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Saint Thomas More: Equity and the Common Law Method*

William D. Bader**

Saint Thomas More was born in London on Milk Street on February 7, 1478.¹ Ironically, twenty yards down the street stood the birthplace of Saint Thomas Becket, and the new baby probably was named in his honor.² Saint Thomas Becket, also known as Saint Thomas of Canterbury, was an Archbishop of Canterbury who disagreed with King Henry II over the rights of the Church. Becket was murdered by the King's followers in Canterbury Cathedral in 1170. Thomas' father, John More, was a successful lawyer who was destined to cap his own career with appointments to the Court of Common Pleas in 1518 and the Court of King's Bench in 1520. He wanted Thomas to follow in his professional footsteps, and he was a significant influence on his son.³

Thomas spent two successful years at Oxford University from 1492 to 1494. He then entered New Inn in London to commence the study of English common law.⁴ From there he entered Lincoln's Inn to train as a barrister at common law.⁵ He distinguished himself at Lincoln's Inn and was admitted as a barrister in 1501.⁶ According to Lord Campbell, More pursued religious studies during and after his legal education and seriously considered the priesthood, but he decided to remain a layman, marry, and pursue legal practice.⁷

Thomas More, according to Campbell, "rose very rapidly at the bar, and was particularly famous for his skill in international

* This essay is dedicated to Pearl.

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1. PETER ACKROYD, *THE LIFE OF THOMAS MORE* 6 (Nan A. Talese, Doubleday 1998).

2. *Id.* at 7.

3. J.A. GUY, *THE PUBLIC CAREER OF SIR THOMAS MORE* 3 (Yale University Press 1980).

4. *Id.*

5. 2 LORD CAMPBELL, *LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND* 6 (Frederick D. Linn & Co. 8th ed. 1880).

6. Brian M. Murray, *Chicken Soup for the Legal Soul: The Jurisprudence of Saint Thomas More*, 51 J. CATHOLIC LEGAL STUD. 145, 147-50 (2012).

7. CAMPBELL, *supra* note 5, at 6-8.

law."⁸ He was in great demand as court counsel among those who had major cases.⁹ More's high standing at the bar was certainly enhanced by his erudite common law lectures and administrative leadership at Lincoln's Inn.¹⁰

More proceeded to serve in a series of lower judicial, political, and administrative positions at the behest of King Henry VIII. He reached his judicial apex in 1529 when the King appointed him to replace Cardinal Wolsey as Lord Chancellor of England.¹¹ Until King Henry VIII's appointment of Lord Chancellor Thomas More, a lay Catholic and common lawyer, the Court of Chancery, the highest equity court in England, had always been run by a Lord Chancellor who was a clergyman. All these Lords Chancellor, with the exception of More's predecessor, Cardinal Wolsey, had formal training in the civil or canon law.¹²

Thomas More's chancellorship has come to be defined by his refusal to accept Henry VIII as head of the Catholic Church, his resulting martyrdom at the hands of the King in 1535, and his consequent canonization. Unfortunately, his significance as the first judge to actively encourage the broad use of equity principles in deciding common law cases has been eclipsed. Most of his opinions are no longer extant,¹³ but the first biography of More by his son-in-law, lawyer William Roper, is considered authoritative, indeed "an exquisite biography, which remains today one of the choice monuments of English literature."¹⁴ It provides an invaluable view of More's legal career. According to J.A. Guy, all subsequent accounts are derivative.¹⁵

More, a leader of the common law academy, the Inns of Court, introduced a common law perspective to the high court of equity.¹⁶ This essay suggests that common lawyer More, through his two and one-half years of service as Lord Chancellor, planted a seed that was to flower much later into a "new" perspective on common

8. *Id.* at 9.

9. EDWARD FOSS, A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND FROM THE CONQUEST TO THE PRESENT TIME: 1066-1870 457 (1870).

10. ACKROYD, *supra* note 1, at 125-26, 152-53.

11. Murray, *supra* note 6, at 150.

12. J. H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS 80 (1986).

13. JOHN C. H. WU, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW 200 (Sheed and Ward 1955).

14. SIR D. PLUNKET BARTON, THE STORY OF THE INNS OF COURT 296 (The Houghton Mifflin Co. 1987) (1928).

15. GUY, *supra* note 3, at 80.

16. BAKER, *supra* note 12, at 80.

law methodology in the common law courts themselves—a perspective that harks back to the original meaning of the early common law. Specifically, More construed equity to be inherent to the common law.

The concept of equity developed because the general character of a law may do an injustice when applied to certain specific, unusual cases. The king's conscience, informed by Judeo-Christian values and reason, served to loosen the legal precedents' interpretation to do justice in such cases.¹⁷ During the early Middle Ages, when leading English jurist Henry de Bracton wrote of the role of the canon law of the Church and the inception of English common law, laws were relatively informal and their enforcement was more personally connected to the king. Thus equity—the king's conscience—could be exercised by the king's court at common law. As the Middle Ages progressed, however, the administration of justice became more bureaucratic and removed from the king personally, and the common law became more rigid to provide predictability and order in an increasingly large and complex society. At that time, justice in some individual and difficult cases was administered by a separate ecclesiastical chancellor through equity completely outside, and in mitigation of, the common law.¹⁸

By the time of Thomas More's ascendancy to the Chancellorship, a bitter rivalry had developed between the judges of the common law courts and the Lords Chancellor. Lord Chancellor More continued his predecessors' practice of issuing injunctions to block the harsh or inappropriate judgments of the common law judges.¹⁹

More handled many commercial suits as Lord Chancellor, actions which clearly illustrate the contrasting approaches of the contemporary common law and equity. The former demanded a strict construction of statutory and precedential text, while the latter permitted a loose and more abstract interpretation. For example, equity intervened with an injunction when a creditor took undue advantage of his legal position at common law to gain unjust enrichment.²⁰ J.A. Guy describes the typical situation eliciting the Lord Chancellor's equitable injunctive intervention:

17. W.S. HOLDSWORTH, *SOURCES AND LITERATURE OF ENGLISH LAW 178-79* (Oxford University Press 1925).

18. *Id.*

19. WILLIAM ROPER, *THE LIFE OF SIR THOMAS MORE* 42 (S.W. Singer ed., C. Whittingham 1822) (1626).

20. GUY, *supra* note 3, at 70.

The most common circumstance was that in which a debtor by obligation paid his debt on his day, but failed to take either written acquittance or the return of the obligation which bound him. Notwithstanding his payment, the creditor then brought an action of debt on the obligation, and the debtor could have no remedy at common law. By [common] law, the debtor was required to pay the money again.²¹

The common law judges were made jealous by these incursions into their turf and were vocal about their dissatisfaction over common lawyer More's Chancery injunctions. This inspired More, who was directly confronted with these complaints, to invite the king's common law judges to a dinner in the council chamber at Westminster in order to discuss the controversy.²²

Roper reveals that after dinner, More proceeded to explain his reasoning for every injunction he had ever issued against a common law judgment. He illustrated how each injunction was consistent with the just and reasonable intent of the law. Surprisingly, the common law judges confessed they would have acted in the same manner as More if they had been Lord Chancellor. Lord Chancellor More then told the assembled judges that, according to his understanding of the common law, they had the same discretion under the common law to mitigate the rigors of the legal text by discerning its equitable intent on a case-by-case basis. More challenged the common law judges to adopt this equitable perspective, which would make his injunctions unnecessary. The judges, however, declined More's offer.²³ Lord Chancellor More confided to Roper: "I perceive, son, why they like not so to do. For they see that they may, by the verdict of the jury, cast off all quarrels from themselves upon them; which they account their chief defence"²⁴

Despite the fact that his view of equity at common law was not immediately accepted, Thomas More was a legal prophet. He realized that the common law method allowed, indeed mandated, an equitable calculus. A "loose construction," if you will, was necessary at times to discern the common law's just and reasonable intent in a particular case. At the same time, More harks back to the early and original common law of Bracton.

21. *Id.*

22. ROPER, *supra* note 19, at 43.

23. *Id.*

24. *Id.* at 44.

The law has progressed along the methodological lines of Thomas More's prescriptions. J.H. Baker notes the steady progression of equitable thinking within the common law courts,²⁵ which was "devised by judicial discretion . . . to make the regular law function more effectively."²⁶ Nevertheless, today, "strict constructionists," specifically, the "legal textualists"²⁷ (not to mention their quasi-judicial analogues, the "zero tolerance"²⁸ adherents), reject this relatively flexible and authentic perspective. They threaten to make our legal culture unfair and brittle. The legal textualists take a highly formal and narrow approach to judicial interpretation, essentially using legal text as the only touchstone. Justice Scalia and Professor Garner explain:

The interpretive approach we endorse is that of the 'fair reading': determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued . . . the purpose [of the text] is to be gathered only from the text itself.²⁹

The case of *Olmstead v. United States*³⁰ provides an excellent modern illustration of legal textualism as compared to the loose and equitable construction at law advocated by Thomas More. *Olmstead* was convicted of violating the National Prohibition Act.³¹ Evidence seized through the use of what is now an illegal wiretap was crucial to his conviction and the main basis of his appeal.³² Chief Justice Taft wrote a strictly construed, textualist opinion for the Court, maintaining that conversations are not protected by the Fourth Amendment because the amendment's text

25. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 202-04 (4th ed. 2007).

26. *Id.* at 204.

27. See ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) for a brilliant defense of textualism.

28. "Zero tolerance" policies are disciplinary rules or codes, usually in schools, that are strictly construed to the letter or text regardless of a violator's intent or the broader context of a violation. For example, an eight year old student was banned from wearing a Denver Bronco's jersey with Peyton Manning's number eighteen; the school had prohibited attire containing gang associations and claimed the number eighteen (and other numbers) were used by local criminal gangs. See JOHN W. WHITEHEAD, A GOVERNMENT OF WOLVES: THE EMERGING AMERICAN POLICE STATE 188-89 (2013).

29. SCALIA & GARNER, *supra* note 27, at 33.

30. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

31. *Id.* at 456.

32. *Id.* at 456-57.

only specified protection of “papers and effects.”³³ Taft again pointed to the words of the Fourth Amendment as protecting “houses” and found no violation because the agents had not entered the defendant’s house.³⁴

In dissent, Justice Brandeis took a looser, more abstract and equitable approach.³⁵ He would have ruled for Olmstead, finding a violation of his Fourth Amendment general right to privacy rather than limiting protection to material things.³⁶ Such textualism, Brandeis wrote, would miss the broader meaning of the Fourth Amendment and condone governmental law breaking.³⁷ In short time, Brandeis’s dissenting interpretation became the prevailing approach of the Supreme Court.³⁸ Likewise, much to the dismay of textualists, most modern judicial opinions reflect a flexible adherence to precedent broadly and justly construed.³⁹ In essence, Saint Thomas More’s active encouragement of the broad use of equity principles in deciding common law cases has carried the day.

The legal textualists are concerned primarily about the abuse of judicial discretion or so-called “legislation from the bench.” They envision an ideal judiciary as a passive branch of government that is essentially subservient to the democratic branches.⁴⁰ They are not mindful that respect for equitably construed precedent, the common law’s original cornerstone principle, acts as an inherent check on the reckless judicial activism they fear while permitting the law to evolve justly to meet social change.⁴¹ They do not appreciate, as Saint Thomas More did, the importance of the strong and equitable common law judge in preventing tyranny and doing justice.

33. *Id.* at 465.

34. *Id.* at 466.

35. *Id.* at 471-85 (Brandeis, J., dissenting).

36. *Id.* at 478-79.

37. *Id.* at 483.

38. For examples of how the approach has been used in the Fourth Amendment context, see *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States* 389 U.S. 347 (1967).

39. See William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 43, 49 n.83 (2011).

40. SCALIA & GARNER, *supra* note 27, at 3 & n.80.

41. See Bader & Cleveland, *supra* note 39, at 40-41.