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CHICKEN SOUP FOR THE LEGAL SOUL:
THE JURISPRUDENCE OF
SAINT THOMAS MORE

BRIAN M. MURRAY

INTRODUCTION

Before Thomas More's life ended, he uttered the following famous last words: “I die the king's good servant, and God's first.” The phrase, while brief, is a window through which one can view More's philosophy, legal career, and service as a judge under the regime of King Henry VIII. Roughly twenty years earlier, More, in his finest and most widely known work, Utopia, advocated perseverance through prudence to public servants facing moral difficulty: "Don't give up the ship in a storm because you cannot direct the winds. What you cannot turn to good, you may at least—to the extent of your powers—make less bad." These lines, demonstrating the tension between serving in a system of imperfect human law while trying to remain the loyal servant of an unearthly yet divine kingdom, also serve as bookends for More's life and philosophy. More's life—and death for that matter—personifies the emergence of modern philosophies of law that ultimately prioritize positive law without reference to unwritten norms. The events surrounding his public legal career and his responses to those events demonstrate the

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1 J.D. 2011, magna cum laude, Notre Dame Law School; B.A. 2008, Philosophy and Political Science, summa cum laude, Villanova University. I would also like to extend a heartfelt thank you to Katherine Murray, my parents, and my brothers and sisters-in-law for their unconditional love, continuous patience, unyielding support, and enduring encouragement.

2 A THOMAS MORE SOURCEBOOK 357 (Gerard B. Wegemer & Stephen W. Smith eds., 2004).


4 Id. at 26.
arduous task of prudently pursuing the common good while remaining true to cardinal principles, assuming one chooses to hold and act on behalf of them.\textsuperscript{4}

More's legal career, in all of its different capacities, displays the perpetual dialogue between the inherent values of the natural law tradition and the primacy of positive law in legal positivism, including each system's most basic assumptions. He lived in an aristocratic England familiar with Catholic philosophy yet dominated by the ideas of humanists such as Erasmus;\textsuperscript{5} further, anti-authority polemicists like Martin Luther and William Tyndale emerged to express the seeds of modern skepticism, albeit from a theological perspective. William Occam's prioritization of the will, especially God's will, had radical implications for the philosophical assumptions underlying the changing legal system during More's life. This exchange of ideas pervaded his service as a judge and culminated in his eventual conflict with King Henry VIII.

Put simply, More's life and legal career is an example of the prudent pursuit of traditional notions of virtue and justice within an era dominated by new ideas about the nature of law and justice in political systems. His jurisprudence implicitly acknowledges the validity of the natural law tradition while paying special attention to the virtue of prudence in public affairs. The natural law tradition pervades More's career as a lawyer and public servant and is the key to understanding his jurisprudence. Saint Thomas Aquinas, who lived roughly two centuries earlier, articulated this understanding of the virtue of prudence.\textsuperscript{6} More continuously attempted to remain cognizant of the particular circumstances in which he had to make decisions, including his place and role in the wider legal system. In other words, he consistently strived to understand and apply the right principles in the right way, while recognizing the limitations of his different offices and the other actors around him.

\textsuperscript{4} Adherence to moral principle, founded on more than expedience, is something that legal positivism lacks and is one reason More's contemporaries failed to understand his motivation for acting the way he did.

\textsuperscript{5} See DEREK WILSON, ENGLAND IN THE AGE OF THOMAS MORE 1–2 (1978).

\textsuperscript{6} See HEINRICH A. ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 226–27 (Thomas R. Hanley trans., 1998) ("For prudence combines the knowledge of general principles with the knowledge of particulars which are the matter of action, since it governs the right choice of means for attaining the end.").
For More, law was a holistic endeavor built from various disciplines reflecting on human nature. His contemporaries could not fully accept More's acknowledgment of the limitations of human governance and the compelling force of the natural law in the Christian tradition, as well as his unyielding devotion to his conscience. In this sense, More's death is a product of the inherent conflict between differing jurisprudential perspectives—including the unchecked force of law founded on will rather than reason that is characteristic of modern positivism. As one scholar notes, More "was fundamentally a man at odds with his age."

I. MORE'S BACKGROUND

Thomas More was born the son of a lawyer. His father, Sir John More, served on the King's Bench Court, and More thought he was a great man. Young More grew to possess similar qualities as his father, including his sense of humor, work ethic, and sharp judgment. As a child More worked as a page for John Morton, the Archbishop of Canterbury; Morton reportedly predicted that More would grow to become "a marvelous man." Perhaps anticipating his future career, Morton sent him to the University of Oxford to study Latin and logic. He returned to London after completing his studies at Oxford and began to follow his father in the profession of law. But More's confidence in his legal vocation wavered; he contemplated leaving the legal

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7 See GERARD B. WEGEMER, THOMAS MORE: A PORTRAIT OF COURAGE 48 (3d prtg. 1998) [hereinafter WEGEMER, PORTRAIT OF COURAGE] ("[H]e well understood that law, like most other professions, requires for its proper execution the philosopher's understanding of human nature, the rhetorician's art in directing the emotions, the diplomat's skill in counsel and negotiation, and the historian's understanding of tradition.").
8 See infra Parts III.A, III.C.
9 WILSON, supra note 5, at 235.
10 This is a brief biographical sketch for purposes of organization and context. The rest of the Article will use some of these anecdotes, occurrences, and events, as well as others from throughout More's life, to elucidate his philosophy and jurisprudence.
11 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 4 ("Thomas described his father as an 'affable man, charming, irreproachable, gentle, sympathetic, honest, and upright.'").
12 See id.
13 Id. at 6 (internal quotation marks omitted).
profession to become a monk in either the Carthusian or Franciscan order.\textsuperscript{15} Yet after only a few years of studying law at his father's side, he became a barrister in 1501.\textsuperscript{16} While studying law, More also engaged in studying literature, history, philosophy, rhetoric, and theology, and maintained a special interest in political philosophy.\textsuperscript{17} During this time, More also developed the spiritual practices that he would maintain for the rest of his life.\textsuperscript{18}

Settled in the legal profession, More became a member of England's Parliament in 1504, where he argued so forcefully against a subsidy proposed by King Henry VII that the King imprisoned More's father.\textsuperscript{19} He was not a bachelor politician for long; he married Jane Colt a year later.\textsuperscript{20} They had four children between that date and her death in 1511.\textsuperscript{21} More remarried a woman named Alice Middleton immediately; she was older and wealthier at the time of their marriage.\textsuperscript{22} They had no children together, although More accepted Middleton's daughter from a prior marriage as his own.\textsuperscript{23} More provided a classical education to his children, including his daughters.\textsuperscript{24} His reputation as a lawyer soon began to spread. His fellow citizens commended him for his honesty and integrity. One early biographer notes how More was always straightforward and frank with his clients.\textsuperscript{25} Erasmus recalled how More was selfless when acting on behalf of his clients.\textsuperscript{26} His first position as a

\begin{itemize}
\item \textsuperscript{15} See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 14–15; EUROPEAN GRADUATE SCH., supra note 14.
\item \textsuperscript{16} See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 48–49.
\item \textsuperscript{17} See id. at 13. He also studied Greek so he could read the original classics. \textit{Id.} at 49. More even lectured on Saint Augustine's \textit{City of God} at the age of twenty-three. \textit{Id.} at 13–14.
\item \textsuperscript{18} See id. at 15. Some scholars claim that More engaged in self-mortification by wearing a "hair shirt." \textit{Id.} He also apparently fasted regularly. \textit{Id.}
\item \textsuperscript{19} See id. at 50–51.
\item \textsuperscript{20} See id. at 28.
\item \textsuperscript{21} See id. at 30.
\item \textsuperscript{22} See id. at 30–31. More married Middleton thirty days after his first wife's death. She was six years older than him.
\item \textsuperscript{23} See A THOMAS MORE SOURCEBOOK, supra note 1, at 321.
\item \textsuperscript{24} See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 50, 79–91. More considered studying the humanities central to a good education.
\item \textsuperscript{26} See DESIDERIUS ERASMUS, THE CORRESPONDENCE OF ERASMUS: LETTERS 993 TO 1121, 1519 TO 1520 22 (R.A.B. Mynors trans., 1987) (1974).
\end{itemize}
judge came in 1510 when he became an undersheriff in London.27 While he served as an undersheriff, he argued numerous cases in the Star Chamber.28 His salary was small but he gained ample knowledge of social problems: “[H]e act[ed] with integrity, and with kindness to the unfortunate.”29 He became a Master of Requests four years later, and by 1517 he formally entered the king’s service, albeit reluctantly.30 Serving as Master of Requests was perhaps More’s favorite position because it involved the causes of the lower classes, including the poorest members of society.31 But More foresaw the difficulties that came with public service at the highest levels: “More realized from his own study of history and of human nature that even the best of kings could become a tyrant.”32 He was reluctant to accept the new position out of fear for the unchecked will of a ruler; little did he know that this fear would develop into reality only a little more than a decade later. Ironically, King Henry VIII reportedly told More to obey God first and him second.33

In the next three years, he became a knight, under-treasurer, and most significantly, the secretary and personal adviser to King Henry VIII, thereby starting one of the most famous royal relationships in English history.34 He also served judicially when he heard many of the cases brought before the King.35 While Secretary, he served as liaison between the King and Cardinal Wolsey, the powerful Archbishop of York. In 1523, More became Speaker of the House of Commons.36

27 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 54–55.
29 RUSSELL AMES, CITIZEN THOMAS MORE AND HIS UTOPIA 44 (1949).
30 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 70–72.
31 See WILSON, supra note 5, at 110.
32 WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 71. More also had other concerns, including losing time to spend with his family, his academic and writing career, and the allure of pride, which he did not consider himself immune from. Id.
33 See id. at 72.
34 Id. at 76.
35 See id. at 74.
36 Id. at 76.
Two years later, More received significant judicial and administrative power when the King named him Chancellor of the Duchy of Lancaster. He governed Duchy lands and finances and served as an equity judge. A rhyme of unknown origin, but from that time, reads:

When More sometime had Chancellor been,
No more suits did remain.
The like will never more be seen
Till More be there again.

This lower chancellor post served as the stepping-stone to his eventual ascension to the position of Lord Chancellor, which was the last government position he ever held. He succeeded Cardinal Wolsey, who had fallen out of favor with the King. His chief responsibility was to serve as the chief justice of England. Legal historian John Guy claims that More handled close to a thousand cases per year. More attempted to follow his conscience by doing what he determined was right while in the position. As the head of the court of equity he could decide cases based on right and wrong:

More had some opportunity to apply those principles and beliefs which, in his opinion, lay behind the written law and went to the heart of real justice. As More sat in his marble chair in Westminster Hall he had to give judgement not in accordance with statute or strict legal precedent but with regard only to natural justice, common sense and common fairness.

Though his primary responsibilities were judicial, More also tried to make peace, although he arguably contributed to the fire

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37 See id. at 106.
38 See id. There are records of over three hundred cases from his court.
40 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 134.
41 See id. at 135.
42 See J.A. GUY, THE PUBLIC CAREER OF SIR THOMAS MORE 79 (1980) (More cultivated "a distinctive policy of self-involvement, scrupulousness and discretion. . . . [H]is great contribution was exactly this: to rejuvenate the ancient theory that judges had a personal duty in conscience to see right done by all whose business was entertained in the courts they directed").
43 WILSON, supra note 5, at 155.
by fiercely defending the Church. His tenure as Lord Chancellor also saw “what was to be known as the most revolutionary parliament in England’s history.”

The next five years consisted of numerous events that are partially, if not completely, responsible for his execution. The downward spiral began when More refused to sign a letter asking the Pope to annul the King’s marriage. Then he refused to take an oath recognizing the King as the head of the Church of England. In 1534, he refused to swear allegiance to the Act of Succession, which contained an anti-papal preface that asserted Parliament’s authority to legislate on matters of religion and was generally subversive of the authority of the Catholic Church in England. More’s refusal led to charges of treason, although there was no evidence of his disloyalty to the King. More, citing English precedent, as well as the statute, claimed that he could not be convicted if he remained silent. He insisted that there was no evidence to find him guilty in the absence of an affirmative denial that King Henry VIII was head of the church. The government charged More with four counts of treason: malicious refusal to accept the King’s supremacy over the Church, conspiracy against the King, sedition, and subversion of the authority of Parliament. He argued well against the first three charges, indicating that under English law silence was not a crime, and in fact, evinces consent. But More underestimated the power of testimony, even if it was incredible; he suffered the unfortunate consequences of what was likely perjured testimony concerning the fourth charge of denying Parliament’s power to declare the king to be the head of the Church in England. The paucity of evidence did not matter, as the jury took only fifteen minutes to render a guilty verdict. His execution followed soon

44 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 136–37.
45 Id. at 137; see infra notes 55–67 and accompanying text.
46 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 162–63.
47 See id. at 162.
48 See id. at 157, 211. This will be elaborated on later in the Article, specifically with respect to More’s position on law, statutory interpretation, and legal analysis altogether.
49 See id. at 211.
50 See id.
51 Solicitor General Richard Rich testified that More had denied the Parliament’s authority to declare the king to be head of the Church in England. Id. at 212.
52 See id. at 214.
thereafter. More than three hundred and fifty years later, Pope John Paul II proclaimed that More was the “Patron of Statesmen and Politicians.”

II. SOCIAL, POLITICAL, ECONOMIC, AND INTELLECTUAL CONTEXT

A. Historical Background

Tudor leadership, the English Renaissance, the Reformation, New World adventures, and the seeds of the English Revolution dominated the era in which Thomas More lived and informed every major intellectual idea of the period. Sixteenth century England was heavily aristocratic, dominated by traditional feudalism and monarchy, and looking to the New World for new economic opportunities. It was primarily manorial, although London was a “busy, rich, sophisticated” city; priests and lords remained the primary leaders of local agrarian communities, while nobles, merchants, and the monarch built relationships entirely on mutual self-interest in accumulating wealth and power. Economic arrangements began to shift away from feudalism but titles reflecting nobility remained. Tudor society consisted of a defined and set social order; the king and the nobility sat at the top of the pyramid and rested on the shoulders of peasants. Peasant agriculture was the foundation of the economy. In the eyes of many English citizens, social hierarchy reflected divine and traditional preferences, and movement between the classes was almost impossible, although those with exceptional talent could eventually reach the top. Further, the monarchical leadership was consistently decadent, profligate,
and excessive. King Henry VII showcased power through theatrics; costly celebrations characterized minor political victories and royalty was constantly on display.62

Further, the constantly shifting power struggle between Parliament and the King dominated the English political situation. Most English citizens considered Parliament relevant but the institution remained subject to the whims of the monarch:

Parliament was by now fully recognised as an essential part of government but it was only an occasional part. The Lords and Commons were summoned at the discretion of the monarch, discussed business, most of which was originated by the crown, and were dismissed as soon as that business was concluded.63

King Henry VIII especially feared aristocratic rebellion.64 More, himself a Member of Parliament, actually disappointed the King at certain intervals to the point that he thought his life, as well as his father's, may even be in jeopardy.65 Specifically, he argued forcefully against the imposition of new taxes as an unfair burden on the lower classes in society.66 His son-in-law, William Roper, notes how More used his grammatical, rhetorical, and legal talents to defend the middle class.67

B. Intellectual Context

Not surprisingly, these conditions contributed to the rise of humanism, which attempted to promote "new learning" with an eye toward producing a golden age of harmony and progress.68 Erasmus, who was one of More's friends, was the most visible thinker behind this philosophical perspective. More and Erasmus sought to imbue education with the classical notion of virtue, especially in its moral and civic facets.69 Erasmus was young, religious, academic, witty, and rhetorically gifted. He "made the new learning fashionable" and attracted scores of

62 See id. at 92.
63 Id. at 101.
64 See AMES, supra note 29, at 32.
65 WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 51.
66 See WILSON, supra note 5, at 102.
67 See AMES, supra note 29, at 40.
68 WILSON, supra note 5, at 2; see WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 64.
69 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 97.
young students. Humanism mirrored some of the thought of the Reformation in that it sought to point out hypocrisy and profligacy in English high society. Erasmus' most famous work, The Praise of Folly, satirized abuses within religious authority while simultaneously praising the piety of those same institutions. Put simply, he pointed out the plight of the poor and the incompetence of rulers. Erasmus and his friends consistently opposed taxation and wars that imposed burdens on the middle class. Yet More differed from Erasmus in one key respect: More sought to apply theory to imperfect government, albeit prudently.

More's lifetime also saw the rise of Martin Luther and another anti-authority religious figure named William Tyndale. Indeed, many of More's writings respond to the attacks levied by each man; More considered it his personal responsibility to defend the Catholic Church. Each side shared little in common, that is, other than their intense religious fervor. Tyndale, echoing Luther, preached the all-saving power of faith and that Scripture was the final authority on religious questions; More emphasized church membership, obedience to religious authority, and other traditional Catholic dogmas. Anti-clericalism was rampant; the reformers could not tolerate excessiveness and hypocrisy in church authority. Most significantly, the individual became primary in religious experience: "Every individual was free to make his peace with God without the need

70 Wilson, supra note 5, at 77.
71 See id.
73 See Ames, supra note 29, at 106, 111.
74 See id. at 109.
75 See id. at 106 ("[Erasmus] lived too much outside of practical reality, and thought too naively of the corrigibility of mankind, to realise the difficulties and necessities of government." (internal quotation mark omitted)).
76 Wegemer, Portrait of Courage, supra note 7, at 118-27.
77 See Wilson, supra note 5, at 194 ("There was no common ground between the protagonists. Tyndale argued for an invisible church of individuals saved by their faith in Christ as revealed in Scripture. More believed that salvation was only possible in and through membership of the historic church and obedience to its leaders.").
78 See id. at 196, 212. One major movement in England consisted of the Lollards. They placed absolute authority in the Bible and rejected the legitimacy of the priesthood. Id. at 213–14.
Luther was the backbone of the emergence of Protestant ideas and his positions spread quickly throughout England. In 1517, he challenged the selling of indulgences when he posted the Ninety-Five Theses. By 1520, he published the implications of his doctrines and visibly challenged papal authority.

More and Luther engaged in a spirited debate over the legitimacy of religious institutions and foundational issues in both Christian theology and philosophy. More strongly opposed Luther’s skepticism regarding reason, virtue, the existence of free will, and rational access to truth. More knew that the Catholic Church was imperfect; he just did not see its inherent corruption to the point that it should be destroyed. Indeed, More recognized the Church as legally legitimate; calls for its destruction would undermine safety, security, peace, and international unity. More’s prudence underscored his philosophical debate with Luther. Luther concluded that only scrapping everything could solve ecclesiastical and religious institutional problems; More, while seeing imperfections that needed to be addressed in the same institutions, desired to preserve their core, which he felt was intrinsically good. Reform may be necessary, but the Church deserved some respect, which involved using “legitimate means” to bring reform. He preferred to acknowledge the legitimacy of religious tradition in the face of revolutionary ideas because that tradition consisted of the “consente [sic] and agrement [sic] of all crysten [sic] people this fyften [sic] hundred yere [sic] confermed [sic].” More was not one to tear down a fence before knowing all of the reasons for why it was erected in the first place.

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79 Id. at 214.
80 See id. at 217-19.
81 Id. at 217.
82 Id.
83 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 97.
84 See id. at 98.
85 Id. at 123.
86 6 SAINT THOMAS MORE, A Dialogue Concerning Heresies, in THE COMPLETE WORKS OF SAINT THOMAS MORE 1, 346 (Thomas M. C. Lawler et al. eds., 1981) [hereinafter MORE, A Dialogue].
Perhaps most troubling for More was Luther's utter refusal to argue doctrinal differences on the "level field" of reason.88 This difference demonstrates the beginning of modern philosophy's presumption of the inadequacy of reason and preference for "feelings" and the passions, especially with respect to moral questions.89 More consistently highlighted how Luther's teachings presumed the infallibility of individual and subjective interpretation, which essentially undermined the entire basis of legitimate argument and debate and served as one of the foundations of legal positivism.90

More also saw Luther's political writings, especially those relating to the legitimacy of civil law, as highly dangerous. Luther advocated an absolutist principle of consent: "[N]either pope, nor bishop, nor any man has the right to impose a single syllable on a Christian man, unless this is done by the latter's consent."91 More quickly noted the unlikelihood that criminals would consent to laws that punish their behavior, thereby demonstrating that Luther's position was absurd for anyone concerned with the safety and security of communities.92 Reason linked to the common good, rather than will, was the foundation of rules in society.

C. More's Philosophy of Life

More's philosophy of life underlies his writing in Utopia and parallels the thought of Saint Thomas Aquinas. Hence, understanding the key aspects of the Thomistic perspective on epistemology, ethics and virtue, politics, and law is essential before analyzing the primary characteristics of More's legal career and jurisprudence as well as the ideas he communicates in Utopia. This section will focus on More's pursuit of Christian virtue in his personal life and how that pursuit informed his public service.

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88 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 103.
89 See infra notes 151–204 and accompanying text.
90 Because objective moral norms are impossible to know via reason, will and preference replace deliberation as the foundation of law. See infra notes 260–318 and accompanying text.
92 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 99.
Aquinas' ethical thought revolves around the notion that human beings possess an ultimate end that is simultaneously the purpose of life. This purpose transcends safety, pleasure, or other temporal goods. The human end is happiness characterized by a relationship with the divine: "The ultimate end of man is an uncreated good, namely, God." Activities that promote the pursuit of God are good. "Ultimate perfection is in the activity whereby he is united to God." The pursuit is deeply intellectual, although the senses "can belong to man's happiness antecedently and consequently." But "the essence of happiness consists in an act of the intellect." For Aquinas, "ultimate and perfect happiness can only be in the vision of the divine essence."

Thomas More sought happiness by pursuing spirituality through the cultivation of virtue, which mirrors Aquinas. In fact, he desired to cultivate virtue so much that he contemplated leaving London because it was not a suitable environment for doing so:

"In the city what is there to move one to live well? But rather, when a man is straining in his own power to climb the steep path of virtue, it turns him back by a thousand devices and sucks him back by its thousand enticements. Wherever you betake yourself, on one side nothing but feigned love . . . on the other, fierce hatreds, quarrels, the din of the forum murmur against you. Wherever you turn your eyes, what else will you see but . . . gluttony and the world and the world's lord, the devil?"

But More was not a quitter, especially when it came to developing his spiritual and moral character. From an early age, he used his intellect to not only discover his weaknesses, but to

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94 Id. at 27.
95 Id. at 29.
96 Id. at 31.
97 Id. at 33. Aquinas also emphasizes that happiness consists in the activity of the speculative rather than practical intellect. At one point, Aquinas notes that complete happiness consists in contemplation of the divine. Id. at 35.
98 Id. at 39.
devise ways in which to diligently train his soul. This mirrors Aristotle and Aquinas in that virtue is the product of habituated activity. He also perceived honorable qualities in his teachers and sought to mimic them. In fact, he befriended many spiritual figures, who inspired many of the spiritual practices that endured throughout his life. His thought on virtues can be found in his spiritual poetry. Followers of Christ should be joyful, trusting and faithful, vigilant, courageous, humble, and unwilling to yield to temporal pleasure and transient desire. For More, attentive, thorough, and unyielding commitment cultivated love and virtue; further, the unity of human and divine will epitomizes virtue. More understood the human purpose as pursuit of the divine: "[A person] should abstain, not only from unlawful pleasures, but also from lawful, to the end that he may altogether wholly have his mind... heavenward... unto the contemplation of heavenly things." For More, human beings should seek to contemplate God. His faith in the power of virtue is the basis of his theory of social existence, specifically with respect to the role of law. Virtue allows reason to reign and "when reason reigns... some measure of justice and peace be realized." This disposition regarding character development certainly informs More’s perspective on the nature of law, specifically positive law.

More’s chief response to the historical conditions noted above, especially to the English social and economic situation, came in Utopia. He reflected on the shortcomings of sixteenth

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100 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 3 (“[C]larity of judgment led him to decide early in life to train himself with great diligence and care.”).


102 More praised his first instructor, John Morton, in Utopia stating that “[h]e was a man... who deserved respect as much for his prudence and virtue as for his authority,” “[h]is speech was polished and pointed,” and “he had acquired a statesman's sagacity which, when thus learned, is not easily forgotten.” 4 SAINT THOMAS MORE, Utopia: Book I, in THE COMPLETE WORKS OF SAINT THOMAS MORE 46, 59–61 (Edward Surtz & J. H. Hexter eds., 1965).

103 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 15.

104 See id. at 24–25.

105 See id. at 23.


107 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 88.

108 Id. at 97.
century England, including its geographical and moral deficiencies. Indeed, England, and especially London, had its fair share of poverty. The cost of living increased by three hundred percent at the beginning of the sixteenth century. Urban areas decayed because the lower and middle classes could not afford to pay exorbitant rents. More had a special place for social reform and for crafting law to correspond to the needs of the poor. Part humanist and part realist lawyer, More recognized poverty as a principal cause of crime, if not the primary cause. In Utopia, he criticizes nobility and reflects on the significant contributions of poor and lower class workers to society.

Most significantly, Utopia is an exercise in answering the central question of political philosophy: “What is the best way of life?” He emphasizes the significance of individual and communal virtue in society in Utopia. The citizens in More’s Utopia mirror the ideal citizens in ancient Greek and Roman thought: “The Utopian moral philosophers maintain that pleasure is the goal of life, but they find that the most pleasurable life is that of virtue.” Many scholars note that More references Cicero more than fifty times in Utopia. Yet More’s citizens differ from the ideal citizen in ancient thought in one key facet: they disregard the false promises of prestige and privilege. The citizens consistently look to reason and the social nature of human beings as the backbone of society. For example, they recognize the “fellowship of nature.” Virtue is simultaneously intellectual, social, and active, which parallels Aquinas’ conception of happiness. This has radical
implications for communities because it rejects the Lockean idea of atomistic individuals; societal institutions must account for the fact that individuals are mutually dependent and thrive in communities.121

Like Aquinas, More views human nature realistically in Utopia, namely as fundamentally oriented to the good, albeit sometimes selfishly so due to the human propensity to sin. The citizens pursue pleasure and virtue through joyful and serious activities like More's contemporaries in England.122 Pleasure, virtue, and vice all exist in Utopia. Young people are prone to lust and bodily pleasure, pride corrupts limited human institutions, crime and disputes between private parties occur, and the aesthetics and usefulness of the natural city are imperfect.123 This is probably why More amplifies the significance of education in Utopia. The Utopian philosophy regarding the cultivation of virtue through education mirrors More's personal pursuit as well as his instruction of his children. Raphael likely echoes More's thoughts on the importance of education:

If you allow young folk to be abominably brought up and their characters corrupted, little by little, from childhood; and if then you punish them as grownups for committing crime to which their early training has inclined them, what else is this, I ask, but first making them thieves and then punishing them for it?124

Specifically, Utopians develop their character from “their upbringing, since the institutions of their society are completely opposed to such folly, and partly from instruction and their reading of good books.”125 Although impossible to know for sure, Utopia likely expresses More's preference for personal education, especially regarding virtue, considering his own personal practice. This mirrors the traditionalist philosophy of Aristotle

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121 Id. at 26 (“[I]f one's own happiness is incompatible with special privilege or with spoiling others' happiness, then it follows that the institutions of the commonwealth, whose goal is to maximize the happiness of its citizens, must be structured so as to implement in every possible way the Golden Rule.”).

122 UTOPIA, supra note 2, at 44. They believe strongly in the dignity of work and competition; they “keep interested in gardening, partly because they delight in it, and also because of the competition between different streets which challenge one another to produce the best gardens.” Id. at 35.

123 See id. at 35, 41, 60–61.

124 Id. at 14.

125 Id. at 49.
and Aquinas that recognizes the importance of quality education for the cultivation of good citizenship. Finally, More also comments on the impact of community on positive human development. More’s Utopians accept the social nature of humans as they pursue activities acknowledging the “fellowship of nature.”126 Human nature connects individuals, but “men who are separated by some natural obstacle as slight as a hill or a brook are joined by no bond of nature.”127 The Utopians’ promotion of a classless society that prioritizes equality rather than the needs of the wealthy or the popular reflects More’s personal philosophy of impartiality in the administration of justice.128

In short, the city designs its institutions to promote virtue, which reflects More’s understanding of the purpose of law and societal custom.129 More’s realism about human nature tempers his thought on the purpose of law, which will be discussed later.130

III. PHILOSOPHY, JURISPRUDENCE, AND THOMAS MORE

A. Knowledge and the Intelligibility of Values

More, living at the tail end of the scholastic era, parallels Aquinas’ thought on the nature of knowledge and the intelligibility of values. More did not expressly articulate an epistemology; however, because his thought adheres faithfully to the teachings of natural law and their basis in human nature, and he was a fierce defender of Catholic dogma, his epistemology follows in the same vein. Therefore, understanding Aquinas’ philosophy of knowledge is essential to understanding the philosophy held by More.

126 Id. at 66.
127 Id. at 65 (referring to Utopian dislike of treaties that sever natural human bonds).
128 In Utopia, Raphael emphasizes the virtues of a legal system devoid of the institution of private property. The abolition of private property mitigates the development of vice. See id. at 42.
129 See LOGAN, supra note 116, at 28–29; see also infra notes 205–58 and accompanying text.
130 See infra notes 205–59 and accompanying text.
The key to Aquinas' understanding of the nature of knowledge is his willingness to recognize the legitimacy of metaphysics.\textsuperscript{131} The study of essences is the foundation of the natural law.\textsuperscript{132} The possibility of knowing being and the essences of things is the foundation of Aquinas' natural law.\textsuperscript{133} Heinrich Rommen summarizes the Thomistic philosophy of knowledge best:

Man perceives individual things through the imagination and the senses, and he is thus able to apply the universal knowledge which is in the intellect to the particular thing; for, properly speaking, it is neither the intellect nor the senses that perceive: it is man who understands by means of both.\textsuperscript{134}

Both the intellect and the senses combine to form ideas that understand that which exists. Ideas are "that by which" things in reality are understood. This is why "[t]he things themselves are the cause and measure of our knowledge. . . . The being of the thing is the measure of truth."\textsuperscript{135}

Hence, knowledge is the product of apprehending essences that exist prior to the intellect.\textsuperscript{136} The intellect perceives essences, in conjunction with the attributes of the senses, and formulates ideas about those essences. But the essences remain the truth—not the ideas. The object of knowledge is the essence of a thing.\textsuperscript{137} As Rommen states: "To know a thing . . . means to apprehend or assimilate the essence of the thing."\textsuperscript{138}

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\textsuperscript{131} See ROMMEN, supra note 6, at 141.
\textsuperscript{132} See id. ("The idea of natural law obtains general acceptance only in the periods when metaphysics, queen of the sciences, is dominant. It recedes or suffers an eclipse, on the other hand, when being . . . and oughtness, morality and law, are separated, when the essences of things and their ontological order are viewed as unknowable.").
\textsuperscript{133} See id. at 143.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 144.
\textsuperscript{136} See id. ("Reality exists prior to the intellect."). Interestingly, this is the reverse of Descartes' famous axiom: "I . . . think[, therefore I [am]." See RENÉ DESCARTES, DESCARTES: SELECTED PHILOSOPHICAL WRITINGS 162 (John Cottingham et al. trans., 1988).
\textsuperscript{137} See ROMMEN, supra note 6, at 145.
\textsuperscript{138} Id. at 148. Aquinas articulates a principle of "adequatio" when discussing how intellectual concepts formed by the mind interact with reality. Concepts are adequate, proportionally, to the thing in reality. The mind is adequate to the task of grasping reality, but the truth of a given concept remains wedded to the thing itself, which is the measure. See Professor G. Robert Blakey, University of Notre Dame The Law School, Lecture Notes on Thomas Aquinas (Feb. 2010) [hereinafter Blakey, Lecture Notes on Thomas Aquinas] (on file with author).
\end{flushright}
essence indicates the nature of a thing.\textsuperscript{139} Essence corresponds to form, which represents simultaneously the efficient cause and end of the particular thing.\textsuperscript{140}

Aquinas makes the Aristotelian observation that things aim for their own good and perfection. Thus, goodness corresponds to a particular thing’s aim or end.\textsuperscript{141} Everything naturally pursues its essence.\textsuperscript{142} Truth, goodness, and beauty are facts of being. In the natural law framework, teleology is the link between being and oughtness; the “ought” is intrinsically part of the “is” rather than a matter of logical deduction.\textsuperscript{143} And because the intellect can perceive a thing’s end, or telos, it can also determine ethical principles according to what is in accordance with a thing’s end. As Rommen summarizes: “Knowable being is the principle of oughtness. The supreme principle of oughtness is simply this: Become your essential being.”\textsuperscript{144} Unsurprisingly, humans are things, possess an end, and the purpose of life is to live according to that purpose.\textsuperscript{145} Thus, Aquinas and likely More believe there is a connection between existence and ethics.

Illustrative of More’s theory of knowledge is his defense of the authority of the Catholic Church against Martin Luther with respect to the idea of grace. More, following Catholic dogma, recognized the positive role of reason in ethical development and faithful living.\textsuperscript{146} On the contrary, Luther placed his theory of grace entirely in terms of faith. This is why Luther’s call for reform consistently attacked the “faith” of those in charge.\textsuperscript{147}

\begin{itemize}
  \item \textsuperscript{139} See Rommen, \textit{supra} note 6, at 146.
  \item \textsuperscript{140} See id. at 148.
  \item \textsuperscript{141} See id.
  \item \textsuperscript{142} See id. at 150.
  \item \textsuperscript{143} See id. (“The teleological conception, grounded in the metaphysics of being, is therefore the basis of the essential unity of being and oughtness, of being and goodness… A basis of right exists only when in something factual an essential being is striving for realization.”). For Aquinas, truth, goodness, and beauty are facts of being rather than conclusions from being. This is why Aquinas does not fall victim to Hume’s is/ought distinction, namely because the “is” already contains the “ought.” “Ought” is intrinsically related to being itself rather than a logical deduction, which is Hume’s main criticism. Unfortunately for Hume, he misunderstood traditional natural law theory.
  \item \textsuperscript{144} Id. at 156.
  \item \textsuperscript{145} See id. (“For the rational, free nature of man this signifies: Act in accordance with reason; bring your essential being to completion; fulfill the order of being which you confront as a free creature.”).
  \item \textsuperscript{146} See Wegemer, \textit{Portrait of Courage}, \textit{supra} note 7, at 97.
  \item \textsuperscript{147} See id. at 98.
\end{itemize}
Indeed, Luther’s recommendation—basically total uprooting of the Church—matches his skepticism of the power of reason. For Luther, only those that received grace through faith were fit to hold authority.\(^\text{148}\) On the contrary, More’s faith in the authority of the Church, and thereby his call for careful rather than radical reform, presupposes faith in the ability of reason to reach principled and just solutions.\(^\text{149}\)

B. Comparison to Other Jurisprudential Perspectives

This section compares More’s philosophy, which is truly an expression of the thought of Thomas Aquinas, with the jurisprudential perspectives of other major philosophers ranging from Ancient Greece to the modern world. More’s philosophy contrasts sharply with most philosophers of the Ancient world, especially regarding their skepticism. His code of ethics is universal and governed according to principles of reason, whereas Ancient thinkers such as Protagoras, Gorgias, Pyrrho, and Timeon doubted both existence and its intelligibility.\(^\text{150}\) These thinkers laid the seeds of modern skepticism and positivism, which also counteract More’s philosophy of law. The modern heirs to these Ancient thinkers include Locke, Descartes, Hume, and Bentham, among others.

Descartes’ epistemology reflected a shift in understanding human nature and thereby influenced his entire philosophy.\(^\text{151}\) This is the basis of his major challenge to traditional natural law theory. It also laid the foundation for the newer individualist natural rights theory that arises during the Enlightenment. Descartes rejects Aquinas’ conception of understanding as a product of the intellect and senses as well as the idea that human reason is only part of the natural order.\(^\text{152}\) Descartes rests human nature wholly on the capacity to think. “[M]an is a res cogitans.”\(^\text{153}\) The capacity to reason is absolute and does not exist as only part of the natural order. The intellect is wholly sufficient. The absolutism of reason is the basis of reality. “[M]an, from his innate ideas, from the ideas present in his

\(^{148}\) See id.
\(^{149}\) See infra Part III.C.
\(^{150}\) See Blakey, Lecture Notes on Thomas Aquinas, supra note 138.
\(^{151}\) See ROMMEN, supra note 6, at 86.
\(^{152}\) See id. at 77.
\(^{153}\) Id.
consciousness, can construct the world along the lines of mathematical reasoning, the ideal of science. All that man needs to do is constructively to [sic] develop what is in human reason, that is, the innate ideas."\(^{154}\) This unequivocal rationalism undermines the entire foundation of traditional natural law because it does not acknowledge the existence of an objective order. Rationalism allows the mind to assign definitions to things. "Rationalism soon made human reason and its innate ideas the measure of what is."\(^{155}\) Hence, rationalism eradicates the science of being, namely metaphysics, which is the foundation of the natural law, while simultaneously laying the groundwork for rationalist positivism.

Descartes' rationalism has many implications. First, he laid the groundwork for the individualism characteristic of the Enlightenment. By establishing the intellect as absolute and wholly self-sufficient, Descartes effectively erased the natural sociability of humans. "[The intellect] does not need the educative cooperation of other minds. Thus the very spiritual root of sociability is denied."\(^{156}\) This idea undeniably contributes to the social contract theorists that found their political philosophy on the state of nature composed wholly of individuals. Rommen believes Descartes' rationalism finds its fullest expression in the individualism of Kant.\(^{157}\) Second, rationalism is the foundation of subjectivism; when reason is absolute and the definer of reality, maintaining objective norms of value is impossible, aside from those reached by consent or majority opinion. Yves Simon touches on this when he discusses modern value prescriptions:

At any rate, when we hear today of moral values, esthetic values, social values, political values, spiritual values, etc., we should know where these come from. They come from the mind, they come from outside the things, they are not embodied in entities, in nature. Thus, 'this has value' does not mean that by

\(^{154}\) Id.

\(^{155}\) Id. at 78.

\(^{156}\) Id. at 77.

\(^{157}\) Id. at 78. ("This process reached its climax in Kant. Human reason now becomes the sovereign architect of the order of knowledge; it becomes the measure of things. The objective basis of natural law, the *ordo rerum* and the eternal law, has vanished. What was termed natural law is a series of conclusions drawn from the categorical imperative and from the regulative ideas of practical reason, not from the objective and constitutive *ordo rerum.*").
reason of what the thing is it is adjusted to something else, to some operation or to some relation: [I]ts value is something assigned to it by the mind while, in itself, it remains without value, without nature.158

Rationalism makes reality wholly subjective and the value of a thing only comes from it being assigned by an outside party. "Intrinsic value" is an oxymoron in a Cartesian universe. Simon extends this to note that teleology cannot exist in a Cartesian universe. This is because in a mechanistic world value is wholly extrinsic.159 Therefore, a Cartesian universe has no place for traditional natural law theory that emphasizes the reality of being and the limits of human reason in the natural order.

Locke contributed to modern skepticism when he doubted the legitimacy of innate ideas and articulated how experience was the sole foundation of knowledge.160 Locke's philosophy resulted in nominalism, namely the denial of accessible universal ideas or principles, which contrasts sharply with Thomistic theories of knowledge. Notably, Locke's philosophy also gave birth to atomism, thereby resulting in fervent individualism and the prioritization of individual rights. This contrasts with More's pursuit of virtue, which involves fervent recognition of others and the significance of communities for flourishing. For Locke, society is an aggregate of individuals rather than a natural social entity.161 This has radical implications for the purpose of government and law, namely prioritization of pre-political and social rights. For Locke, the law should primarily seek to protect natural rights rather than pursue justice and a conception of the common good.162 Rights are antecedent to the common good and the law should take cognizance of this fact. This philosophy of natural rights pervades the American founding and is a major challenge to applying More's jurisprudence in the American framework.163

More's philosophy also contrasts starkly with the epistemology of David Hume, which like Locke's epistemology, cannot come to grips with the legitimacy of metaphysics and the

159 Id. at 48.
160 See ROMMEN, supra note 6, at 80.
161 See Blakey, Lecture Notes on Thomas Aquinas, supra note 138.
162 Id.
163 See infra notes 353–63 and accompanying text.
natural capacity of human reason. Hume grounds his philosophy of knowledge in empiricism. He confines knowledge to direct observation via sense impression; ideas are the product of sensory experience and observation. Hume grounds his philosophy of knowledge in empiricism. He confines knowledge to direct observation via sense impression; ideas are the product of sensory experience and observation.

Ideas are "that which" understand reality rather than "that by which" reality is understood. Reason is subservient to passion in human nature. Hume's chief contribution, or lack thereof, to epistemology, is that he "leaves no method for determining what is intrinsically good or bad in these passions and in the acts that proceed from them." Moral principles do not come from objective truth or reason and their status, as "principles," is dubious for Hume. Thus, Hume severs the link between being and ought found in Aquinas and the natural law tradition: "Hume rejects the fundamental conception of St. Thomas that being, truth, and goodness are intrinsically linked together." Because the human intellect cannot grasp essences, or the "is," it also cannot determine the "ought" as a matter of logical deduction. As mentioned earlier, Hume's understanding of the

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164 DAVID HUME, A TREATISE OF HUMAN NATURE 414 (L.A. Selby-Bigge ed., 1888).
165 Id. at 415.
166 ROMMEN, supra note 6, at 99.
167 See id.
168 Id. at 100. Hilary Putnam attacked Hume's critique of the "is/ought" problem by demonstrating that factual assertions are not devoid of values. See generally HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 28–46 (2002) (discussing the entanglement of fact and value). Interpreting factual statements, even the most raw facts, still involves inherent values and normative assumptions. Therefore, the is/ought distinction is not a logical problem as Hume asserts. "Ought," or values, are simply unavoidable and intrinsically part of "is." This seems right on its face. After all, at what moment in human existence have human beings lived in a world with only facts? Individuals, simply by being born, are put into situations involving values and preferences. Putnam also attempted to show that ideas and meanings are not just "in the head." Putnam used his famous "twin worlds" thought experiment to prove how meaning exists outside the mind. See generally Hilary Putnam, The Meaning of 'Meaning', in 2 PHILOSOPHICAL PAPERS: MIND, LANGUAGE, AND REALITY 215 (Hilary Putnam ed., 1975). Finally, Putnam, in his philosophy of science, sought to demonstrate how scientific skepticism maintains its own assumptions and values. For example, if science were truly devoid of non-demonstrable facts, it would not contain theoretical terminology describing demonstrable data. Science contains values, such as consistency, as well. See PUTNAM, supra, at 20–27 (acknowledging how science maintains its own set of values).
169 See ROMMEN, supra note 6, at 100. ("For Hume, being does not appear to the human intellect as the true because man's mind has no access to the thing-in-itself, to the essences or ideas of things.")
relationship between “is” and “ought” as a logical deduction misconstrues traditional natural law theory by failing to see how “ought” is part of “is” from the beginning.

Indeed, for Hume, morality is a product of sentiment. But the foundation of approval or disapproval of a particular practice is the principle of utility, later developed further by utilitarian thinkers like Bentham and Mill. Approval conveys usefulness. Usefulness corresponds to desires concerning self-preservation or individual and societal self-interest, normally in the form of some degree of pleasure. Hence, Hume really is, as Rommen calls him, an empiricist positivist. Goodness and justice, if they even exist, are contingent on usefulness, born from subjective sensory experience and expressed through sentiment. The empiricist work of Hume reflects the assumptions underlying legal positivism, which prioritizes the will, or approval, of the majority, as the highest value supporting the legitimacy of law. This is because it discounts the legitimacy of metaphysics as a limiting and guiding principle. Legal positivism is a reflection of Hume’s attempted deconstruction of the relationship between being and oughtness and its effect on human law. The tenets and merits of positivism are discussed below.

Related is the philosophy of Bentham and Mill, who are often known as the founders of utilitarianism. Bentham followed Hume for the most part, but his valuing of utility indicates he is not a total skeptic. Like Locke, Bentham is a nominalist: Words refer to “fictional entities.” Goodness, and thereby individual happiness, depends on utility. Utility is the product of the weighing of pleasure and pain, which can occur either from a universal or individual perspective, although this ambiguity is

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170 See David Hume, An Inquiry Concerning the Principles of Morals 107 (Charles W. Hendel ed., 1957) (“[V]irtue [is] whatever mental action or quality gives to a spectator the pleasing sentiment of approbation; and vice the contrary.”).

171 See Rommen, supra note 6, at 99.

172 See id.

173 See id. at 100.

174 See id. (“The good and the just are what is here and now deemed useful to the self-interest of individuals and to their life in common.”).

175 See id. at 109.

176 See infra notes 340–51 and accompanying text.


178 Id.
one of the major criticisms of utilitarianism. Indeed, Bentham's utility principle ultimately results in subjectivism or, as some professors like to call it, "psychological hedonism." The utility principle, which informs ethical decisions, presupposes that "identity" is static and that results are foreseeable. It also equalizes all pleasures; it does not allow for a distinction between types of pleasures because that would presuppose a standard by which to judge pleasure, thereby indicating that pleasure is not the real focus of the inquiry. Finally, the utility principle pursues the blind maximization of such pleasure at all costs. The question of distributive justice is beside the point for Bentham and he does not account for interpersonal utility. In other words, Bentham's utility principle, while seemingly in touch with the desires of human beings, actually leads to the prioritization of pleasure over justice.

Richard Posner attempts to resolve the difficulties of measurement and calculation that plague utilitarianism by associating utility with the allocation of resources according to rational choice principles. For Posner, the optimal result occurs when everyone has chosen and receives what they want. Choice pursuing economic efficiency is the organizing principle and the law should promote the exercise of individual autonomy with respect to economic decisions. Utility is a function of the "efficient choice" in any given situation. However, this seemingly remains susceptible to the same problems confronting utility measured by pleasure; Posner's theory equates goodness with choice despite the fact that goodness seems to be a more complex concept. If choice is the measure of good, then the availability of choice implies the non-existence of evil. Further, Posner's theory assumes that individuals choose wisely simply by

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179 Id. Measuring utility can often result in subjectivism.
180 Id.
181 Id.
182 Id.
183 Id.
184 See id.
185 See id.
186 Id.
virtue of having the ability to choose. It does not take a rocket scientist to realize that human beings do not always make the most efficient decisions in a given situation.\textsuperscript{187}

Lon Fuller and John Finnis, two modern philosophers, sought to revive natural law as it relates to discussions of jurisprudence. Fuller, like Aquinas and More, recognized reason as essential to natural law.\textsuperscript{188} Yet his morality, as it relates to law, is an internal one.\textsuperscript{189} Legitimate human law maintains certain inherent purposes and principles that bind together the more visible rules: “What Fuller is setting out are principles of legality, a restatement of the rule of law.”\textsuperscript{190} In this sense, Fuller prioritizes the concept of order in a legal system. Order, expressed in procedural rules, underlies the force of law.\textsuperscript{191}

In contrast, Finnis reformulates natural law according to a theory of “basic goods.”\textsuperscript{192} These goods are self-evident and serve as the basis of the natural law rather than Aquinas’ teleological understanding of the nature of things. The natural law is a product of practical reasonableness “in ordering human life and human community.”\textsuperscript{193} The basic goods are “pre-moral” and objectively and self-evidently good.\textsuperscript{194} They include: life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness, and religion.\textsuperscript{195} This has implications for law, which will be discussed later in reflections on More’s jurisprudence.\textsuperscript{196}

More’s philosophy also contrasts with realism, which counteracted rigid, abstract formalism.\textsuperscript{197} Realism, while still positivist, located the study of law in philosophy and the social

\textsuperscript{187} For example, individuals often choose to prefer pursuing things, activities, or relationships that run directly counter to economic efficiency. Preferring family associations to the demands of one’s career, although less financially rewarding, is one example.


\textsuperscript{189} See id. at 121.

\textsuperscript{190} Id.

\textsuperscript{191} See id. at 119.

\textsuperscript{192} John Finnis, Natural Law and Natural Rights 281–90 (2d ed. 2011) (1980).

\textsuperscript{193} Id. at 280.

\textsuperscript{194} See Freeman, supra note 188, at 127.

\textsuperscript{195} See id. at 127–28.

\textsuperscript{196} See infra Part IV.

\textsuperscript{197} See Freeman, supra note 188, at 985.
sciences, with specific emphasis on empirical studies. Knowledge was wholly an empirical endeavor and pragmatism is the proper goal of the law. Oliver Wendell Holmes "stressed the empirical and pragmatic aspect of law." The study of law primarily concerns what the law "is" rather than what it "ought" to be. Interestingly, Holmes simultaneously referenced an amorphous notion of "policy" that continuously informed legal development. This is seemingly paradoxical considering Holmes' attempt to base law on articulated principles developed solely by empirical and historical study of human behavior. The realist movement produced offspring in the form of feminist and critical race jurisprudence and critical legal studies. Each of

198 See id. at 988 ("Realists were the first lawyers to undertake empirical social scientific research into laws and legal institutions, though many of their assumptions were naive and what they produced is generally thought to suffer from a reliance on crude empiricism.").

199 Id. at 986. Roscoe Pound articulated similar ideas. For Pound, wants and interests drive the purposes of law; preference for expediency is the foundation of legal pragmatism. See Professor G. Robert Blakey, University of Notre Dame The Law School, Lecture Notes on Realism (Apr. 2010) (on file with author).

200 See FREEMAN, supra note 188, at 986. Realists do not completely deny the "normative character of legal rules." Id. at 996. They just do not think they completely explain why legal institutions act in certain ways. Yet realists do not offer a better explanation when they reference "policy" as a guiding principle in legal interpretation and decision-making.

201 Feminist jurisprudence, while splintered itself, emphasizes how the legal order is essentially patriarchal. See id. at 1287. Feminist theory approaches the law from a hermeneutical and emancipation perspective: it seeks to understand and then free the legal order from the grip of patriarchy. Id. at 1297. Hence, it analyzes law and demonstrates how the legal order perpetuates patriarchy in everyday human affairs. Id. Its end goal is to eliminate the elements of patriarchy that supposedly pervade the system. Id. Concepts such as the "equality principle" are not even safe; jurisprudential feminists perceive societal notions of equality as reflecting the dominant male psyche. Id. at 1289–91. They are skeptical of the project of grasping essences and an objective order on which to base law; essences are nothing but social constructs and therefore an illegitimate basis of law. Id. at 1298.

202 Critical race theory is an "off-shoot of Critical Legal Studies." Id. at 1491. Race and its relationship to the law is the central focus. Richard Delgado is one of the leading thinkers and speaks of how the law is wholly the product of "elite white imperial scholars." Id. Race theory advocates race consciousness and formal and substantive equality, including an emphasis on equality in outcomes. Id. at 1492. One pervasive difficulty confronting this perspective is its inability to clearly define "race." Id. at 1495–96. This is potentially a serious shortcoming because how can race theory adequately analyze the relationship between race and the law when it cannot even define the term that is the focus of its study? And even if race could be defined, that definition would seem to remain subject to the critique that was the foundation of the definition in the first place. One might suggest that these difficulties present sufficient reason to not make "race" the primary unit of analysis.
these perspectives approach studying law from a particular slant rather than as a holistic enterprise that is a complete reflection of human nature.\textsuperscript{204}

C. More and Law

Aquinas and More share essentially the same philosophy of law. The theory of natural law that Aquinas expounds appears in More's judicial and legal career, as well as his response to King Henry VIII's assertion of additional authority in the English system. Thus, understanding Aquinas' conception of law—including all four types of law—is necessary in order to fully appreciate how More applied it to his everyday life.

\textsuperscript{203} Critical Legal Studies (CLS) is skeptical of orthodox understandings of law and is the parent of feminist and race jurisprudence. \textit{Id.} at 1209. Similar to realism, CLS responded to formalism. But unlike realism, CLS understands law as totally the product of politics; the law does not maintain its own set of rules and rationales. \textit{Id.} at 1210. Hence, law is primarily the offspring of relationships of power reflected in the political realities of society: "Legal decisions . . . are no more neutral than the decisions of a legislature or an executive." \textit{Id.} at 1216. This conception is broader in scope than that proposed by the feminists and race scholars but echoes essentially the same idea: the law is an expression of societal preferences, which may or may not be desirable and somewhat arbitrary.

\textsuperscript{204} This is why these approaches to jurisprudence are completely at odds with More's conception of jurisprudence. More understood law as a reflection of human nature, understood in its entirety. On the contrary, these modes of analysis select one attribute and seek to understand the entire system through the lens of that particular trait. While the perspectives offer valuable insight at times, mostly due to their ability to expose certain assumptions, they are not adequate to the task of comprehensively understanding law. They mistakenly focus on one particular attribute of human affairs rather than understanding that attribute as one aspect of a whole that needs to be studied. In most instances, the decision to use the particular unit of analysis appears arbitrary. This is also the problem with postmodern jurisprudence. By deconstructing everything it disallows the construction of anything. Postmodern scholars admit from the start that their framework is "notoriously ambiguous." \textit{Id.} at 1409 (internal quotation marks omitted). For the postmodern, law is indeterminate. It is incapable of reaching human affairs because it is unclear whether human affairs can even be understood properly: "One important postmodernist theme invokes the instability or indeterminateness of the 'subject.'" \textit{Id.} at 1410. Any unit of analysis is ambiguous and therefore incapable of informing proper legal norms. The legal system is a social construct reflecting socially constructed units of analysis. Hence, the primary purpose of postmodernism is to expose and "illuminate[] the . . . master narratives" underlying the existing system. \textit{Id.} at 1414 (internal quotation marks omitted). The aim of postmodern jurisprudence is primarily hermeneutical. \textit{Id.} Legal solutions are pluralistic in nature and seek to account for the specificity and significance of certain human attributes neither historically perceived nor presently emphasized by the law. \textit{Id.} at 1417. Intelligibility, the locus of More's jurisprudence is non-existent in the postmodern framework.
For Aquinas, "law is a rule and measure of acts that induces persons to act or refrain from acting."\textsuperscript{205} Reason, just as it is the guide of human nature, is the foundation of law.\textsuperscript{206} Further, law fundamentally corresponds to and pursues the common good.\textsuperscript{207} Law is also the product of legitimate authority, which can either consist of the "whole people" or the person placed in authority.\textsuperscript{208} Hence, the following definition of law: an ordinance promulgated by a legitimate authority for the common good. Most significantly, Aquinas articulates four types of law: eternal, divine, natural, and human or positive law. Eternal law is synonymous with the divine reason.\textsuperscript{209} Divine law is the law of Christ articulated in Scripture; it is law expressly given by God.\textsuperscript{210} The natural law is the offspring of divine reason, which assigns proper actions based on the natural ends of things.\textsuperscript{211} Human laws correspond to the practical reason of human beings.\textsuperscript{212}

Aquinas' theories of divine and natural law and their relationship to human law are the most relevant for studying the jurisprudence of More. The natural law is static and immutable; this is because all humans are "incline[d] . . . to act in accord with reason."\textsuperscript{213} Aquinas writes: "[T]here is a single standard of truth and right for everyone which is known by everyone."\textsuperscript{214} The natural law, because it reflects human ends, promotes good. Similarly, human laws should follow the natural law to promote adherence to the natural law and therefore goodness.\textsuperscript{215} After all,
justice is the result of rules that follow the dictates of reason, and the first rule of reason is the law of nature. While rulers can dispense and modify human law, they cannot dispense with the "precepts of the natural law." This also holds for the divine law.

Aquinas also has specific thoughts as to the scope of human law. Human law must account for the practices of the community to be legitimate and effective. Because humans are not perfectly virtuous, the law cannot prohibit every vice. It should prohibit those activities that undermine the safety of others. Thus, law is not determinate.

Human law contains gaps that must be filled by higher principles, such as the other types of law, which are based simultaneously on theology and an understanding of teleology. This is partially due to the limitations of language. Law gives practicality to moral responsibility, but it cannot do it totally given the limitations of language. As Finnis writes:

> By the language of legislation and precedent-forming judicial arguments, we make the countless determinationes morally required to give effect to our moral responsibility to love (respect and promote the well-being of) our neighbour as ourselves. But those acts of specification never altogether eliminate vagueness, or the need for further determinations which must seek an appropriate fit not only with the

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216 See id. at 47.
217 AQUINAS, ON POLITICS, supra note 214, at 58.
218 See AQUINAS, TREATISE ON LAW, supra note 205, at 69 ("Only God or his special representatives can dispense from precepts of the divine law.").
219 See id. at 54–55.
220 See id. at 54 ("Human law does not prohibit every kind of vice . . . [but] only the more serious kinds of vice, from which most persons can abstain, and especially those vices that inflict harm on others, without the prohibition of which human society could not be preserved . . . [such as homicide,] thefts, and the like.").
221 Aquinas develops the concept of "determinatio" to answer the fundamental question of "what is law?" For Aquinas, law is under-determinate. It does not reach—and cannot reach for that matter—every level and aspect of human action. The general principles of the natural law must inform everyday human action when the positive law is inadequate to the task. This contrasts with positivism, which views law as determinate and capable of reaching human problems through logic and formulaic rules premised on majoritarian will. It starkly contrasts with post-modernism, which perceives law as indeterminate, namely incapable of reaching human action. Post-modernism critiques how most legal systems improperly locate the unit of analysis in individuals and other social constructs. See Blakey, Lecture Notes on Thomas Aquinas, supra note 138.
*determinatio* being interpreted, but also with the relevant remainder of our law, and the continuing or perhaps new requirements and implications of relevant moral truths.\(^{222}\)

The intrinsic vagueness of language is inescapable and pervades human law.\(^{223}\) Finnis’ words echo More’s approach to law, which recognizes its positive and negative existence as a force that shapes human action. This approach is prescriptive yet humble in its scope: “[T]he classic[al] theory of *determinatio* acknowledges plainly that in a good many cases there is no one right answer, but rather a number of right (not-wrong) answers.”\(^{224}\) This differs significantly from legal positivism, which views law as determinate, fills gaps with logic, and seeks to extend to countless human actions regardless of their degree of separation from the original precept.\(^{225}\)

Further, human law has binding force on the human conscience if it is just.\(^{226}\) Human laws can be unjust in two ways: They can disregard proper human ends and compel humans to act in ways contrary to the good or they can be the product of an improper usage of authority.\(^{227}\) The latter category is perhaps most relevant for studying More, as Aquinas notes that Christians should obey authority that comes from God, which precludes obedience to rulers that act outside the scope of their authority and conflict with divine precepts: “[[R]ulers abuse their authority] because they command things outside their sphere of authority. In this case the subject is obliged neither to obey or disobey.”\(^{228}\) And laws that do not pursue the


\(^{223}\) See *id.* at 39 (“Semantic vagueness is one, but only one, of the causes of this pervasive under-determinacy of law.”).

\(^{224}\) *Id.* at 38–39.

\(^{225}\) See *infra* notes 274–83 and accompanying text (discussing legal positivism and “gap filling”).

\(^{226}\) AQUINAS, *TREATISE ON LAW*, supra note 205, at 57.

\(^{227}\) *Id.* (“Laws may be unjust regarding their end, as when authorities impose burdensome laws on citizens to satisfy the authorities’ covetousness or vainglory rather than to benefit the community. Or laws may be unjust regarding the authority to make them, as when persons enact laws that exceed the power committed to them.”).

\(^{228}\) AQUINAS, *ON POLITICS*, supra note 214, at 65–66 n.8 (alteration in original); see also AQUINAS, *TREATISE ON LAW*, supra note 205, at 57 (“Laws can be unjust . . . by being contrary to the divine good . . . . And it is never permissible to obey such laws, since ‘we ought to obey God rather than human beings,’ as Acts 5:29
commonweal have “no power to bind morally.” As discussed later, this informs More’s response to King Henry VIII’s decision to separate from the Catholic Church.

Similar to Aquinas, More viewed the law through the prism of human nature: “[H]e well understood that law, like most other professions, requires for its proper execution the philosopher’s understanding of human nature.” He thought that natural law existed in the human heart and could be known by reason. This mirrors Aquinas’ notion of the natural law as immutable and accessible by human reason. Significantly, appeals to reason dominate More’s legal career. Reason, rather than passion and self-interest, was the key to good social order. Law, as the product of generational experience and deliberation, deserved to govern because of this inherent stability. Indeed, More’s chief criticism of Luther and his followers was their appeal to the passions, or “fonde affeccyon.” More’s response to Thomas Cromwell’s demand that he take an oath indicates his belief that the force of law corresponded to reason rather than will. More could not be convinced to take the oath regardless of the force of Henry’s will or the consequences. As Wegemer writes, “[u]nder the law he was protected; but only for as long as law, not passionate will, reigned supreme.”

More also recognized the practical necessity of human positive law; the law is simultaneously a positive and negative response to the human condition. Law is a “sure and substantial shield” that is necessary for human freedom and for pursuing a just society. It reminds humans of their limits and allows them to live according to God’s plan. Law can promote order

says.”); see infra notes 244–46 and accompanying text (discussing More’s disobedience of unjust laws).

229 AQUINAS, TREATISE ON LAW, supra note 205, at 61.
230 See infra notes 245–48 and accompanying text.
231 WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 48.
232 A THOMAS MORE SOURCEBOOK, supra note 1, at 253 n.1.
233 WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 38. Interestingly, Wegemer believes that More thought literature, rather than law, was the “primary civilizing force” amongst the products of reason. He emphasizes More’s love of comedy and wit, expressed through literature, as evidence of this point. Id. at 38–40.
234 See WEGEMER, MORE ON STATESMANSHIP, supra note 115, at 212.
235 MORE, A Dialogue, supra note 86, at 433.
236 WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 169.
237 A THOMAS MORE SOURCEBOOK, supra note 1, at 253 (internal quotation marks omitted).
238 See id. at 254.
consistent with liberty and provide boundaries for individuals. In this sense, law corresponds to the demands of human nature, both the good and the bad, reflected in reality: “More took guidance, as always, from his understanding of the person as free though fallen.”

More knew that no amount of reason, without the force of law, could check strong passion and prejudice. At times the law must step in and ensure safety, although that is not its primary responsibility. More also perceives human law as the product of legitimate authority, which comes from the those who are ruled: “Any one man who has command of many men owes his authority to those whom he commands; he ought to have command not one instant longer than his [people] wish.” And human law reflects human tradition and arises from leadership concerned for the common good.

Yet, like Aquinas, More knew that human law was by no means comprehensive: It must acknowledge the primacy of eternal, divine, and natural law. More expressed this idea when he was defending himself while on trial for treason. Questioning the legitimacy of the authority that enacted the law that was the source of the criminal charges, as well as the judges applying it to his case, More stated the following:

This realm, being but one member and small part of the Church, might not make a particular law [that was] disagreeable with the general law of Christ’s Universal Catholic Church any more than the city of London, being but one poor member in respect of the whole realm, might make a law against an Act of Parliament to bind the whole realm.

This passage expresses two points: First, authority cannot produce laws that fall outside the scope of that authority. Second, no human authority can contravene divine authority, which in this case, was the Catholic Church installed by Christ. More buttressed this latter point by offering scriptural texts during his trial to prove that no layman, including King Henry

239 WEGEMER, MORE ON STATESMANSHIP, supra note 115, at 207.
240 See id. at 155.
241 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 125–26.
242 A THOMAS MORE SOURCEBOOK, supra note 1, at 237 (alteration in original) (footnote omitted).
243 See id. at 253; see also AQUINAS, TREATISE ON LAW, supra note 205, at 2–3.
244 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 215–16.
245 Id. (alteration in original) (internal quotation marks omitted).
VIII, could be head of the Church. Put simply, More could not support the notion that human law could contradict divine law. Human law has its limits.

More's service as Lord Chancellor provides further evidence of his view that both law and government must be forces for the common good that act in accordance with the natural law. His first principle of service to the King was to tell him what he ought to do rather than what he can do. This implicitly expresses adherence to an unspoken code of ethics rather than blind service to raw authority and power. He explicitly mentions how kings should rule virtuously. For More, law is the primary indicator of a particular government's justice because it is the product of citizens attempting to pursue the common good.

Similarly, More communicates the purpose of law in *Utopia*. The city of Utopia promotes virtue through law and social custom. For example, the city places the meek in battle in order that they may pursue courage and bravery. The abolition of private property undermines vicious human desires, such as greed, avarice, and pride. The city is cognizant of the needs of all, thereby implicitly acknowledging how the social nature of humans implicates the common good. One radical public policy involves the redistribution of wealth from one city to another, which is done freely as "outright gifts; those who give receive nothing in return from those to whom they give. Thus the whole island is like a single family." Regardless of one's position on the soundness of this particular public policy, or whether More actually prefers it, it is undeniable that the passage communicates how law must acknowledge the common good and respond to individual and social human nature.

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246 See id. at 216.
247 See A THOMAS MORE SOURCEBOOK, supra note 1, at 232.
248 See id. at 237.
249 See WEGEMER, MORE ON STATESMANSHIP, supra note 115, at 209.
250 See MORE, supra note 2, at 69–70 ("[S]hame at failing their countrymen, desperation at the immediate presence of the enemy, and the impossibility of flight often combine to overcome their fear, and they turn brave out of sheer necessity.").
251 See id. at 42 ("[P]rivate property] makes every living creature greedy and avaricious—and, in addition, man develops these qualities out of pride, pride which glories in putting down others by a superfluous display of possessions.").
252 Id. at 45.
Finally, More's recognition of the primacy of conscience fits neatly with his philosophy of law. Conscience was integral to More's conception of the good and virtuous life.\textsuperscript{253} He lived by the principle that allegiance to conscience could take precedence over positive law because of its relationship to natural law.\textsuperscript{254} He refuses the advice of his daughter, Meg, to conform his conscience to human law that he perceives as unjust.\textsuperscript{255} For More, conscience, informed by the natural law, is the judge of positive law.\textsuperscript{256} Yet More's death also demonstrates his lifelong advocacy of respect for human law, even unjust ones.\textsuperscript{257} He saw the reform of unjust laws as commendable, although he did not advocate radical change that uprooted systems as a whole.\textsuperscript{258}

More's understanding of the types of law, and their purpose in society, contrasts with modern thinkers sympathetic to legal positivism. At the most basic level, More views human law as only one type of four and subservient to eternal, divine, and natural law. On the contrary, legal positivists only subordinate law to the will, or something like Thomas Hobbes' sovereign. Either way, positivism is a sort of blind adherence to a guiding principle, albeit one chosen by the participants in the system.

William Occam was a major medieval thinker that challenged the notion that reason is the primary basis of law and predates modern philosophers with related ideas. Instead, he places the will as the dominant element in the foundation of natural law.\textsuperscript{259} For Occam, the will is higher than reason. "The will is the nobler faculty; the intellect is but the ministering torch-bearer of the will, which is the master."\textsuperscript{260} Reason simply serves the object of the will. This is reminiscent of Thomas Hobbes' assertion that reason simply finds the means to serve the will's pursuit.\textsuperscript{261} Thus, for Occam, the moral order finds its basis in God's will rather than His wisdom. "As all being is

\textsuperscript{253} See WEGEMER, MORE ON STATESMANSHP, supra note 115, at 183 ("So important was conscience in More's understanding that he considered all education to be ordered to its formation . . . ").

\textsuperscript{254} See id.

\textsuperscript{255} Id. at 210–11.

\textsuperscript{256} See id. at 211.

\textsuperscript{257} See id. at 210.

\textsuperscript{258} See id.

\textsuperscript{259} ROMMEN, supra note 6, at 52.

\textsuperscript{260} Id.

founded on the mere absolute will of God without participation in His essence, so all oughtness or obligation rests solely on the same absolute will." Reality and essence derived from divine wisdom are no longer the basis of purpose; the will determines direction. Therefore, action cannot be judged by an unchanging standard because the will is always subject to change. "An action is not good because of its suitableness to the essential nature of man, wherein God's archetypal idea of man is represented according to being and oughtness, but because God so wills." This has major implications for the nature of law. For Occam, because will is the guide of human action, the basis of law must be will as well. The validity of law rests in its relation to the will of the lawmaker. This allows the natural law to resemble positive law. For Occam, the natural law is wholly an expression of the will of the lawmaker and has no relation to a set of unchanging norms. This is precisely because the foundation of norms is now a will that is subject to change. Law then has no relation to an objective order. "Law is will, pure will without any foundation in reality, without foundation in the essential nature of things." There is no teleological element in an Occamist world. Occam only sees arbitrary instances rather than an order founded on essence. Moral goodness, which usually derives its foundation from correspondence with one's purpose and objective norms, is wholly subject to the whims of God. Simon extends the implications of this perspective:

[F]or Occam 'all depends on the divine will as ultimate cause—the essences of things, the possible and the impossible.' There are no unchangeable laws, nothing right or wrong in itself: '...theft, adultery, and even hating God are not wrong in themselves, for God can command them, and then they become meritorious.'

To make the will primary is to ignore the reality of essence, including the essence of God, which is divine wisdom.

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262 ROMMEN, supra note 6, at 52.
263 Id.
264 See id.
265 Id.
266 Id. at 52–53 ("Occam, who sees only individual phenomena, not universals, the concepts of essences . . . .")
267 See id. at 53.
268 SIMON, supra note 158, at 34 (alteration in original).
Occam’s viewpoint laid the foundation for later thinkers who ultimately advanced the causes of legal voluntarism and positivism. Hobbes’ completely sovereign “Leviathan” closely resembles Occam’s God. Norms of right and wrong and justice are at the discretion of the sovereign and wholly products of its will. Simon details Occam’s contribution to legal voluntarism:

Legal voluntarism, . . . the theory that law is primarily an act of sovereign will and, at the limit, an arbitrary decree of an absolute, unenlightened, irrational will, is historically associated in a remarkably constant fashion with voluntarism as a general philosophic position, i.e., with the theory that primacy belongs not to the true but to the good and that the higher faculty is not the intellect but the will.

Occam’s position detailing the primacy of the will laid the foundation for political theorists such as Rousseau who emphasized the “sovereign will” as the only valid basis of authority in a state. This will, regardless of its intentions or apparent heinousness, is always valid. As Simon points out, goodness, which often reduces to usefulness in such a system, is subject to the whims of the legislators rather than any existing body of norms based on objective essences in reality.

Bentham argues that his utility principle may serve as the basis of positive law; for him, law rests on utility rather than morals. John Austin “sought to show what law really is, as opposed to moral or natural law notions of what it ought to be.” Law and morals are separate. Law is a creation of society, but not in the same sense as for More, who noted how the natural

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269 See ROMMEN, supra note 6, at 54–55.
270 Hobbes writes, after acknowledging the Leviathan as the truest representative of the Commonwealth and absolutely sovereign, that the Leviathan “is annexed to the Soveraignty, the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy and what Actions he may doe [sic].” HOBBES, supra note 261, at 233–34. Further, “[l]awes [sic] are the Rules of Just, and Unjust; nothing being reputed Unjust, that is not contrary to some Law. Likewise, that none can make Lawes [sic] but the Common-wealth; because our Subjection is to the Common-wealth only.” Id. at 312.
271 SIMON, supra note 158, at 61.
272 ROMMEN, supra note 6, at 81 (discussing Rousseau’s political philosophy).
273 SIMON, supra note 158, at 61.
274 See Blakey, Lecture Notes on Positivism, supra note 177.
275 FREEMAN, supra note 188, at 255.
276 See id. at 262 (stating that the positivist aspect of Austinianism is most evident in the separation of laws and morals).
law written in human nature informs the creation of positive law.\textsuperscript{277} In contrast, legal positivists ground law in logical preference conveyed through expressions of sovereignty.

Austin is one of the major positivist thinkers to outline such a framework of law. His goal was to use logic for law in the same way that Newton built physics from basic math.\textsuperscript{278} For Austin, the appropriate goal of jurisprudence is positive law, which is the product of an independent community.\textsuperscript{279} This definition of human law sharply contrasts with Aquinas' notion of law as a rule promulgated by legitimate authority for the common good. Austin's definition of law is devoid of reference to higher principles and prioritizes authority or the lawmaker. Hence, the basis of law is "command," or will: "[E]very law or rule is a command."\textsuperscript{280} This theory contrasts with that of Hart, who founds law on a dual system of rules: primary and secondary rules. Primary rules are general standards and rules of obligation, whereas secondary rules specify primary rules in application.\textsuperscript{281} Hence, the secondary rules are "mainly procedural and remedial."\textsuperscript{282} In other words, they are concerned with the "nitty gritty" of law.

Austin's conception detaches law from morality: "The science of jurisprudence... is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness."\textsuperscript{283} The goodness or badness of laws is irrelevant to their legitimacy as forces directing human action. Finally, for Austin, law is determinate; it is the product of logic, which can touch multiple areas of activity and craft solutions to legal problems.\textsuperscript{284} Logic fills the gaps of law in order to create a framework into which humans can fit.

\begin{footnotes}
\item[277] See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 48.
\item[278] See Blakey, Lecture Notes on Positivism, supra note 177.
\item[279] See J. Austin, The Province of Jurisprudence Determined (Hart ed., 1954), in LLOYD'S INTRODUCTION TO JURISPRUDENCE, supra note 188, at 291, 291 ("The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors.").
\item[280] Id. at 292.
\item[281] See FREEMAN, supra note 188, at 268.
\item[282] Id.
\item[283] Austin, supra note 279, at 294.
\item[284] See Blakey, Lecture Notes on Thomas Aquinas, supra note 150.
\end{footnotes}
D. Justice

For More, an objective standard of the good life, cognizant of the importance of cultivating virtue, informs the meaning of justice and its unavoidable relationship to law. The roots of More's conception of justice are Aristotelian.\(^{285}\) In this sense, More fits into Michael Sandel's third theory of justice, namely that characterized by the pursuit of "virtue." Sandel summarizes theories of justice into three types.\(^ {286}\) The first defines justice as corresponding to the maximization of welfare; utilitarianism and other philosophical theories that calculate goods dominate this theory.\(^ {287}\) The second type cites freedom as its starting point and prioritizes autonomy and equality.\(^ {288}\) Kant and Rawls are its chief exponents. Finally, the last category sees virtue as the proper indicator of justice.\(^ {289}\) More's theory of justice, informed by Christian theology and the thought of Aquinas, parallels the theories in Sandel's third category, with a few modifications.

For More, justice entails giving of "what is due." The concept of "what is due," which is an admittedly ambiguous phrase on its surface, follows from his understanding of human nature and the purpose of life, which was outlined above.\(^ {290}\) Justice corresponds to the good life, which Christian ideals inform. This is why More's conception of justice has Aristotelian roots. Aristotle also understood justice as related to essence or telos.\(^ {291}\) For Aristotle, "what is due" corresponds to the purpose of a thing in a given situation.\(^ {292}\) This is why distributive justice depends on the essence of the thing being distributed and the merit surrounding the person on the receiving end.\(^ {293}\)

Similarly, More's conception of justice flows from his understanding of human nature. Aquinas holds that "a thing is said to be just in human affairs when it is right because it follows


\(^{286}\) Id. at 19.

\(^{287}\) See id.

\(^{288}\) See id. at 9, 19–20.

\(^{289}\) See id. at 20.

\(^{290}\) See supra notes 93–108 and accompanying text.

\(^{291}\) Sandel, supra note 285, at 186.

\(^{292}\) See id. at 187–88.

\(^{293}\) See id.
the rule of reason.”

As mentioned above, the first rule of reason is the law of nature. Justice involves the rule of reason, which is distinctly human and related to the cultivation of virtue, in particular circumstances. Hence, for More, reason is key to justice. Justice corresponds to goodness and right and what is due. More famously told one of his sons-in-law: “[S]on, I assure [you] on my faith, that if the parties will at my hands call for justice, then . . . [even if] my father stood on the one side and the devil on the other, his cause being good, the devil should have right.” “What is due” relates to what the good to be pursued is in a given situation, which is informed by the unchanging nature of things. Prudence is the process of properly applying the norm to particular circumstances.

More's refusal to adhere to the oath written by Cromwell after passage of the Act of Succession further demonstrates his understanding of justice as human law in accordance with the dictates of reason and God. More viewed his incarceration as unjust because the oath articulated by Cromwell did not have proper authorization. He wrote to his daughter Meg, expressing his frustration: “[T]hey that have committed me [here], for refusing of this oath not agreeable to the statute, are not by their own law able to justify my imprisonment.” Thus, for More, a law that does not correspond to reason because it stems from usurpation of authority is inherently unjust.

Further, More's conflict with the crown demonstrates the primacy of conscience in his conception of justice: “Because conscience is the faculty by which fundamental issues of good and evil are manifest to all human beings, even the most corrupt, More considered it to be the metaphysical foundation for law and

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295 AQUINAS, TREATISE ON LAW, supra note 205, at 36–43.
296 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 39, 97 ("[O]nly when reason reigns can some measure of justice and peace be realized.").
297 See id. at 188.
298 ROPER & HARPSFIELD, supra note 28, at 21–22 (internal quotation marks omitted).
299 See ARISTOTLE, supra note 101, at 89.
300 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 162.
301 ROPER & HARPSFIELD, supra note 28, at 38 (internal quotation marks omitted).
In other words, conscience is a vehicle for promoting both individual and communal justice. A conscience that perceives and reasons rightly can pursue justice properly.

More’s conception of justice strongly contrasts with Sandel’s first and second categories. Sandel summarizes the first type as characterizing justice as the maximization of welfare. Bentham, Mill, and utilitarianism in general dominate this approach. Welfare involves the greatest amount of happiness for the greatest number of people. Happiness is a measure of pleasure and pain. The maximization of pleasure leads to more happiness, at least in Bentham’s framework. While the pleasure principle is the theory’s first and clarifying principle, it is also arguably its weakest because it is probably impossible to maintain a consistent definition of pleasure, or utility for that matter. The currency of utilitarianism is subject to change according to the preferences of those involved. Similarly, Bentham’s utilitarianism does not allow for a prioritization of pleasures or recognize different values between them. Finally, the utilitarian conception of justice leaves no room for recognizing individual rights or claims. It prioritizes the good of all, whatever that is, over individual needs, regardless of their legitimacy, in every situation.

John Stuart Mill sought to resolve this problem by wedding utility and welfare to liberty. For Mill, the maximization of welfare, and therefore justice, involves pursuing the greatest amount of utility that remains cognizant of individual liberty. Mill maintains a hierarchy of utility that corresponds to majoritarian preference aware of liberty interests. This relates to Mill’s harm principle, which articulates the idea that government should not interfere with individual liberty absent physical harm. But this does not truly resolve the main problem of utilitarianism, namely how to prevent calculations from devolving into subjectivism. This is because the harm

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302 WEGEMER, MORE ON STATESMANSHP, supra note 115, at 184.
303 See SANDEL, supra note 285, at 34–35.
304 See id.
305 See id. at 41.
306 See id.
307 See id. at 37.
308 See id. at 50.
309 See id. at 54.
310 See id. at 49.
principle is only cognizant of physical harm. It ignores the possibility of unjust circumstances that extend beyond tangible negatives. It prioritizes liberty, even if it is intangibly destructive, over invisible and intangible goods that remain significant for the health of the community. Justice, because it only involves calculations cognizant of restraints on physical liberty as they relate to welfare, is devoid of intangible goods such as virtue, upheld by thinkers like More.

More’s understanding of justice also differs from theories of justice premised on individual freedom. Libertarianism and the thought of Kant infuse this line of thinking. Rights, flowing from the autonomy of individuals and the human capacity to reason, inform the meaning of justice. The basis of these rights is rationality, which demands dignity and respect. For Kant, morality is the product of acting out of duty from a self-prescribed universal law known as the categorical imperative and that is the product of autonomy. True freedom equals action in accordance with this self-made, albeit universally applied, duty. Freedom is the organizing principle for morality and justice. This implicitly recognizes the anti-individual calculation of utilitarianism and recognizes the harmonizing of individual freedom as key to justice. Because humans maintain intrinsic worth due to their rationality as well as certain rights, they must be treated as ends, and thereby cannot fit into a utilitarian calculation. Yet Kant’s theory sharply contrasts with More’s conception because it locates duty in individual freedom to craft universalized moral law. On the contrary, More conceives duty as related to the intrinsic nature of human beings, namely their orientation to pursue good. More’s pursuit of justice is more other-regarding than the Kantian notion, which springs forth from individual freedom.

Freedom also infuses John Rawls’ conception of justice, which prioritizes fairness as the product of choice. Justice is fairness because individuals would choose what is fair if they did not have other obligations and wore a “veil of ignorance.” Hence, for Rawls, justice equals distribution in a situation of

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311 See id. at 107.
312 See id. at 123–24.
313 See id.
314 Id. at 141.
equality characterized by truly free choice. In his hypothetical veil of ignorance scenario, Rawls postulates that individuals would choose equal liberty as an organizing principle of justice. Basic rights, rather than certain goods, would be the outcome of his thought experiment. Further, with the exception of inequality that is in the form of advantage, especially for the least fortunate, social and economic equality are essential to justice. Rawls’ theory levels individuals in society and focuses on justice at an institutional level. This contrasts with More, who like Aquinas and other Ancient thinkers, recognized the significance of different levels in society. While More might agree that the assignment of talent is arbitrary, or at least due to God, More would utilize those talents to societal advantage rather than equalizing individuals and then moving forward.

E. The Role of Judges in Implementing Values

Thomas More thought that judges should always remain cognizant of, and actively draw from, natural theories of justice. Judges must act in accordance with the law as well as justice, which is why More would rule for the devil if he had the better case. Impartial judicial functioning is an aspect of justice: “‘However bitter an enemy to me a man may be, or however much he may have injured me, I will not allow this to prejudice his case in court, where justice must be administered impartially . . . .’”

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315 See id. at 142, 151–63 (discussing how equality would emerge from the “veil of ignorance”).

316 While this seems to make sense on the surface, it is subject to three common sensical criticisms. First, Rawls presumes, like Locke, that a state of nature should inform notions of justice despite the fact that the state of nature is completely opposed to actual human experience. Second, Rawls’ framework assumes that each generation would choose the same situation as the one that came before, without providing a basis for the validity of such an assumption given human experience. Finally, why does Rawls believe that humans will act risk averse? Human beings decide to roll the dice—both literally and figuratively—all the time in their everyday lives. Why should we assume that the hypothetical state of nature would be any different?

317 See WEGEMER, MORE ON STATESMANSHP, supra note 115, at 212 (“To implement, interpret, and improve a nation’s laws, the wise statesman must have a thorough knowledge of his nation’s laws, traditions, and literature as well as a thorough knowledge of human nature.”).

Significantly, More did not shy away from the idea that a judge's personal moral view could impact decision-making. John Guy noted how "'his great contribution was exactly this: to rejuvenate the ancient theory that judges had a personal duty in conscience to see right done by all whose business was entertained in the courts they directed.'" Yet given More's adherence to traditional natural law theory his view of conscience was likely objective. Conscience was not an outlet for subjectivism or relativism.

More's canons of statutory interpretation are not evident in his writing. The most visible example is his response to the statute responsible for his death. More greatly disputed the construction given by his prosecutors; he focused on the definition of the word "malice" in the statute. More explained that the word "malice" had a precise meaning in the law. More held that in the statute it meant: "'forcible'... in the statute of forcible entries, by which statute, if a man enter peaceably, and [did not] put... his adversary out forcibly, it is no offence. But if he put him out forcibly, then by that statute it is an offence, and so shall he be punished." He insisted that the testimony of Richard Rich, which consisted of hearsay about chance conversations with More, did not indicate malice in this sense. This communicates at least minimal adherence to text and legal definitions, as well as a concept of stare decisis.

More's most famous defense, silence, also indicates his comprehension of the fundamental premise of criminal law: that the evidence must be sufficient to convict. The statute criminalized verbal representations and manifestations of disobedience. With passion and wit, More pointed out that silence is not a crime under a proper interpretation of the text of the statute. In fact, he reminded the prosecutors that if silence meant anything, it meant consent. In this sense, More

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319 WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 135.
320 Id. at 213.
321 ROPER & HARPSFIELD, supra note 28, at 44.
322 See WEGEMER, PORTRAIT OF COURAGE, supra note 7, at 213.
323 Id. at 211. Robert Bolt dramatized this famous argument in a stirring scene in his play A Man For All Seasons:
Cromwell: [T]his silence betokened—nay, this silence was not silence at all but most eloquent denial.
More: Not so, Master Secretary, the maxim is 'qui tacet consentire.' The maxim of the law is 'Silence gives consent.' If, therefore, you wish to
preached fidelity to the law on the books; Cromwell's characterization of his silence conflicted with legal precedent and was therefore legally unsound. The law, as articulated, is what binds, rather than the caprice of authority.\textsuperscript{324}

More's canons of constitutional analysis are also difficult to know, although at the end of his trial he did shift his defense to two perennial questions that confront both lawyers and judges. First, More questioned the legitimacy of the statute rather than his guilt or innocence by citing contradictions in English law. He claimed that the Act of Succession and the Act of Treason conflicted with other statutes.\textsuperscript{325} They conflicted with legal precedent and legal traditions, including the Magna Carta, which acknowledged religious freedom.\textsuperscript{326} Second, More questioned the legitimacy of the judges' authority:

Forasmuch as, my lord, . . . this indictment is grounded upon an Act of Parliament directly repugnant to the laws of God and his Holy Church, the supreme government of which or of any part whereof, may no temporal Prince presume by any law to take upon him, as rightfully belonging to the See of Rome, a spiritual pre-eminence by the mouth of Our Saviour himself, personally

\begin{flushright}
\textit{This Court must construe according to the law.}
\end{flushright}


\textsuperscript{324} Bolt also communicates this idea, after More's son-in-law, Roper, cannot understand why More will not arrest Richard Rich for perceived immorality:

\begin{quote}
ROPER: Arrest him.
\end{quote}

\begin{flushright}
\textit{MORE: For what?}
\end{flushright}

\begin{flushleft}
ROPER: For libel; he's a spy.
\end{flushleft}

\begin{flushleft}
MARGARET: Father, that man's bad.
MORE: There is no law against that.
ROPER: There is! God's law!
MORE: Then God can arrest him.
\end{flushleft}

\begin{flushleft}
\textit{. . . The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal.}
ROPER: Then you set man's law above God's!
MORE: No, far below; but let me draw your attention to a fact—I'm \textit{not} God.
\end{flushleft}

\textsc{Bolt, supra} note 323, at 65–66.

\textsuperscript{325} \textit{See Wegem\textsuperscript{er}, Portrait of Courage, supra} note 7, at 216.

\textsuperscript{326} \textit{See id.} at 216–17.
present upon the earth, only to St Peter and his successors, . . . it is therefore in law amongst Christian men insufficient to charge any Christian man.\textsuperscript{327}

More points to both divine and natural law and questions the authority of the judges to enforce a statute that contradicted first principles of the Christian faith. This implicitly acknowledges a hierarchy of law. Human statutes—and for that matter constitutions—cannot conflict with divine and moral precepts. The written law cannot transgress the unwritten law made known to humans through reason and revelation. Human law, whether in the form of a constitution or legislative statute, has limits that judges should recognize and acknowledge when deciding cases. Chief Justice Fitz-James did not answer More's challenge to the legitimacy of the statute.\textsuperscript{328}

Interestingly, More also took a stab at the problem of majoritarianism. For More, majorities cannot trump firm legal principles:

If the number of Bishops and Universities [should] be so material as your lordship seemeth to take it, then see I little cause, my lord, why that thing in my conscience should make any change. [I]f I should speak of those which already be dead, of whom many be now Holy Saints in heaven, I am very sure it is the far greater part of them that, all the while they lived, thought in this case that way that I think now.\textsuperscript{329}

Thus, More puts squarely on the table the problem of majoritarianism in political societies founded on the rule of law and constitutions; he acknowledges that majority will cannot trump established legal traditions and principles enshrined in the particular political and legal system.

\textsuperscript{327} ROPER \& HARPSFIELD, supra note 28, at 45 (internal quotation marks omitted).

\textsuperscript{328} In fact, he told his fellow justices: "I must needs [sic] confess that if the Act of Parliament be not unlawful, then is not the indictment in my conscience insufficient." \textit{Id.} at 46. In other words, the Chief Justice obfuscated the question by making his assent to conviction conditional; his fellow justices did not catch his rhetorical trick and merely consented to his position of guilt for More.

\textsuperscript{329} \textit{Id.}
More's writing on the problem of publicly serving in inherently fallible public institutions informs his view on the role of judges in implementing values. In *Utopia*, More writes:

There is another philosophy that is better suited for political action, that takes its cue, adapts itself to the [play] in hand, and acts its part neatly and well. [D]on't arrogantly force strange ideas on people who you [must] know have set their minds on a different course from yours. You must strive to influence policy indirectly, handle the situation[s] tactfully.\^\textsuperscript{330}

This statement is a remarkable expression of the traditional virtue of prudence. More acknowledges the difficulty of seeking to do good when the circumstances appear bad. Practicality, or pragmatism, is the governing standard, while remaining cognizant of the good to be pursued. This is partially why More refused to be polemical upon losing favor with King Henry VIII. Preserving his reputation enabled him to continue to promote peace and justice.\^\textsuperscript{331} More answered the question of obedience to the bad law in the same vein as Aquinas. Judges should defend laws that are good while prudently giving advice to change those that are not.\^\textsuperscript{332} Further, the inefficacy or imperfection of a law is no reason to disobey it. The rule of law should remain for the sake of institutional integrity and stability.\^\textsuperscript{333} In this vein, More would probably caution judges to seek to change the law for the good, within the proper boundaries of their authority, while recognizing the value of prudence.

IV. EVALUATING MORE'S JURISPRUDENCE

More's philosophy of law is fundamentally sound, coherent, and amenable to human communities because its basis is human experience and characteristics of human nature. This makes his jurisprudence attractive from the outset, precisely because it seeks to respond to reality and the realistic demands intrinsic to society. His conception of human nature, which follows Aquinas

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\^\textsuperscript{330} *UTOPIA*, supra note 2, at 25–26.

\^\textsuperscript{331} See WEGEMER, *PORTRAIT OF COURAGE*, supra note 7, at 157.

\^\textsuperscript{332} AQUINAS, *TREATISE ON LAW*, supra note 205, at 55–58, 61 (discussing human obedience to unjust laws and reform of bad laws); see *A THOMAS MORE SOURCEBOOK*, supra note 1, at 257.

\^\textsuperscript{333} Compare *A THOMAS MORE SOURCEBOOK*, supra note 1, at 257, with President Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), available at http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm (discussing the relationship between law and order).
and is based on experience and philosophy, guides his theory of law and its place in society. In other words, understanding reality, in all of its aspects, rather than the pure logic and science of positivism, is the foundation of his philosophy of law. More's jurisprudence is therefore holistic and rightly attuned to the complexities that are present in human communities, including the competing demands of objective notions of morality and communal expectations. It recognizes humans as rational, moral actors and leaves room for morality and law to overlap. Further, by recognizing law as under-determinate, More's understanding provides space for human ingenuity, adaption to changing circumstances, and discretion through character. In this sense, it implicitly prioritizes the virtue of prudence in legal practice. Thus, I find More's philosophy of law properly grounded and preferable, albeit with a few caveats. First, it is difficult to see how More's jurisprudence fits neatly and completely into the modern American political and legal regime. Second, More's system may need to be modified in a significantly pluralistic society.

A. Philosophy of Law in General

1. The Purpose of Life and Jurisprudence

The basis of More's jurisprudence is his conception of human nature and the relationship between human reason and reality. This is a legitimate starting point for a philosophy of law because it seeks to account for all of human experience—both internal and external—in the world. If law is made to govern human behavior it only makes sense for it to grow out of the complexities of human experience. More's conception is primarily that of Aquinas; teleology is the governing principle, with deference to the teachings of Christian theology, either through philosophical speculation or the teachings of Scripture. More's prioritization of developing virtue, both personally and communally through institutions such as the law as a response to the demands of human nature, reflects a proper understanding of the nature of human affairs and the role of law. Indeed, it prioritizes the truths of metaphysics over the demonstrable and visible facts.

334 See supra Part III.C.
born from experience that are the foundation of positive law.\textsuperscript{335} The legitimacy of legal philosophy is contingent on recognizing the limitations of the positive law, which implies something greater; metaphysics, or a philosophy of being, is the only set of truths capable of filling this gap because it is the foundation of all science.\textsuperscript{336}

Put simply, reliance on the natural law, which appears in human nature, keeps objective morality and law related in everyday life. As Rommen states, "the teleological conception, grounded in the metaphysics of being, is therefore the basis of the essential unity of being and oughtness, of being and goodness."\textsuperscript{337} Teleology, grounded in metaphysics, gives individuals, as well as communities, a reason for choosing the rules that they adopt. More's approach to the law recognizes that jurisprudence is a normative science, subject to the highest science of metaphysics.\textsuperscript{338} More knew the limits of the law, as an institution bound by the truths of higher sciences: "[J]urisprudence is a systematic formulation of judgments about the general and particular positive institutions of the legal order: their existence, essence, sources, principles, normative coherence, validity in space and time."\textsuperscript{339}

2. Natural Law and Positive Law

Positive law derives its legitimacy from natural law. This is because the natural law comes from a natural lawgiver, regardless of whether it is the Christian God or not, and is a product of the science of metaphysics, which is the highest science. The simple fact is that reality reflects order. Everything that exists, from inanimate objects to living things like human beings, has a place within the order and therefore a purpose. The purpose of human beings can be deduced from observing

\textsuperscript{335} See ROMMEN, supra note 6, at 141 ("The idea of natural law obtains general acceptance only in the periods when metaphysics, queen of the sciences, is dominant."). Some argue that theoretical and philosophical speculation is not the only path to recognizing the significance of metaphysics. Trial and error through raw human experience informs the science of metaphysics as well.

\textsuperscript{336} See id. at 141–42 ("If moral philosophy and, in moral philosophy and with it, legal philosophy are to have a solid foundation, they must be a continuation of metaphysics."). The philosophy of metaphysics is a topic that is probably beyond the direct scope of this Article.

\textsuperscript{337} Id. at 150.

\textsuperscript{338} See id. at 162.

\textsuperscript{339} Id.
their natural tendencies and needs. The institution of human law, itself a product and response to human nature, should not be any different. As Rommen eloquently summarizes:

[Law, through its inclusion in moral philosophy, was given its metaphysical basis. The science of law received its foundation, the philosophy of law its objects, and positive legal institutions their legitimation in the natural law, which in its turn rested upon social philosophy and hence upon the metaphysical doctrine of man. The oughtness or obligation of legal norms also obtained thereby a material foundation in the essential being of man's social and rational nature.]

Law is one science, incapable of being comprehensive, and incapable of being based entirely on something other than the nature of things. It is under the umbrella of ethics, which is a science dominated by norms founded on reason.

More is correct when he recognizes the legitimacy of law as a function of its relationship to reason. More's understanding leaves room for a system of law called to higher purposes that reflect the demands of human nature. Human reason, tempered by accessible moral norms, judges the goodness and soundness of law because reason can abstract the goodness of things from the start. Reason is constant and unchanging, whereas will or command, which is the foundation of positivism, is subject to the whims of individuals and communities. Founding law on will is like placing family decisions in the hands of a child in a candy shop. Desire and will, because they are not the highest faculties of human nature, cannot be the foundation of the institution that governs human action. Reason, intrinsically connected to purpose, provides a guide for the construction of law: "Without purpose, action would be meaningless; without purpose, the will has nothing to strive for." Put simply it is impossible to avoid the basic fact that "deliberation," which is a function of reason, precedes "decree," which corresponds to the will. Any other type of lawmaking is blind without reference to purpose. This is troubling for numerous reasons, such as the legitimacy of law,

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340 See id. at 164 ("To this complex reality correspond various sciences which concern themselves with man inasmuch as he belongs to these worlds.").
341 Id.
342 See id. at 165.
343 See id. at 172.
344 Id. at 169.
345 See id. at 174.
the stability of a whimsical legal system, and the absence of static norms that bind people together. From an individual perspective, a legal regime characterized by positivism does little to safeguard individuals. In a system dominated by will and command as the foundation of law, the majority is always right. Grounding law in the will makes it impossible to distinguish between might and right. Individuals are prone to become lost in the shuffle. Protecting liberty requires reference to objective goods worthy of free pursuit.

More's understanding of law as a limited institution founded on reason and reflective of human nature leaves ample room for the best of both worlds. It allows metaphysics, and thereby morality, to inform legal norms. “[T]he natural law need not stand diametrically opposed to the positive law, nor has such an opposition always existed in history.” It enables human beings, rational and free, to craft positive laws that correspond to peculiar individual and communal needs. Because More recognizes positive law as under-determinate, his system provides humans significant freedom to craft rules that reflect the needs of the specific community. His philosophy of law encourages prudent adaptation in the field of law. At the same time, the scheme provides a baseline of norms that should not be transgressed and a consistent and coherent framework for human advancement. Order and freedom, wedded, but the product of the good, promote stability and flourishing on both a social and individual level.

The theory that the law is under-determinate leaves ample freedom to human communities. Strict positivism is unnecessary for freedom, and indeed falsely guarantees freedom, within a system of law. This is because “natural law . . . contains but a few universal norms and forgoes deductive extremes.” It does not presume human infallibility and thereby promotes humility,

346 See id. at 177 (“The genius of legal reason cannot, therefore, rest content with self-denying positivism.”). Sheer will was the foundation of law in Nazi Germany. The positive law had no limits because it implicitly denied the reality of an objective ethical order limiting the scope of the law.
347 Id. at 221.
348 Id. at 222. Law is not strictly a product of deduction; it is a matter of judgment—or prudence for that matter—in the same vein as Aquinas' concept of “determinatio.” Legal positivism cannot withstand the deficiencies of human language or the realities of human fallibility, which require adaptation through human discretion.
which in turn generates watchfulness. To be sure, it provides a baseline of principles that serve as starting points for prudential application. But it simultaneously enables and encourages human ingenuity in the face of new problems. It is like a "skeleton law," informing the rightness of laws but not mandating specific positive prescriptions. Therefore, a legal regime that recognizes the legitimacy of unwritten moral norms adequately accommodates the realities of objective morality and the demands of modern freedom. Such a system acknowledges that humans can be lawmakers as long as they make law rightly or in accordance with certain dictates of justice. Indeed, this is how humans work for justice, namely by linking their earthly activities, such as positive lawmaking, with unchanging moral norms. The more the positive law reflects the natural law, and thereby imbues the community with a sense of justice, the less visible natural law must be in society.

More's understanding of law, while defensible philosophically, is also defensible by simply pointing to history. Every single legal regime that has ever existed has pointed to higher norms. Roman Senators, medieval lawyers, Congressmen, members of Parliament, presidents, and judges "continually appeal to morality; and every revolutionary relies upon a moral, higher law of justice in his opposition to the positive law." This raw fact suggests, at the very least, a human inclination to recognize right and wrong when crafting organizing principles of society.

Finally, More's approach to unjust laws is workable because it recognizes the relationship between positive law and order while remaining cognizant of the limitations of positive law. More did not actively seek to uproot the unjust law that cost him his life; instead of running a campaign, he led by example. He was a silent martyr in this sense. He obeyed his conscience on a personal level while simultaneously speaking to thousands through his actions, thereby prudently promoting justice and order.

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349 See id.
350 See id. at 230 ("The natural law calls, then, for the positive law. This explains why the natural law, though it is the enduring basis and norm of the positive law, progressively withdraws, as it were, behind the curtain of the positive law as the latter achieves a continually greater perfection.").
351 See id. at 178.
B. Justice

More's refusal to accept the principle that the "ends justify the means" properly accounts for human dignity. Consequentialism may be used to justify subjective totalitarianism. Its content is subject to the whim of the decision-maker and his or her preferences. This is because it is impossible to quantify, assign value to, and prioritize human goods that are intangible, such as freedom, family, faith, and pleasure, amongst others. Yet this is precisely the aim of consequentialist calculation. Preferring one set of consequences according to efficiency or pleasure depends on the definition assigned to those values, which devolves into subjective preferentialism.

It is impossible to prevent utilitarianism from devolving into a slippery slope because it does not evaluate the nature of acts. In other words, the nature of things and acts do not inform moral calculations. The justice of the pursuit depends on the value placed on the thing by the particular calculator rather than any objective norm. This is why utilitarianism provides solid ground to justify disproportionate punishment or harm to the innocent. On the contrary, evaluating actions according to their intrinsic moral value, as reflected in the nature of things, is the only way to determine the validity of such actions in particular situations. Acting for a good purpose does not make that act good in itself. The goodness of individual acts depends on the nature of those acts, which informs the pursuit of goals in the future. Cognizance of the essence of things—as well as actions—is a proper foundation of justice because it seeks to abstract principles of behavior from the nature of reality rather than subjective goods.

Another problem with consequentialism is there is no distinction between intended and foreseen consequences. The principle of double effect, articulated by natural law theorists, is instructive on the relevance of intentionality to the moral value of certain acts. Catholic act analysis analyzes the nature of the

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352 Even under a consequentialist framework that prioritizes something most consider valuable, like life for example, unnecessary harm can occur. This is because such a scheme cannot articulate a principle to prevent non-lethal harm in the name of preserving life. By what principle will the torturer stop torturing in the name of saving lives? It all depends on the utility of the torture and the torturer's definition of utility on top of that.
act as well as the intentions of the actor when passing moral judgment. Utilitarianism partially ignores the first step and fails to account for the relevance of the second consideration. Hence, there is no limit to the range of actions, provided that subjectively assigned consequences that are pursued are preferable. Thus, in a situation that will inevitably result in two consequences, one good and one bad, Aquinas’ principle of double effect is preferable. It requires a morally good or at least indifferent act to serve as the means as well as no willing of the bad effect. This permits bad consequences some of the time without leading to absurd assignments of culpability. Unlike utilitarianism, it limits the scope of those bad consequences according to the nature of the act involved rather than the wants and desires of the individual actor.

Finally, implicit in the above discussion is the idea that utilitarianism and other consequentialist systems allow for using humans as instruments. This is contrary to human dignity because any given human situation accounts for innumerable interests, tangible and intangible, that might be unjustly lost in the shuffle given the reality of intrinsic moral goods.

C. American Pluralism, the Prioritization of Liberty, and the Need for Dialectic in Law

More’s understanding of law, as a promoter of virtue, does not perfectly correspond with basic American principles. In the United States, the first principle of societal organization is liberty. This flows from the nation’s natural rights and Lockeian roots. Indeed, many of the Founders acknowledged how the primary purpose of government is to secure rights. Rights precede law and consent is the foundation of legitimate authority. However, a simply Lockean perspective is misleading and ignorant of the long-standing influence of Classical and Catholic natural law theory on political society in history. Elements of traditional natural law theory exist in the philosophy characteristic of the American Founding, although

354 See id. at 27 (“Government is instituted to secure rights . . . . The security of rights can be the only legitimate end of political society.”).
they are not central. This is arguably the genius of the American experiment; it wedded a theory that adequately accounts for the often-tenuous relationship between liberty and authority with the practical, political, and historical realities of the American people and continent at the time of the creation of the United States. Although it certainly does not dominate, strains of traditional natural law appear in the origin of the Union, the principle of consent, and the Founders' emphasis on virtue.

Many scholars do not give enough credit to the idea that the formation of the American Republic was somewhat organic and not entirely the product of social contract. Orestes Brownson noted how the Union existed in fact before its legal existence under the Constitution. Indeed, the contents of the Union developed naturally and remained the same even following independence. The Union acted wholly together following independence. Brownson notes how the unwritten constitution, namely the Union which developed organically, is the organizational principle rather than the Constitution written on paper. The Declaration of Independence seemingly expresses the ontological reality of this Union. Without the organic Union there is no Declaration and without the Declaration there is no Constitution. The fact is that the Union was a natural reality regardless of whether it was expressed on paper or not. See generally O.A. BROWNSON, THE AMERICAN REPUBLIC: CONSTITUTION, TENDENCIES, AND DESTINY (1866). President Lincoln, during the Civil War, argued that the reality of the Union, expressed but not made by the Declaration of Independence, legitimized the Constitution. See HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 39 (2000).

While Founding-era philosophy consistently speaks of natural rights, one should remember that these natural rights are still the offspring of the "law of nature." It is true that the Founders recognize rights as foundational to their political theory; but these rights are only part of the foundation. Bernard Bailyn notes that the American experiment was a combination of liberty and the glorification of human nature. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 20 (1992). Arguably, the Constitution itself reflects the idea that rights are only part of Founding philosophy; it should be remembered that the first draft of the Constitution consisted entirely of institutional organization. The Bill of Rights was only added after the fact. See id. at 67–68. Hence, it is plausible to argue that the American regime wedds liberty with higher principles of law. It seeks to resolve the tension between freedom and authority perceived by social contract theorists by recognizing the relationship between liberty and governmental power. This allows it to at least reflect traditional natural law, which recognizes the place of liberty within a larger political philosophy and at the service of objective norms that are the real foundation of law.

Recognizing the principle of consent as an element of the foundation of legitimate authority is not entirely antithetical to traditional understandings of law and authority. This is because the natural law recognizes human equality as an organizing principle; numerous Catholic natural law theorists recognize the effect of consent on the moral legitimacy of authority. See JOHN A. RYAN & FRANCIS J. BOLAND, CATHOLIC PRINCIPLES OF POLITICS 75 (1948). The blunt reality is that
While a product of the natural law rather than rights tradition, More's understanding of human nature that acknowledges human equality at least ensures that his philosophy is not diametrically opposed to the founding principles of the United States and democratic regimes in general. This is because it recognizes the significance of human reason for ordering affairs. Indeed, an objective valuing of human nature is at the core of the American creed: The principle of equality, while mostly a product of Locke's natural rights tradition, is the foundation of the American legal regime.

The equality principle is one of the main reasons that a system as pluralistic as the United States' can even work. Pluralism, expressed through religious preference, differing belief systems, cultural heritage, ethnicity, and other sources is often perceived as a barrier to a working, coherent, peaceful, and legitimate legal regime. This is because it enables strong conflicts between values. But More's conception of law probably can resolve this difficulty because it grounds law in philosophy, accessible through reason reflecting on human nature that is objective and equal all around. Indeed, the Thomistic conception of law encourages dialectic; the construction of law grows from deliberation and debate. It encourages bringing diverse human experiences to the table to inform positive legal norms deduced from objective moral truths.

More's understanding of law, while not prioritizing liberty, recognizes the significance of liberty for the legitimacy of law. He recognizes that the law cannot account for every situation. This implies a baseline of freedom in everyday human affairs. The major source of tension between the American presumption of liberty and More's philosophy of law is the foundation of consent and cooperation are necessary for communities to exist. This is consonant with More's understanding of human nature.

558 Many Founders shied away from the Lockean idea that government had no role in forming the character of citizens. See BAILY, supra note 356, at 83–84.

559 See Marcello Pera, Relativism, Christianity, and the West, in WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM 1, 26 (Michael F. Moore, trans., 2006) ("[D]emocracy places at its very foundations the values of the individual, dignity, equality, and respect. Deny these values and you deny democracy.").

560 See ROMMEN, supra note 6, at 219–33.

binding norms. By prioritizing liberty, the American regime strongly emphasizes consent rather than intrinsic goodness as the basis of legitimate authority. Whereas More reflects on human nature to determine binding norms, the American legal system often defers to contractual principles—macro and micro, formal and informal—to create rules. However, this tension is not impossible to resolve as long as consent is not the preeminent value. There are plenty of examples in the current legal system demonstrating this point. For example, consent is not a defense to certain tort and criminal actions. Individuals do not have absolute rights to harm themselves. Hence, More’s belief in the authority of unarticulated norms is not entirely inconsistent with the American way of doing things. The American political regime just develops from the ground up rather than from the top down. In this sense it prioritizes a sort of reverse prudence.

D. The Role of Judges in Implementing Values

Implementing values is inherently part of the judicial function. Every time a judge decides a case, whether through statutory interpretation, appeals to the principle of stare decisis, or some other rule of decision, the judge impliedly recognizes legal norms. These principles can be either written or unwritten and may not even be expressed. But decision, based on deliberation, prioritizes some set of values. The expression of values is intrinsically related to choice conveying preference. Therefore, it is impossible to prevent judges from implementing values.

But this reality of the judicial function provokes two significant questions. First, it is unclear whether the scope of implementing values should be restricted. In other words,

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363 Whereas More’s philosophy looks to the general moral principle and seeks to apply it to the particular situation at hand in the form of law, the American system creates general principles and laws out of particular situations. This is partially due to the fact that the American regime is simply more democratic and recognizes “We the People” as its first principle. Nevertheless, it is interesting that each philosophy is the product of reflection on natural human experience, albeit in reverse ways.

364 See FREEMAN, supra note 188, at 1547 (noting how judges make law regardless of the method of decision).

should judges only implement values to a certain degree given their unique role in formulating rules of law? The second question, intertwined with the first, focuses less on the scope of the judicial function and more on its content. Indeed, should judges only emphasize certain values within the system that they are operating? For example, many of More's decisions, in which he referred to natural principles of justice, occurred in courts of equity. In contrast, Supreme Court justices decide cases within a constitutional framework premised on democratic values and principles of liberty.

The Constitution of the United States, and the general principles underlying it, inform the legal system and provide guidance for answering the first question. The primacy of the Constitution is simultaneously an unavoidable fact and legal first principle. The Constitution divides government into three spheres, and reflecting most state political systems, places official lawmaker power in the hands of the legislature. Legislative action is a function of direct and indirect democracy; elections, procedural and substantive votes, hearings, and other mechanisms result in democratic outcomes. Similarly, judges are part of this democratic system, although their role is different. Judges interpret the laws that come before them in individual cases. They cannot avoid "deciding" the meaning of law. Judicial review is inherent to the judicial function. But the judicial function is only one aspect of a three-way street guiding the rule of law.

The second question cannot be entirely separated from the first. Judges are bound in the scope of their role as well as the content they articulate precisely because they are only one part of a broader constitutional framework that is the product of the

366 U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").
367 Breyer, supra note 365, at 20–22.
369 The legislature legislates, the executive enforces, and the judiciary interprets the law. See Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law.").
people, who are sovereign in America.\textsuperscript{370} Thus, the values that emanate from the people, expressed in written format in the Constitution, and in unwritten format through collective political and social democratic action, bind judges and inform their interpretative methods. The values that judges implement spring from the values that are part of the legal system itself, expressed in documents like the Constitution and confirmed by the democratic actors that author the law.\textsuperscript{371} These values are objective once expressed but remain open to change given the nature of democracy. Their objectivity enables impartiality in judicial functioning, requires a great deal of prudence, and provides basis for judicial restraint.\textsuperscript{372} But because judges are actors within a democratic system, they are democratic actors too. They must remain cognizant of the democratic values that underlie the system in order to contribute to making law legitimate and acceptable to society.

The most visible and popular example of how judges implement values is when they engage in statutory interpretation. Statutory interpretation requires reference to multiple interpretative tools, including reference to text, purpose, tradition, \textit{stare decisis}, consequences, and outcomes, to name a few. While not exhaustive, the most visible dichotomy is between those who espouse textualism and those who champion the significance of context, among other tools. Each method results in the implementation of values. Textualists impliedly codify definitions and meanings of words based on first principles of language; judges who recognize the relevance of purpose and context emphasize underlying values expressed democratically or in some other political fashion. On the surface, strict textual interpretation appears to favor stability, which is a value itself. But logic is not exhaustive, even if it comes through strict

\textsuperscript{370} The Constitution is a product of "We, the People." See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326–29 (1819) (discussing how the Constitution emanated from a social contract with the people rather than the states separately).

\textsuperscript{371} See Breyer, supra note 365, at 27 (noting how judges can pay attention to a "document’s democratic theme"). Justice Breyer writes how "so might a judge view the Constitution through a more democratic lens." Id.

\textsuperscript{372} See id. at 107 (stating how the American tradition, which he believes prioritizes “active liberty,” “encompasses a particular view of democracy” that calls for judicial restraint).

\textsuperscript{373} See id. at 119 ("[S]ubjectivity is a two-edged criticism, which the literalist himself cannot escape.").
textualism. Ironically, given the diversity of human experience, strict adherence to logic will likely result in instability and absurdity. Judges should be aware of this reality when acting judicially. Further, contextualism is not devoid of stability or totally subject to caprice. This is because reference to purposes and values that are simultaneously bound and informed by other more definitive and authoritative democratic actors restrict the discretion of the judge applying such principles.  

Judges should be cognizant of purposes and consequences when making decisions. This stems from the fact that law is under-determinate. That fact is unavoidable: The law cannot account for every situation and fact pattern. Human experience is too unique. But human communities that organize themselves according to certain values provide decision-makers with guidance to prudently apply the unwritten norms to the novel situations that the law does not reach. Hence, a jurisprudence that is cognizant of the virtue of prudence is preferable, especially with specific reference to the values expressed democratically by the sovereign. Legal development requires human actors that are aware of how experience informs values and that are willing to apply those values in concrete situations. This is what More did, albeit in a different legal system, and judges today are capable of doing it too. To be sure, judges do not and should not have unfettered discretion; instead, they must seek to prudently apply the norms and values approved by other democratic actors within the same system and through other processes. Because judges are part of that system, they are

374 For example, Justice Breyer considers the idea of "active liberty," informed by history and tradition, the dominant value in the American legal system. The merit of his prioritization of liberty is beyond the scope of this Article. With that said, I am partial to a presumption of liberty, remaining cognizant of the fact that there are competing definitions of that term itself. Aquinas' understanding of liberty, informed by theology, is radically different from John Stuart Mill's principles. Fortunately, the democratic nature of decision-making in the United States allows judges to articulate the definition of liberty that is most consistent with the expressions of democratic actors over time, rather than declaring what the term means itself. In other words, because Americans choose to live in a regime that allows "the people" to decide the largest and most significant questions, judges simply have to figure out what "the people" are saying. To be sure, this is no simple task, but certainly less audacious. Judges are not required to be philosophers; they just need to be aware of philosophy and politics in order to properly execute their role in the implementation of values. This task in a democratic-oriented regime like the United States is even more interesting when one considers how our constitutional framework recognizes the legitimacy of individual conscience.
democratic actors too, and hence inherently competent and required to implement values. But the pervasiveness of those values deters subjective judicial decision-making.375

CONCLUSION

Thomas More’s legal career, occurring at the time of royal upheaval within the regime of King Henry VIII, reflects the contrast between traditional and modern jurisprudence. The philosophical teachings of Thomas Aquinas serve as the roots of More’s philosophy of law; More’s approach to life, virtue, education, justice, and the purpose of law matches Aquinas on almost every level.376 His jurisprudence, counseling the significance of the virtue of prudence in public affairs, contrasts sharply with intellectual conditions in which he lived as well as modern jurisprudence. More recognized human law as underdeterminate and limited in scope whereas modern positivism rejects this approach. More’s conception, leaving room for human action conducted prudently, has no place in modern philosophies of law, which seek to fill gaps with logic and empiricism while simultaneously putting natural law to death.

The natural law tradition pervades More’s jurisprudence. Ethics and morality inform, guide, and measure the legitimacy of positive law. The positive law should reflect and serve the natural law. As a practicing Catholic, More also viewed eternal and divine law as binding.377 An objective notion of good, based on human nature, also informed human law. These ideas contrast strongly with Locke, Hume, Bentham, and other modern philosophers who recognized other first principles as the foundation of the law, such as freedom, utility, and economics.378 These modern jurisprudential perspectives result in the permanent separation of law and morals in favor of empirical pragmatism. The law is less holistic and primarily reactive to human behavior as observed by scientists. Hence, More’s notion of prudence, namely rightly applying the right principles in a

375 See BREYER, supra note 365, at 114 (noting how “safeguards of objectivity” remain even when judges account for purpose in legal interpretation).
376 See supra Parts II.C, III.A.
377 See supra Part II.B.
378 See supra Part III.B.
particular situation, lost its relevance with the onset of modern jurisprudential thinking. Strict logic, rather than prudential judgment, became primary.

More's philosophy of law leaves room for human freedom, albeit a different understanding of freedom than modern philosophy. Modern notions of freedom, growing out of the Lockean natural rights tradition, and fundamentally atomistic, serve as the foundation of present-day political regimes, such as the United States. At the same time, elements of the natural law tradition remain, although they are by no means primary or central to the legal system.

But this does not mean that More's legal career and philosophy of law are not worthy of study. The persistent reformulation of the natural law tradition, reflected in thinkers like Finnis, remain in dialogue with legal thinkers like More. More's career as a judge, pointing to theories of natural justice while deciding cases, informs analysis of the role of modern judges. The timeless questions surrounding the role of judges, especially in a democratic republic, still exist. More's life of prudence serves as one answer to those questions and therefore can provide insight into modern jurisprudential inquiries. More may have been a man "fundamentally...at odds with his age." 379 Eighty years ago, G.K. Chesterton stated that More was "more important at this moment than at any moment since his death, even perhaps the great moment of his dying; but he is not quite so important as he will be in about a hundred years time." 380 The same could be said right now. The depth and breadth of More's legal career, philosophically and practically born out in his life and death, reflects and contains every relevant inquiry for the study of law itself. And that is more than enough reason to study More in every age to come.

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379 Wilson, supra note 5, at 235.