ... the Christ-forgetting Christ-haunted...Western World,”<sup>17</sup> called upon to do? How do we know, assimilate and transform modern culture, now that the ghost of Constantine is well buried and political power has gone forever?

In ancient times, Christians were often seen as worthy of imitation. As Tertullian noted, pagans were impressed, saying: “See how they love one another, and how they are ready to die for each other.” That gentle sense of decency, order, and

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<sup>17</sup> Walker Percy, *Love Among the Ruins* (1971).

kindness were profoundly impressive to a chaotic and predatory society.

People who exemplify the settled dispositions of prudence, justice, fortitude and temperance, and the theological virtues of faith, hope and charity, people who exemplify authentic and faithful integrity, people who show prayerful humility, are worthy examples. Could anyone go wrong following Micah: “Do Justice, love kindness and walk humbly with your God?”( Micah 6)

What is convincing to the modern mind is whether something works in the real world. Credibility comes more from the powerful force of lived examples, than from words.

Fittingly, Thomas More was the first writer to use the English word “integrity”. His faith and life were integrated. On the scaffold he famously said: “I die the King’s good servant, and God’s first.” Notice that he said “and”, not “but”. He rightly saw personal and public life as an integral whole that could not be severed.

Take Ricouer's challenge and stake your life positively, not by inertia. Take Pascal's wager and engage passionately and lovingly, not querulously, with your faith, your Church and your community.

We are, in this part of the world at least, not called upon today, unlike Thomas More, to pay the ultimate price for our faith. But around the world things are not so sanguine. Let us remember kindly our patron on his day, and all the martyrs, ancient and new.