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CONSTITUTIONAL UTOPIANISM: AN EXERCISE IN LAW AND LITERATURE

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I. INTRODUCTION--TWO STORIES ABOUT UTOPIA

Having just read Sir Thomas More's *Utopia* for the first time, I find myself preoccupied with two entirely different kinds of questions about this challenging work.

First, my question about constitutional utopianism is the kind of question I might be expected to find interesting, given my background and professional focus. I spend a lot of time thinking about the United States Constitution, both in my teaching and writing, and in my second life as President of the American Civil Liberties Union (ACLU). So while a historian might focus on the events in sixteenth-century England leading More to write *Utopia*, it is not surprising that More's construction of his Utopia makes me think of the construction of the United States of America. I am drawn by the differences between the Utopian Constitution and our own, and by the challenge of examining the concept of constitutional utopianism. A Constitution embodies a society's chosen ideals and acts upon them by creating a governmental structure believed to be conducive to those ideals. This is what More was offering in *Utopia* too: the construction of a society--albeit an imaginary society--built on a choice of ideals.¹

But before discussing that comparison, I will reveal that another part of my background is that I have taught and sometimes written about law and literature.

That general subject heading covers a wealth of different kinds of inquiries I find interesting and worthwhile. For example, legal writing and literary writing have quite a number of features in common: strategic use of techniques like

organization and diction, reliance on storytelling, attention to point of view.² Studying law and literature together enables lawyers to learn more about the uses of rhetoric, narrative, and voice than we could if we only studied forms of legal writing like judicial opinions and briefs.

Law and literature studies can also highlight differences between the two genres. One much mooted question, for example, is a meta-question: to what extent are literary theorists' analysis of approaches to interpretation of literary text also useful in deciding how to interpret legal texts?³

I will begin this article on the meta-level, by discussing two law and literature topics. First, looking at *Utopia* as a work of literature, I will discuss Sir Thomas More as a writer (as opposed to a theorist), examining how he used the techniques of fiction writing to serve his purposes. Second, I will compare the uses of fiction in *Utopia* with another great literary work I have recently studied in depth, Theodore Dreiser's novel, *An American Tragedy*. This section invites comparison of the utility of fiction and non-fiction writing in examining moral, legal, or political questions, and reflects on the nature of literary truth.

In Part II, I will look at the society More imagines and compare the constitution of Utopia with the Constitution of the United States. Here I will discuss constitutional idealism, and the particular ideals prioritized by the Utopian and American constitutions.

*95 II. LAW AND LITERATURE META-STORIES

A. Utopia as a Literary Endeavor

Ever since *Utopia* was written, readers have debated three basic questions about the society More's traveler describes: (1) Did More believe that the Utopia he designed is ideal, or "utopian" as we now understand that term?; (2) Is this society indeed ideal?; and (3) Is it realistic? Could this Utopia exist in the real world?

Looking at the fact that *Utopia* was written as a work of fiction, and at how it was written, helps to formulate an answer to the first question.

My answer is that *Utopia* does not tell us very much about More's own opinion of Utopian society. One advantage--and perhaps a central purpose--of writing *Utopia* as a fiction rather than as a tract was that More could easily avoid revealing and perhaps even formulating his own views.

Most of *Utopia* consists of the narrative of Raphael Hythlodæus, in the original Latin.⁴ Raphael offers (1) a detailed description of an egalitarian society he claims to have observed; (2) his own testimony that this society is a great success, resulting in a high degree of universal happiness; and (3) attempts at persuasion, explaining why the structure of this novel society, although unfamiliar to his listeners, would indeed create an ideal society.⁵ There are few Utopian customs Raphael does not wholeheartedly advocate.⁶ One practice which bemuses him is a marriage ritual in which the bride and groom observe one another naked before entering marriage--a kind of truth in advertising to prevent buyer's remorse.⁷ But on the whole, he presents Utopian society as essentially perfect despite his reservations about a few particulars.⁸

But is Raphael speaking for More in concluding that such a society would be ideal, or at least highly desirable?

More gives us clues, first, in the name he gives his narrator--although all these clues turn out to be fairly inconclusive because they point in both directions.

Raphael's first name establishes his connection with Christianity. In Christian tradition, Raphael, whose name is Hebrew for "God has healed,"⁹ is a healing angel. But the name comes with an additional connotation. In the apocryphal Book of Tobit, the Archangel Raphael leads Tobit's son Tobias on a *96 journey that results in curing his blindness.¹⁰ So this part of our narrator's name suggests that Raphael may be curing readers of political blindness--a very affirmative view of his credibility.

But this positive endorsement is immediately counterbalanced with a negative. More created Raphael's last name from Greek words meaning "peddler," or "dispenser" of nonsense.¹¹ To remind non-Greek speakers of this meaning, translator Paul Turner renders Raphael's last name as "Nonsenso."¹² By choosing this belittling name, did More mean simply to remind us that Utopia is imaginary? Or did he intend to undermine this character's credibility by warning us not to trust travelers who tell tales? Might the last name of the narrator be More's subtle way of hinting that he regards Utopia as nonsense, as a satire rather than a thought experiment about the nature of ideal society?

My own view is that the first and last names were intended to neutralize each other, in a manner that may not be apparent to modern readers when the last name is translated as the heavy-handed "Nonsenso," and "Raphael" may not impress the reader as anything other than a familiar first name. Names are often telling, but the combination of Raphael's first and last names may tell us only that More wanted to have it both ways.

The book contains very few other clues about More's own views. There is little debate within the book; most of the pages are given over to Raphael's account.¹³ One exception to this generalization is that early in Raphael's exposition, "More," as a character in the book, questions the precepts of communism, protesting that common ownership of all things would likely destroy the incentive to work.¹⁴ But is that the view of More the author, or is the objection simply a rhetorical device, perhaps intended to prevent the reader from too easily assuming that More was actually advocating the political system of Utopia? And despite this initial objection to a radically unfamiliar system, might either the real or fictional More have been satisfied by Raphael's lengthy response to this objection (beginning "You're bound to take that view, for you simply can't imagine what it would be like--not accurately, at any rate.")?¹⁵

More, the author, may be in dialogue with himself, attempting to imagine and create a full portrait of a communist society in order to decide what he thought of it. But even assuming that More had decided what he thought of Utopia,¹⁶ I don't think he intended to present his own views by putting them into the mouth of Raphael or even, I think, of his own avatar.

*97 Sir Thomas More does seem to have his own concerns about inequality.¹⁷ Even before Raphael launches into his description of Utopian society, the conversation among the characters in the book focuses on several evil consequences of economic inequality in sixteenth-century Europe,¹⁸ including capital punishment of thieves, and Enclosure Acts providing exclusive pasturage for sheep at the cost of preventing peasants and tenants from making a living.¹⁹

At the end of the book, More gives us another example of what seems to be the ambivalence reflected in the naming of his narrator. After Raphael concludes his narrative, "More" reenters the conversation, saying that he has many questions about Utopia that he would want to discuss on another occasion. He attributes his reluctance to continue the conversation to the considerate thought that Raphael (as opposed to the author of the book?) must be tired after his

lengthy disquisition.²⁰ The author evidently prefers to let his readers play out their own debates rather than trying to script all the questions and responses. Evidently by design, his book raises many more questions than it answers.

And most interestingly, “More” explicitly hedges his bets. As the book ends, “More” says, on the one hand, “I cannot agree with everything that he said.”²¹ But on the other hand, “there are many features in the Utopian Republic which I should like--though I hardly expect--to see adopted in Europe.”²² So “More” does not agree that everything Raphael has described is ideal, but neither does he think that it is all nonsense--despite the playful last name conferred on his narrator. But what features does “More” approve? Does he accept the essential notion of communal living while perhaps rejecting some details? Or does he view Utopian society as too extreme a version of equality, with a few exceptions? Does the fact that “More,” who does not often speak in the book, uses one of his rare interjections to object to the basic concept of communism early on suggest that we should incline toward the latter view?

I think these few clues in the book, the narrator's name, the occasional interjections, the use of a character named for himself, do not provide a sufficient basis for discerning Sir Thomas More's actual attitude toward his Utopia. Writing *Utopia* as fiction rather than as political philosophy, More successfully distances himself from endorsing either the ideals posited or the speculation about how well a society with such a charter would work. Like William Shakespeare or Herman Melville, More uses his characters, including “More,” to present a variety of arguments, and then leaves the reader to decide.

There is one other place where “More” explicitly disagrees with Raphael, and I think it is telling that More included an explicit comment on this subject. *98 When “More” suggests that Raphael should work in the service of a king and share his knowledge and talents, Raphael protests that kings are more interested in war than in political philosophy or policy.²³ Given More's fraught and ultimately fatal relationship with his own king, it is understandable that More thought it prudent not just to distance himself from Raphael's anti-royalist views on this subject through the deniability of the fiction writer, but to register opposition to such disrespectful talk for the record. And perhaps he meant to leave it to more sophisticated readers to wonder whether it was only “More” rather than More who vouched for the wisdom of (at least some) kings--and why More included this conversation at all.

We can't be sure whether or not Sir Thomas More knew what he thought of communistic society,²⁴ but he certainly knew how to use the conventions of fiction to his advantage.

B. An American Tragedy and Literary Truth

Another comparison of law and literature I find fascinating is the very different capabilities of the two genres in framing and examining significant legal, political, or social issues. To explain what I mean by this, I will offer a different work as a model of how I think this kind of connection can work at a meta-level, as well as a very practical level.

For these purposes, I have chosen Theodore Dreiser's great novel, *An American Tragedy*, first, because it is one I have recently spent time analyzing on a meta-level, and second, because my analysis led me to a perception about law and literature which I have been trying to apply to *Utopia*. Finally, as I will discuss after talking about *Utopia*, the world of Dreiser's novel provides a fascinating counterpoint to More's imagined society.

At the invitation of the New York Courts Historical Society, I have both spoken and written about Dreiser's novel and its chief legal prototype, the New York homicide trial of Chester Gillette, a little over a century ago.²⁵ Dreiser borrowed many elements of Chester Gillette's story without modification: the basic triangle of poor boy, poor girl, rich girl; an

incident in a rowboat ending in the death of the poor girl, who had become pregnant; many aspects of Gillette's trial for homicide; and love letters written by the poor girl, reproduced word for word in the novel.²⁶

But Dreiser also varied aspects of the story to prod his readers to consider more questions about the consequences of inequality in American society than observers of the Gillette trial would have been likely to ask. For example, *99 Chester Gillette had limited means and could not afford to hire a lawyer to defend him in his murder trial.²⁷ In the actual case, New York State assigned prominent attorneys to represent Chester without fee; in the novel, the protagonist's rich uncle hires defense counsel and thus is able to call the shots at trial, to the defendant's disadvantage.²⁸ Readers are invited to be indignant at this highly visible manifestation of how poverty affected the fictional defendant's life and even his trial--as it did the life and trial of Chester Gillette, albeit in ways that were less superficially apparent.²⁹ Dreiser also spends hundreds of pages before the trial portraying his defendant's early life and influences, history no real life jury would have had.³⁰

In addition to using fiction to provide more context and to draw attention to deep questions about equality and justice lying beneath the sensationalistic story, Dreiser used a unique capability of fiction in offering his readers "true" answers to the difficult but critical factual questions confronting the jury at trial: was the young woman's death actually a homicide or an accident? Did the defendant intend to kill her? Was he telling the jury the truth in his account of what happened?

I was surprised by my realization that there is absolute truth in literature in a way that we cannot hope to achieve in our practice of law.

In American criminal law, the key to culpability in a homicide prosecution is the defendant's state of mind. But the only person who truly knows what was in the defendant's mind, the defendant him or herself, has a constitutional right to remain silent.³¹ A defendant who decides to testify has a very powerful self-interest in telling a story of innocence whether it is true or not. And the deceased, often the only other person who actually knew what happened in a homicide case, is not available to testify. So in the most serious prosecutions, the jury may have only the least reliable forms of evidence--circumstantial evidence and the evidence of witnesses who could not see what happened in the rowboat or in the defendant's mind.

In a novel, the author can take us directly into the rowboat and into the defendant's mind and show us exactly what was happening there in real time. A real-life trial jury may reach a mistaken conclusion about what happened or what the defendant intended. A jury of readers, however, has access to what is indisputably true in the world of the novel.³² Counterintuitively, truth is more reliable in fiction than in real world trials. And so Dreiser could use his own construction of what happened on the lake and in his defendant's mind to put the *100 justice system on trial. As in a scientific experiment, he was able to make truth a constant and thus position readers to judge whether the trial reached the right result.³³

Some readers of *An American Tragedy* will resist Dreiser's attempt to turn the spotlight from a particular criminal defendant to the society that formed him; others will be influenced by Dreiser's perspective and perhaps develop or deepen a desire to change the law or the society that bred this tragedy. But the conventions of fiction have the power to influence our real-world views through a kind of transference.

C. Utopia and Truth

Sir Thomas More's *Utopia* presents us with a similar opportunity to compare the advantages and disadvantages of a literary world over a real world when it comes to considering deep questions about our ideals and how we should structure our society--a law and literature meta-level.

How can reading about a fictional Utopia help us to evaluate the choices made in structuring that society?

More's portrait gives us a basis for imagining what it might be like to live in such a culture. But does it help to answer the second and third questions I listed above: Is this society indeed ideal? And is it realistic? Could this Utopia exist in the real world?

Dreiser posited truth to advance our insights about justice. Is More's decision to have Raphael attest to the happiness of Utopians anything like Dreiser telling us what actually happened in the rowboat?

In some respects, it does not really matter for the reader's purposes if Raphael is lying--for example, if he is lying about the very existence of Utopia. The first aspect of his narrative, his description of the workings of a communal society, is still useful to us in considering whether we think a society so designed would be ideal--just as useful as More's decision to write this fiction.

But Raphael's veracity as a character does matter when it comes to our acceptance of the features of his narrative that are more evaluative than descriptive: his observation that Utopian society has led to happiness and his attempt to persuade listeners to accept his evaluation.³⁴ According to Raphael, the essential feature of this society, equalizing labor and individual wealth, has led to "not only the best country in the world, but the only one that has any right to call itself a republic."³⁵ He assures us that he knows that Utopian society is ideal not only in its choices of values, but also in its results.³⁶

*101 But here we encounter what seems to be a limitation of literature. "More" and other characters within the world of the book might be persuaded by Raphael's eyewitness testimony if they judge him to be credible and convincing--the Archangel winning out over Nonsense and curing their blindness by showing them how well such a society could actually work. But, first of all, More does not give Raphael that advantage because he does not tell us whether or not the characters in the book find Raphael credible.³⁷ After hearing Raphael out, "More" expresses some ambivalence at the end of the book; the other listeners do not express their views at all.³⁸

More importantly, we readers are not likely to take the word of a fictional character that this society would work, even if other fictional characters were portrayed as believing him. It is one thing to consider a model presented by a fictional character; it is quite another to trust that character (or his author) to make judgments on our behalf.

At the end of my Dreiser article, I observed that literary truth ("knowing" what actually happened in the rowboat) is a more reliable basis than actual legal proceedings for forming judgments about the ideal criminal justice system.³⁹ But designated truth in literature (the Utopians were all very happy) seems much less helpful here in deciding what government structures are ideal. I am not sure that I can explain why there is such a difference.

At the meta-level, is it possible to generalize about the nature and utility of literary truth in thought experiments?

III. THE IDEAL IN LITERATURE AND IN LAW

Regardless of what More might have believed, and regardless of literary conventions, how might we approach the second question listed above: whether *we* should believe that Utopian society as described in the book is ideal?

A. Utopian Constitution Ideals

“Utopia,” a word More derived from the Greek for “no-place,” has come to signify any “imagined place or state of things in which everything is perfect.”⁴⁰ But More was not trying to imagine an Eden or Shangri-La. Bad weather, war, and mortality all exist within his imagined society.⁴¹ More's Utopia, a political thought experiment, is better defined more narrowly as “an imaginary place in *102 which the government, laws, and social conditions are perfect.”⁴² Note that this contemporary definition assumes a positive answer to the question of whether the Utopia prototype is itself a model of political perfection.

In reflecting on the ideal society, we are confronted from the very outset with the question of whether defining perfection is an inherently subjective task. Depending on how values are prioritized, might one person's utopia be another's dystopia? If it were possible, we might all choose to live in a society that is both free and equal. But to the extent we need to choose between those ideals, would we all make the same choice?

In the society offered by More's book as a model, at least arguendo, the driving ideal is equality.⁴³ Raphael's signature indictment of non-Utopian laws favoring the one percent seems uncannily predictive of the presidential campaign of Bernie Sanders, half a millennium later.⁴⁴

In fact, when I consider any social system that prevails in the modern world, I can't, so help me God, see it as anything but a conspiracy of the rich to advance their own interests under the pretext of organizing society. They think up all sorts of tricks and dodges, first for keeping their ill-gotten gains, and then for exploiting the poor by buying their labor as cheaply as possible. Once the rich have decided that these tricks and dodges shall be officially recognized by society--which includes the poor as well as the rich--they acquire the force of law. Thus an unscrupulous minority is led by its insatiable greed to monopolize what would have been enough to supply the needs of the whole population.⁴⁵

By eliminating money and the need for money, Raphael tells us that Utopia also eliminates criminal behavior like fraud, theft, etc., as well as anxiety, overwork, and even poverty itself--all said to be caused by an unnatural greed for possessions.⁴⁶

A connection Dreiser would have appreciated is drawn between economic inequality and crime, condemning the practice of creating thieves (by impoverishing people) and then punishing them for taking inevitable action to sustain themselves.⁴⁷ We are currently engaging in a comparable conversation about whether to reform the American criminal justice system in the interests of equality, although it has taken the United States a long time to come to terms *103 with the connection between poverty and punishment More found unsettling 500 years ago.⁴⁸

1. Equality in Utopia

I will begin my comparison of Utopian and American society by outlining what I see as the essential features of the constitutional structure of Utopian society. (Another of my law and literature tenets is that summaries like the one to

follow are also literary creations, as my own values and experience will inevitably influence what I notice and how I describe what seems important to me about this society.)

Utopia is designed to equalize access to material goods and to equalize labor. All provisions are shared;⁴⁹ all have equal and adequate access to material goods as well as to health care;⁵⁰ everyone does a fair share of work.⁵¹ There is no value placed on indicators of wealth like fancy clothing, gold, or jewels.⁵² Everyone dresses alike, in simple clothing.⁵³ In fact, the people are taught to hold materials like gold and silver in contempt--gold is used for chamber pots or chains on slaves and criminals; children are taught that wanting jewels is childish.⁵⁴ Money only matters in case of war--either to spend in a manner that will prevent war or to hire mercenaries in order to spare the lives of Utopians.⁵⁵

Utopians believe that it would be ridiculous to worship rich men⁵⁶ or to engage in demeaning gestures like bending one's knee to another.⁵⁷ In Raphael's account, other nations believe that the rich are superior only because of an "idiotic conspiracy" inducing them to desire things which are not really inherently pleasurable (like fancy clothing).⁵⁸ Freed from vanity and greed, Utopians achieve an almost classless, altruistic society. "Elsewhere, people are always talking about the public interest, but all they really care about is private *104 property. In Utopia, where there's no private property, people take their duty to the public seriously."⁵⁹

Society is also structured so as to avoid creating elite classes based on factors other than wealth. There is no professional military class. The military relies on volunteers.⁶⁰ And there are no lawyers in Utopia.⁶¹ (One might cynically ask, what would be the point of being a lawyer if acquisition of wealth is out of the question?) In court cases, everyone appears *pro se*. One reason lawyers are not needed is that there are so few laws:

[O]ne of their great complaints against other countries is that, although they've already got books and books of laws and interpretation of laws, they never seem to have enough. For, according to Utopians, it's quite unjust for anyone to be bound by a legal code which is too long for an ordinary person to read right through, or too difficult for him to understand.⁶²

Because the laws are simple, everyone is a legal expert and the legal system is freed of "the sort of lies that one learns from lawyers."⁶³

Priests, on the other hand, are treated as special.⁶⁴ While More was able to liberate his sixteenth-century imagination in many respects, his religious identity seems to have remained as a filter for his views.

The Utopian Constitution strives for political as well as economic equality. There is a multi-tiered system of democratically elected representatives, very different from the European regimes More knew. Wealth does not influence elections, as money does not exist and material goods are valueless. There is no campaigning for public office. In fact, anyone who campaigns is permanently disqualified from holding office.⁶⁵ (While it may be a serious challenge for us as lawyers and law students to entertain the possibility that a lawyerless society might be ideal, in these days of non-stop presidential campaigning, the Utopian version of politics might readily be viewed as a paradise.)

*105 More's society, envisioned during a period when monarchy reigned, presents the civic virtue of ordinary citizens as a worthy substitute for sixteenth-century social stratification.

Utopian society does deviate in some respects from our contemporary understanding of equality. Slavery is accepted,⁶⁶ although Utopians strive to treat conquered natives as equals⁶⁷ and do not enslave prisoners of war (as opposed to those captured on a battlefield).⁶⁸ Utopians convicted of crimes may be punished by enslavement (said to be preferable to capital punishment.)⁶⁹ And foreigners may volunteer to be slaves in Utopia because that life is so much better than their lives at home.⁷⁰

Feminism has not come to Utopia: “Wives are subordinated to their husbands.”⁷¹ But there are some interesting nods to gender equality, for a sixteenth-century vision. Women farm; women are eligible to become priests (although that rarely happens);⁷² and women may choose to accompany their husbands to the battlefield⁷³ (another form of equality American society has only recently begun to take seriously).⁷⁴

Utopians resist age discrimination, showing sympathy to older women (“in no circumstances can a man divorce his wife simply because, through no fault of her own, she has deteriorated physically”)⁷⁵ and respecting their elders.⁷⁶ Utopians even avoid a kind of discrimination that has only recently gained a name in our society: “lookism,” defined as “prejudice or discrimination based on physical appearance and especially physical appearance believed to fall short of societal notions of beauty.”⁷⁷

2. Liberty in Utopia

More also tells us about fundamental decisions regarding the nature of liberty in Utopian society.

***106** Liberty is not as highly valued as equality. Where you live, what time you will have dinner, what you will wear, how you raise your children, are not decisions to be made by individuals. Everyone follows the same schedule: a six-hour workday (three hours in the morning, lunch, then three hours in the afternoon), bedtime at eight, followed by eight hours of sleep.⁷⁸ Structured families, or clans, rather than the individual, are the basic units of society--as subdivisions of the towns.⁷⁹ Most children enter the same trade as their parents, although a child who “fancies some other trade” may be adopted into a different family.⁸⁰ Families may be moved to a different town in order to equalize population.⁸¹

This family structure is enforced by strict criminal laws--one of the few areas where public criminal law is employed instead of leaving issues of punishment to the family. Men cannot travel without permission--from an official as well as from their wives.⁸² Being in the wrong place without a passport is considered desertion and is punishable severely; a second offense is punished by enslavement.⁸³ (Of course, the fact that all of the towns are identically structured reduces the incentive to travel.)⁸⁴ Premarital sex is punished harshly in order to encourage marriage.⁸⁵ A second offense of adultery is punishable by death.⁸⁶ There are no taverns or brothels⁸⁷ or “stupid pleasures” like gambling⁸⁸ to tempt anyone to neglect family relationships.

Euthanasia is considered a desirable option for the incurable,⁸⁹ showing in another way that the individual is not the focal point of this communal world.

There is a surprising degree of freedom of religion. “Utopus” was able to conquer the land that was named for him because the inhabitants were divided by religious factions, and so he decreed that the Utopian Constitution should

provide for religious tolerance.⁹⁰ “If there was only one true religion, and all the rest are nonsense,” he thought, “truth would eventually prevail.”⁹¹

But there are limits to this tolerance. One may decide to worship the sun or the moon as a god, but anyone who does not believe in an afterlife of rewards and punishments is considered so contemptible as to forfeit the right to be considered *107 human.⁹² Proselytizing aggressively to try to convert others is frowned upon, as shown by a cautionary tale of a man who advocated his own religious beliefs so loudly that he was convicted of disturbance of the peace and exiled.⁹³ And, perhaps unsurprisingly given More's own predilections, it turns out that Utopus was right that if there is one true religion, it will be recognized as such: Raphael is gratified to report that on learning from foreigners about Jesus Christ, many Utopians promptly decided to convert to Christianity.⁹⁴

On the whole, this Utopia resembles a monastic society, one which combines Christian teachings with aspects of Plato's *Republic*.⁹⁵

B. American Constitutional Ideals

Some comparisons between the Utopian and the United States Constitutions are readily apparent. Throughout American history, we have had a troubled relationship with the concept of equality.

Equality has never been our priority.

The American Declaration of Independence, like the Utopian Constitution, set forth high-minded principles:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

But despite its general aspirations of principle and its particular grievances, the Declaration of Independence did not create an actual charter for government. The Constitution did that.

There is a great difference between a statement of principle and a working Constitution, just as there is a difference between an imaginary society and a real one. If framers of a Constitution do not all agree on what is ideal or on what is realistically possible, the need for compromise will trump the desire to try to effectuate or perhaps even to articulate lofty ideals. The most prominent and wrenching example of how realism forced compromise with principle in our Constitution is, of course, the Constitution's tolerance of slavery.⁹⁶ Given the *108 compromise over the issue of slavery, it would have seemed hypocritical for the eighteenth-century Constitution to include language asserting that all men are created equal, and our original Constitution does not echo the Declaration of Independence in declaring allegiance to principles of equality. The compromise over slavery, of course, blew up in less than a century. After the Civil War, the Thirteenth and Fourteenth Amendments articulated, for the first time, constitutional opposition to slavery⁹⁷ and a commitment to a principle of equal protection of the laws.⁹⁸

But guaranteeing equal *protection* of the laws is not the same as guaranteeing equality. Values choices reflected in the eighteenth-century Constitution have kept the Reconstruction Amendments from being interpreted as creating anything like a radically egalitarian Utopian society.

First and foremost, the framers of the American Constitution chose to protect rather than disparage private ownership of property. The Fifth Amendment's Takings Clause⁹⁹ and Due Process Clause¹⁰⁰ speak mostly to process questions surrounding any governmental attempt to seize private property. But these constitutional provisions, reinforced by other provisions like the Third and Fourth Amendments' guarantee of physical privacy, reflect a Lockean notion of the nature of property and of the proper relationship between the individual and the state. It is difficult to imagine our Constitution being interpreted in a manner that would be consistent with a communal society like Utopia's, where the concept of private property is not exalted or even respected.

Second, the eighteenth-century Constitution did not provide for socioeconomic rights or any form of social engineering. There was no mention of any right to public assistance, public health care, or public education. I believe that after the addition of Thirteenth and Fourteenth Amendments, it would have been possible to revisit the question of whether our government should be obligated, like the Utopian government, at least to provide for just wants.¹⁰¹ But that has not happened. Some of our bitterest political and legal debates since the Civil War have concerned our differences of opinion about the propriety of social welfare laws having even a far lesser redistributive effect. In the now infamous case of *Lochner v. New York*,¹⁰² for example, the Supreme Court invalidated a law establishing a maximum number of hours employers could require bakers to work, *109 finding the law to be a violation of the right of freedom to contract. But even though *Lochner* has been overruled so that courts no longer expect to vigorously enforce the principle of freedom of contract, laws with redistributive effect are still highly controversial. Take, for example, the protracted and overheated debates in all three branches of the federal government over the question of whether the Constitution leaves enough space even to permit Congress to provide a statutory right to universal health care.¹⁰³

Unlike Utopians, who evidently agree on how to achieve political equality, we hold ardent but decidedly different opinions about what kind of political system the Constitution establishes. Money makes a tremendous difference in our elections. Utopia bans political discussion outside of parliamentary chambers to avoid political factions. The First Amendment, in the Supreme Court's interpretation, guarantees a right to political speech and to spend money on political speech.¹⁰⁴ Our debates and disagreements about whether to limit the role of money in political campaigns in order to achieve greater equality are among our most divisive.

Civic virtue in Utopia entails everyone participating equally in all aspects of society: political, legal, and military. In politics and in law, as in the military, we have elite classes and inequality of opportunity and burden. The role of religion in American society can best be described in Facebook terms: It's complicated.

Finally, and most critically, our Constitution prioritizes liberty over equality or community. Individuals are viewed as having rights to make their own choices, regardless of what is best for their families or communities. Our Constitution has been interpreted to let individuals decide what kind of family they will have and how to raise their children¹⁰⁵ and whether or not to carry firearms.¹⁰⁶ We espouse religious freedom, even for atheists; we can choose to have locks on our doors, to set our own bedtimes, and to select our own clothing. American courts would certainly invalidate any attempt to tell us what time to have dinner or to punish us for traveling within the United States without permission. We have a constitutionally protected right to travel,¹⁰⁷ so we can choose to ignore our families and ride off into the sunset alone.

Because they subordinate individual freedom to the communal good, Utopians do not need laws, which frequently serve to define or guarantee individual rights. We need and have many forms of law and many opportunities for the employment *110 of lawyers because we are constantly vigilant about government attempts to impose communally-made decisions on individuals and about any threat to rights of ownership.

Generally speaking, Americans are good at liberty and less good at equality, even though our Constitution purports to guarantee both in some form. Our Constitution does not attempt to include the third value in the French triumvirate of liberty, equality, and fraternity--another area where Utopian society would rate high.

But even though our own constitutional priorities are clear, we articulate a form of equality--equal protection of the laws--as one of our constitutional ideals. What are the consequences of having a constitutional text posit multiple ideals, liberty and equality, even if we have not been able to--and perhaps could never be able to--fully realize both? Is the hardest message of Utopia, for Americans, that we do have to choose, and in fact, have chosen, between our avowed ideals? Must we subordinate equality to enjoy liberty, or is some better balance of the two a finer ideal? Is it better to claim two ideals even if we cannot serve both well, than to make the choice between liberty and equality so starkly as not to purport to believe in equality?

C. The Ideal vs. the Real

1. Judging the Ideal in Fact and Fiction

Would you trade our system for Utopia's if you could? If, like Raphael, you were persuaded that the Utopian system works in practice to make everyone very happy, you might think about it. And Raphael tells us that the chief reason you might be skeptical about his conclusions is that you have been trained to accept our liberty-oriented system.

Like "More," we would want to ask many questions before abandoning the U.S. constitutional model and accepting Utopia as an ideal. Do we believe that the Utopian assumptions about economics are correct? Raphael posits, for example, that a steady six hours a day of work from everyone has created an extraordinarily affluent society because the inefficiencies of capitalism have been avoided.¹⁰⁸ What would economists say?

And do we believe that everyone in such a society actually would be happy? The success of Utopia is based on the assumption that vanity and greed are not inherent human characteristics but are only artifacts of a materialistic, capitalist culture.¹⁰⁹ Do we believe that Utopians would have learned not to value gold or status symbols, even when confronted with members of other societies where such distinctions are valued? If opinions about status symbols are derived only from *111 culture, they might be susceptible to change. But is there something more deeply rooted in human nature that craves such distinction?

Would Utopians really be happy with their individual choices so limited, or would they chafe under their lack of freedom? Is Raphael right that freed from want or competition, everyone would work to promote the public welfare?

"More" is right that we would need many conversations to sort all this out, not only with religious figures and philosophers, but with economists, psychologists, anthropologists, sociologists, and evolutionary biologists.

Reading *Utopia* poses the questions but does not really offer us answers, or even enough information for us to formulate our own answers.

2. From Ideal to Reality in Fact and Fiction

Finally, if we were to decide that we would want to adopt Utopian society in whole or in part, could that realistically come to be? What is said to have happened in Utopia is that a Napoleonic figure called Utopus conquered the quarrelsome

natives and imposed his own idea of good government.¹¹⁰ We have to wonder what the transitional period was like for these natives, even if they ultimately concluded that the change was for the better. And we also have to wonder whether, on a political level, such an extreme regime change could happen in a democracy through democratic means. What compromises would be necessary to effectuate such a transition, and would enough people be willing to participate?

At the end of the book, as mentioned above, “More” expresses doubt about whether Utopia could ever be brought into being in his Europe, saying that he “hardly expect[ed]” that the best features of Utopia could be adopted.¹¹¹

There are many reasons to be skeptical about whether Utopia, even if we regarded it as ideal, could become reality in our own country, or in most others. In addition to the challenges of the political process that would have to be confronted--a new constitutional convention?--human nature might present the greatest obstacle to change. Even if it is true, could people be convinced that in the long run, everyone would be happier if wealth were equalized? Could the haves be persuaded to give up their advantages and pool their resources in order to achieve this just and happy society? Questions like this have preoccupied philosophers from Kant to Rawls,¹¹² not to mention evolutionary biologists.

More was wise to conclude his thought experiment by inviting questions and debate rather than trying to provide answers.

*112 IV. CONCLUSION

I will end by connecting the two fictional works I have been discussing with a provocative question: Dreiser's *An American Tragedy* portrays the excesses and consequences of a materialistic society that does not truly value equality--a society that is the antithesis of Utopia's. If we reject Utopia because we choose to retain our more familiar constitutional values of freedom and individuality, are we condemning ourselves to live in the dystopia Dreiser describes?

Is American liberty, after all, incompatible with Utopian, or even a less radical American version, of equality? Or might constitutional utopianism mean that we can avoid the extreme choice between equality (as in Utopia) and liberty (as in Dreiser's America) by insisting on dual ideals and committing ourselves to work to merge them?

Asking whether Utopia is realistic may be too high a hurdle. Perhaps that is why More simply imagined instead of evaluating, and concluded with questions instead of answers.

Asking whether constitutional change is realistic may also be the wrong question. It may be better for us to start by imagining that we might find ways to achieve both liberty and equality, even if we cannot at this point fill in all the details of what such an ideal society would look like and even if we cannot envision how we would arrive at that goal.

Rather than only embodying choices deemed realistic, perhaps the ideal Constitution should tell us what to try to imagine. Poet John Lennon may be right that imagining is the first and most critical step to achieving an ideal world:

*Imagine no possessions
I wonder if you can
No need for greed or hunger
A brotherhood of man
Imagine all the people sharing all the world.
You may say I'm a dreamer
But I'm not the only one*

*I hope some day you'll join us
And the world will be as one.*

Utopia indeed.

Footnotes

a1 Centennial Professor of Law, Brooklyn Law School; President, American Civil Liberties Union. B.A. Barnard College, 1968; J.D. New York University, 1974.

1 It is a bold venture to attempt to create an ideal society instead of simply critiquing an imperfect one. As a philosophy major in college, I thought it was noteworthy that even the great Ludwig Wittgenstein was more successful in his critical *Philosophical Investigations* than in his *Tractatus*, where he attempted to build a philosophical system.

2 See, e.g., Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and the Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 772 (2006).

3 See, e.g., AUSTIN SARAT, CATHERINE O. FRANK & MATTHEW ANDERSON, *TEACHING LAW AND LITERATURE* (2011); RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP* (3d ed., 2009).

4 See THOMAS MORE, *UTOPIA* (Paul Turner trans., Penguin Books 2003) [hereinafter *UTOPIA*].

5 *Id.*

6 Raphael announces at one point that he is only describing, not defending Utopian society, *UTOPIA*, but that turns out not to be true.

7 *Id.* at 84.

8 An introduction to one edition of *UTOPIA* describes the enterprise as “ideal communism with some witty extravagance.” THOMAS MORE, *UTOPIA* 7 (Cassell & Co. ed., 1901).

9 *UTOPIA*, *supra* note 4, at xii.

10 *Id.*

11 *Id.*

12 *Id.*

13 See, e.g., *id.*

14 *Id.* at 45.

15 *Id.*

16 Paul Turner, *Appendix in UTOPIA* 114-17 (Paul Turner trans., Penguin Books 2003), examines More's other writings for evidence of his opinion of communism and finds no basis for reaching a conclusion.

17 See *UTOPIA*, *supra* note 4, at 22-32.

- 18 *Id.* at 22-32. The lively translation in the Penguin edition is by Paul Turner.
- 19 *Id.* at 25-27.
- 20 *Id.* at 113.
- 21 *Id.*
- 22 *Id.*
- 23 *Id.* at 20.
- 24 *See* Turner, *supra* note 16.
- 25 *See* Susan N. Herman, *People v. Gillette and Theodore Dreiser's An American Tragedy: Law v. Literature*, 11 JUDICIAL NOTICE 22, 23 (Summer 2016).
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 *See* [Miranda v. Arizona](#), 384 U.S. 436, 460 (1966).
- 32 Gentjana Taraj, '*An American Tragedy*': *Analysis of Language and Writing Techniques*, 3 INT'L J. ON STUD. ENG. LANGUAGE AND LITERATURE 20, 21 (2015).
- 33 *Id.*
- 34 *See* UTOPIA, *supra* note 4, at 109.
- 35 *Id.*
- 36 *See id.*
- 37 *See id.*
- 38 *Id.* at 113.
- 39 Herman, *supra* note 25.
- 40 OXFORD DICTIONARIES, available at http://www.oxforddictionaries.com/us/definition/american_english/utopia (on file with *The University of the Pacific Law Review*); *see also* GOOGLE, <https://www.google.com> (search "utopia definition") (on file with *The University of the Pacific Law Review*).
- 41 UTOPIA, *supra* note 4, at 79-80.
- 42 MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/utopia> (on file with *The University of the Pacific Law Review*). The Wikipedia entry on Utopia, for whatever it's worth, hypothesizes that the meaning of "Utopia" expanded to mean a general paradise because the word's homophone, Eutopia, builds on the Greek word for "good." WIKIPEDIA, <https://en.wikipedia.org/wiki/Utopia> (last visited Aug. 21, 2016) (on file with *The University of the Pacific Law Review*).

- 43 *See* UTOPIA, *supra* note 4, at 27.
- 44 *See id.*
- 45 UTOPIA, *supra* note 4, at 111.
- 46 *Id.*
- 47 *Id.* at 22-29, especially 27.
- 48 *See, e.g.,* Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, http://www.mitpressjournals.org/doi/abs/10.1162/DAED_a_00019#.VvMAQXqVlgw (on file with *The University of the Pacific Law Review*); *see generally* AMERICAN CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (October 2010), *available at* <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons?redirect=prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons.new-debtors-prisons> (on file with *The University of Pacific Law Review*).
- 49 UTOPIA, *supra* note 4, at 65.
- 50 *Id.* at 83.
- 51 Everyone, for example, must take a turn working on farms. *Id.* at 50-51, 55. One of the chief purposes of the local governors is to ensure that no one is slacking. *Id.* at 56.
- 52 *Id.* at 66-70.
- 53 *Id.* at 55, 59.
- 54 *Id.* at 67.
- 55 Mercenaries are happy to be hired by Utopia, which has so much treasure to spare that it pays better than any other country. *Id.* at 93-94.
- 56 *Id.* at 70.
- 57 *Id.* at 74.
- 58 *Id. See also id.* at 76.
- 59 *Id.* at 109.
- 60 *Id.* at 95.
- 61 *Id.* at 87. Turner used the word “barristers,” but it is unlikely that he meant to suggest that there was a thriving business for solicitors in Utopia. Lawyers are portrayed throughout the book in a negative fashion. When Raphael describes a Persian society, which has adopted an alternative manner of addressing the problem of theft, a lawyer who was part of the conversation preemptorily dismisses the idea as dangerous, and is then second-guessed by an open-minded Cardinal. *Id.* at 32.
- 62 *Id.* at 87.
- 63 *Id.* As a reader of Hilary Mantel's WOLF HALL, I wondered if this antagonism toward lawyers was directed at More's rival, Thomas Cromwell, the consummate lawyer.
- 64 *Id.* at 104-06. The intelligentsia also seem to be an elite class.
- 65 *Id.* at 86.

- 66 *See id.* at 60, 62, 85.
- 67 *Id.* at 60.
- 68 *Id.* at 82.
- 69 *Id.*
- 70 *Id.* at 82-83. These voluntary slaves are free to leave at any time.
- 71 *Id.* at 60.
- 72 *Id.* at 105.
- 73 *Id.* at 95.
- 74 *See* KRISTY KAMARCK, WOMEN IN COMBAT: ISSUES FOR CONGRESS, CONGRESSIONAL RESEARCH SERVICE (Dec. 3, 2015), available at <http://fas.org/sgp/crs/natsec/R42075.pdf> (on file with *The University of the Pacific Law Review*). More seems to have intended this as a way to keep a family together, and probably did not imagine women actually engaging in combat.
- 75 UTOPIA, *supra* note 4, at 85.
- 76 *Id.* at 63. Remarkably enough, the elders given pride of place during mealtime conversations are non-boring, non-depressing, and know exactly when to stop talking. *Id.*
- 77 MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/lookism> (on file with *The University of the Pacific Law Review*).
- 78 UTOPIA, *supra* note 4, at 56. The remaining hours are free.
- 79 *Id.* at 54.
- 80 *Id.* at 55-56.
- 81 *Id.* at 60.
- 82 *Id.* at 64. Given the sex-specific translation, it is not clear whether women would have a similar ability to travel if their husbands consented.
- 83 *Id.* at 64.
- 84 *Id.* at 52.
- 85 *Id.* at 83-84.
- 86 *Id.* at 85.
- 87 *Id.* at 65.
- 88 *Id.* at 47.
- 89 *Id.* at 83.
- 90 *Id.* at 100.
- 91 *Id.* at 100-01.

- 92 *Id.* at 101.
- 93 *Id.* at 100.
- 94 *Id.* at 99.
- 95 *See id.* at 35, 44 (referencing Plato).
- 96 The original Constitution allowed states to decide whether or not slavery would be allowed, prohibiting Congress from abolishing the slave trade before 1808, Article I Section 9, prohibiting any constitutional amendment revising that ban in Article V, and requiring non-slave states to cooperate in returning escaped slaves in Article IV Section 2. Whether or not these accommodations make the Constitution a proslavery document has been a subject of vigorous debate. *See, e.g.,* Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* in II THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467-80 (Foner ed., 1950) (arguing that the Constitution tends to support the eventual abolition of slavery).
- 97 U.S. CONST. amend. XIII.
- 98 U.S. CONST. amend. XIV.
- 99 U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).
- 100 U.S. CONST. amend. V (“nor [shall any person] be deprived of life, liberty, or property without due process of law.”).
- 101 *See* Susan N. Herman, *Reading between the Lines: Judicial Protection for Socioeconomic Rights Under the South African and United States Constitutions*, in COMPARATIVE CONSTITUTIONALISM AND RIGHTS: GLOBAL PERSPECTIVES 229, 240 (Penny Andrews & Susan Bazilli eds., Vandeplass 2008); Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 15 (1969).
- 102 *See* *Lochner v. New York*, 198 U.S. 45, 53 (1905).
- 103 *See, e.g.,* *National Federation of Indep. Business v. Sebelius*, 132 S. Ct. 2566 (2012).
- 104 *See* *Buckley v. Valeo*, 424 U.S. 1, 3 (1976); *Citizens United v. Federal Election Comm.*, 558 U.S. 310, 311-12 (2010).
- 105 *See, e.g.,* *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a city ordinance whose definition of family prohibited a grandmother from sharing a home with her son and grandsons); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (establishing right of individuals to decide how to raise and educate their children); *Pierce v. Society of Sisters*, 268 U.S. 519 (1925) (protecting right of parents or guardians to choose to have their children attend a private religious school).
- 106 *See* *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).
- 107 *See* *Saenz v. Roe*, 526 U.S. 489, 490 (1999) (right to travel to a different state and be treated as a citizen of that state).
- 108 UTOPIA, *supra* note 4, at 57.
- 109 *Id.* at 61.
- 110 *Id.* at 100.
- 111 *Id.* at 113.
- 112 This is one of the issues John Rawls grapples with in A THEORY OF JUSTICE (1971), following Hume, Kant, and so many other great philosophers who have debated the nature of the social contract and how to achieve a just society. Needless to say, there is more than one answer to whether people would be willing to enter a contract for a just society.

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