
IX. “JUSTICE FOR ALL SEASONS”

ST. THOMAS MORE SOCIETY

Stanford University, November 20, 2008

Good evening. Thank you for that very gracious introduction. I understand that the St. Thomas More Society was founded to promote the discourse of ethical, moral, and social issues relevant to the legal profession. So I will say a little bit about Saint Thomas More, because I think his story is quite relevant to the issues we all face as lawyers and as judges.

I first learned about Thomas More many years ago in high school through Robert Bolt’s excellent play, *A Man for All Seasons*. The play describes how Sir Thomas More, the lord chancellor of England, refuses to acknowledge King Henry VIII’s supremacy as the head of the Church of England, which the king has just broken off from the Roman Catholic church. More refuses to sign an oath recognizing the king’s marriage to his second wife (the second of six marriages) and refuses to succumb to the political pressures of the king and his political aides. He is tried for treason in a show trial and is beheaded, dying for his principles.

The play portrays More as a deeply principled man whose stand against the king persists even as he is about to be beheaded. We remember More for his challenge to royal tyranny, standing up on behalf of reason and principle, and, perhaps most of all, for his fidelity and loyalty to the rule of law.

So, he is the patron saint of lawyers and politicians (now there’s an interesting pairing!) and he represents the ideal for each of these — the true statesman and lawyer, whose commitment to his principles is so personal, and so complete, that he is willing to give up his life for them.

And Thomas More’s story is every bit as important to us these days when we take for granted our many freedoms, and the distribution of political power, among our three branches of government, rather than the vesting of that power in one, all-powerful, ruler. But, I submit, we still have to fight, and fight hard, to preserve this system, because it is the *system itself* that protects us. As a judge, I am obviously reminded every day of the singular importance of our impartial and independent judiciary.

Now, as judges we are sometimes called upon to make decisions which are unpopular with the majority. Still, we are required to apply the law impartially. We must make difficult choices in interpreting the Constitution on matters related to church and state, freedom of speech, due process, and frequently now, we are asked to consider ever-evolving standards of equality and decency here and abroad, whether they relate to our right to privacy, the right of same-sex partners to marry, life without parole sentences for juveniles, or the imposition of the most severe punishment, the death penalty.

And while we judges are subject to the same societal pressures that everyone is exposed to, most people expect, and the Constitution requires, that judges rise above any personal preferences in reaching their decisions under the law. Nothing new here.

But our deeper and deepest challenge lies in using legal principles and doctrines that we will not regret in the future — in making decisions that will stand the test of time, that will impose justice now and “Justice for All Seasons.”

Now, in America we have not always remained loyal to our best ideals in times of crisis — basic civil liberties, like freedom of speech, and habeas corpus, may seem to diminish in light of security threats from abroad; but, in fact — and in truth — these are the moments. These are the moments when our civil liberties are the most important — and when we must be super-vigilant in guarding these rights. I say this because it is easy to defend our ideals in times of peace and prosperity (in the good times), and hard, but absolutely essential, that we continue to defend our ideals in times of crisis.

*Korematsu v. United States*¹⁴⁰ is one of the most painful of historical cases — though certainly not the only one — which illustrates the great importance of carefully considering the historical context in which one is acting as a judge. The case is also particularly historically relevant in today’s climate of fear and terrorism, because it reveals the ease with which we (presidents and courts, alike) can justify curtailing the human rights of our own citizens on account of their race or ethnicity. The parallels to many of our government’s current practices seem obvious and painful. The Court justified its decision

¹⁴⁰ 323 U.S. 214 (1944).

then by saying that the country was at war, and the military was justified in taking any measure to ensure the safety of the country.

Ironically, it was, after all, U.S. Supreme Court Justice Louis D. Brandeis in dissent in the *Olmstead* case who earlier said: “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.”¹⁴¹

Now, of course, with hindsight, we are able to place the *Korematsu* decision in its proper historical context, and to properly criticize it — but it is a context, different in degree perhaps, not all that different from the one facing some Arab Americans and other minorities today.

Could it happen again?

Has it already happened again?

Has our current Supreme Court adequately addressed and provided for essential procedural protections for Guantanamo detainees and others? And how will history judge our actions as a society and our legal system, as we reach decisions on other issues like indeterminate detention, the death penalty, or the right to marry?

Will the justice we render today be a “Justice for All Seasons”?

For about the past decade, or perhaps longer, our country has become increasingly polarized on a number of fronts — politically, economically, rhetorically. Whether generated by the war on terrorism or the war in Iraq, the contentiousness in Washington, or the incessant battles in the culture wars for the hearts and minds of America, it matters not. Increasingly, we are identified as either Democrats or Republicans, red states or blue states, pro-choice or right-to-life, intelligent design and creationism, gays vs. straights, fundamentalists and others. We have somehow come to see ourselves as a nation of opposites, contradictions, and vast disparities, rather than striving to be the apocryphal melting pot, in which view-points and backgrounds of all types are welcomed, or at least tolerated. No one seems to listen to the other side as facts are distorted and personal attacks and fearmongering seem to carry the day.

¹⁴¹ *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

In our rush to join one side or the other, I think we often forget that we shall be all working together on a common project that is supposed to allow us to have our strong beliefs, but to still live together peacefully. I sometimes think we would do well to remember the reason this country was started in the first place as a haven of religious tolerance and for reasoned and accountable government. That as our new president-elect has said: “We are not red states or blue states, but the United States of America.”

On that point, I should note that exactly two months from today, we will have a new president:

- A son of an immigrant African father.
- A biracial son of parents who could not marry each other legally in many of our states on account of their race.
- And a president who has already indicated significant changes in our country’s policies on Guantanamo, indeterminate detentions, torture, and any number of important legal issues.

I know that I and my colleagues on the bench understand how important it is that judges decide cases free from intimidation and the influence of public opinion, and to confine ourselves to deciding cases based on the rule of law and the facts before us. We are not, and should not be, accountable to any particular point of view or constituency. That when actions by the legislative and executive branches are called into question, ever since *Marbury v. Madison*, the responsibility of determining the constitutionality of these actions falls squarely on the judiciary, without regard to popular opinion, or to the whims of an all-powerful king.

There is a scene in *A Man for All Seasons*, that I think is particularly relevant to us these days. In the play, Thomas More’s son-in-law warns More to be careful around some of the king’s men, his political enemies, who he believes are trying to build a case against him. He urges More to use his considerable power to remove the legal protections and benefits his enemies enjoy, but More refuses, saying,

When the last law [is] down, and the Devil turned round on you — where would you hide . . . ? This country’s planted thick with laws from coast to coast . . . and if you cut them down . . . 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.

We have to apply the laws evenly everywhere in order to protect ourselves, he is saying. Our laws are like a thick forest that protects us from the harsh volatile winds that would otherwise turn our country into a wasteland.

Or as the political philosopher, Thomas Paine, put it: “He that would make his own liberty secure must guard his enemy from oppression: for if he violates this duty, he establishes a precedent that will reach to himself.”

Because without law we have chaos. It reminds me of something I heard Justice Anthony Kennedy say: “The law makes a promise — neutrality. If the promise gets broken, the law as we know it ceases to exist. All that’s left is the dictate of a tyrant, or perhaps a mob.”¹⁴²

So it is up to us — the legal community — to maintain the promise, the promise that protects even the Devil and the most heinous of criminals.

We judges, of course, must be committed to neutrality and impartiality. At the same time, we absolutely depend on lawyers who will provide representation for all views in society — not just for the wealthy, and for the politically popular views, but for the indigent, the disenfranchised — and yes, even for the most despicable members of our society who still need a lawyer just as much (and more) as the most innocent and upright citizen. And to give them the fullest protection of law that distinguishes our country.

In the end we remember Thomas More because of his dramatic and heroic act of personal sacrifice in standing up for his principles and fundamental principles of law. Thanks to him, and people like him, we now have a system in which people are free to act on their principles — to do so peacefully, and without fear of repercussion, and certainly, without fear of having your head chopped off. And a key part of that are the members of our legal profession, peacemakers, defenders of due process, defenders of equal protection, and other civil liberties — legal principles that I hope continue to prosper in good times and in bad, and in all seasons, and for all people.

Thank you.

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¹⁴² Anthony M. Kennedy, *Address to American Bar Association Symposium, Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice*, Dec. 4–5, 1998, Philadelphia.