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ST. THOMAS MORE AND NATURAL LAW†

by Mathew O. Tobriner*

Saint Thomas More is a man of history, but to us today, he is more than that; his life and philosophy convey a special meaning to the present legal world. He exemplifies the concept that over and above the law of the state there is equity itself: he stands for the supremacy of moral law.

Born in 1478, a brilliant student at Oxford, a friend of Erasmus, a scholar of wide dimension, he became a highly successful practitioner of law. Hardly a cause of importance was heard in the courts of England which he did not present. He authored the classic *Utopia*. Attracting the attention of the young King Henry VIII, More was called to the court. Often dining with More at his house in Chelsea without previous notice, the king would discourse with him on matters of state, astronomy, geometry and points of divinity.

When a successor had to be found for Wolsey, Henry raised More to the chancellorship. In so doing the king had counted on More's support for his desired divorce from Queen Catherine and for his proclamation ordering the clergy to acknowledge him as the supreme head of the church. More rejected both these contentions, and, finding himself in disagreement with Henry, resigned the Great Seal. Two years later Parliament passed a bill fixing the succession in the issue of Anne Boleyn and imposing an oath abjuring any foreign potentate, and, the authority of the Pope. When sent for, More offered to swear to the succession but steadily refused the oath of supremacy as against his conscience. Committed to the Tower, he was tried for treason, found guilty, and executed. His last words were: "the King's good servant, but God's first."

More was, indeed, a martyr to his belief that moral law superseded the law of the state. This relationship of morality and equity to the law of the state has, indeed, been a central concern of legal theorists throughout recorded history.

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This relationship was a central concern of Saint Thomas More. More was a follower of the natural law tradition which had its roots in Greek philosophy, Hebrew doctrine, and the teachings of St. Augustine and Thomas Aquinas: law and justice were inseparable; law, to be considered as law, to command obedience, must be just, must be in accordance with the laws of nature, which, in turn, enjoyed divine sanction. When More engaged in civil disobedience by refusing to take the oath dictated by the Act of Supremacy, he did so because of his belief that there were principles greater than an Act of Parliament.

When the Declaration of Independence recited as self-evident men's endowment with the rights of life, liberty, and the pursuit of happiness, it marked the beginning of a spectacular career of natural law in American constitutional development. While "happiness" was less important than "property," the Constitution nevertheless incorporated the notion that the laws of the state were to be judged by the standards of justice.

Subsequently, the scholars began to question these alleged principles of natural law. First, the legal positivists insisted that the use of the term "law," except as a description of law that could be enforced because of the power of the state, caused a misconception. The law represented the command of the sovereign, and the task of the lawyer and the judge was to interpret and apply that command. While laws might be criticized because of their injustice, such questioning fell to the philosopher, not the lawyer or the judge.

Second, and more significant in terms of constitutional development, the broad language of the Constitution came to be identified in decisions of the United States Supreme Court with what has been called "metaphysical individualism"—the notion that each individual is entitled by the principles of the Constitution to hold property, to use it, and to contract as he sees fit, without legal restraint. It was this reasoning which led the Supreme Court, for example, to strike down as unconstitutional minimum wage laws, or laws regulating the hours of labor.

"Metaphysical individualism" constituted a particular brand of natural law, and it came under attack by the legal realistic and sociological jurists such as Holmes and Pound. These critics pointed out, and quite correctly, that it is meaningless to talk about freedom in the abstract, independent of economic realities. Life, liberty, and property, can only have meaning in a particular society, in the context of particular economic and political relationships. The search for "immutable" principles of justice by which laws were to be judged was in that sense a false search.

As a result of all this and more, the term "natural law," as Professor Lon Fuller has said, had about it for many "a rich deep odor of the witches' cauldron."

Clearly the positivists were correct in insisting upon a distinction between law and justice; and clearly the legal realists and sociological jurists were correct in insisting that the Constitution did not enshrine nineteenth century views of individualism. But Morris Cohen, himself a great philosopher, has said that philosophers are generally right in what they affirm of their own vision and generally wrong in what they deny of the vision of others.

There is, in natural law, a vision which is of value even to those who are unable to accept either the concept of divine origin or the concept of ascertainable principles of justice immutable for all times and places. It is a vision which has as its central premise that the end of law is justice, and a just society.

As Professor Julius Stone has observed in his book *Human Law and Human Justice*, natural law has historically been double edged. At times it has served a conservative function, to legitimize the existing social order and its legal system—to sanctify, in effect, the status quo. Aristotle, for example, justified the separate treatment of slaves on the ground they were born to be slaves—such was the natural order of things. And in the Middle Ages, natural law was in large measure conceived as dictating the so-called "natural" relationship of various strata in society, one to the other.

At other times, however, natural law has served a more radical, even revolutionary function—to call existing laws and institutions into account—to measure them by standards of justice independent of the laws themselves. That was the use to which More put natural law. That was also the grand concept of the framers of the Declaration of Independence and the Constitution.

Natural law as conceived by our founding fathers constituted a rebellion against the fixed relationships of medieval society. Their focus was upon the individual, and his right to freedom.

In the further extension of this view, the justice of a law was to be determined not on the basis of formalistic analysis, but on the basis of the *effects* of the law upon the human condition. By this, more modern approach, justice does not consist of immutable principles to be applied mechanically or deductively in a particular context, but rather of principles, the content of which must necessarily vary with the particular society.

A leading exponent of this approach, which surely relates back to natural law, is John Rawls, whose *A Theory of Justice* has had a tremendous impact upon current legal thinking. He predicates the first society upon

the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality . . . In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. . . . All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.

This modern approach echoes some of the observations of More in his *Utopia*. Of course, no present-day approach proceeds remotely as far as that in *Utopia*. After all, *Utopia* is an unreal society; the very word was coined by More from two Greek words meaning "not" and "place," and thus it is no place at all; it is an imaginary society. But the reader gets a glimpse of More's version of natural law when he writes that the Utopians "define virtue as living according to nature."

In *Utopia*, there is no private property. The person in Book I who describes *Utopia* to More states that he agrees with Plato that the "one and only way to make a people happy is to establish equality of property," and that it is impossible to do this when property belongs to individual men. "Among them [the Utopians] there is no mal-distribution of goods, nor is anyone poor and indigent."

And, reflecting his deep religious convictions, More writes,

And what may seem strange they [the Utopians] seek support for their pleasure philosophy from religion . . . The religious principles are these: that the soul of man is immortal and by divine beneficence has been ordained for happiness. Though there are many different religions among them, yet all these, no matter how different, agree in the main point, the worship of the one Divine Nature, as though they were all going toward one destination by different routes.

Finally, More rejects the society that depends upon a multiplicity of complex laws, demanding, instead, that the government see that justice is effected. He writes that Utopians have few laws; they think it highly unjust to bind men by laws that are too numerous to be read and too obscure to be readily understood.

And More concludes by asking "And is it just for a government to ignore the welfare of farmers, charcoal burners, servants, drivers, and blacksmiths, without whom the commonwealth could not exist at all?"

How amazing that a book written in 1516 should cast light upon problems so crucial today and should seem to presage some of today's thinking. In light of More's belief in the supremacy of moral law and his questioning of the maldistribution of property, we could perhaps conclude that his concept of natural law today would not accept the inequities of a society so unbalanced as is our present one.

Indeed many present-day proponents of natural law in its modern version, following the tradition of the founding fathers of this country, challenge existing laws and institutions; they insist that the law accord with independent concepts of justice. They see a society that is sorely out of balance: the white middle class majority of the society enjoys the sweet benefits of power and material goods while the disadvantaged and the poor are denied them.

The new school of thinkers urges that the old notion of unrestrained competition and equality of opportunity is giving way to a conception of equality of results. The obligation of government must go beyond affording each individual an equal *opportunity* in the society; it must make sure that the individual will be afforded at least the minimum requirement of a standard human life.

As a law clerk of mine wrote in an unpublished paper:

The proponents of functional equality are not so concerned with *opportunity*, for they have learned that an equality of opportunity is often a hollow equality indeed. They point out that though we all may assemble at the same starting line, we are not all equally equipped to run the race. Some are pigeon-toed, some knock-kneed, and some are one-legged. They can hardly be expected to be overjoyed by the fact that those who have sponsored the race have cheerfully agreed to allow them to run in it.

Thus the proponents of functional equality or of the modern version of natural law urge that positive and affirmative action must be undertaken to give the handicapped at least an equality in fact with the unhandicapped.

Bernard Schwartz, Professor of Law at New York University Law School, in an essay on *The Ends of Law in American Law: The Third Century*, states the proposition in these words:

The end of law is seen to be, not only vindication of legal equality, but also provision of equality *in fact* with regard to more and more of the elements that make life meaningful. The postulate that people may assume that a standard human life will be assured them may give way to a broader assumption that they are *entitled to equal conditions of life as*

compared with their fellows. (Compare 3 Pound, *Jurisprudence* 321 (1959)).

The contemporary thrust for equality is one from the long-standing tenet of equality of opportunity to the new demand for equality of result—what has been termed the New Equality. (Nisbet, *The Twilight of Authority* 198 (1975)). The extent to which this demand is to be accepted by the legal order has become a central value problem of the evolving law. (Emphasis added).

I do not pretend in this limited space to set out whether the legal order will accept these new approaches or what measures should or will be undertaken to achieve this urged equality of result. I suggest only that the quest must be for more than an analysis of the cases that follow the law as it stands today; there must be the searching for the justice that is greater than the law of the state: the concept that Saint Thomas More expressed when he agreed that there were things which no parliament could do—*e.g.*, no parliament could make a law that God should not be God.

And thus, More takes his special place in history: he personifies the proposition that principle is more precious than life itself. He put his life on the line when asked to succumb to the state's demand that he sign an oath to recognize the superiority of the sovereign over moral law. Time and again mankind has been pressed to face similar crucial moral issues. We have encountered such challenges only recently. There were the Germans who faced Hitler's holocaust, our own moral choices in the days of McCarthyism and at the atrocities of Vietnam. When does one say "No" to the state: "this far I will go—but no farther?" More's answer was a resounding "No," and it has echoed down the corridors of history. Whenever in the course of time such agonizing moral issues arise, we shall see the gaunt, defiant figure of More who chose the axe of the state rather than the surrender of his soul.