



THE UNIVERSITY OF  
CHICAGO

**FREEDOM OF RELIGION AND PUNISHMENT IN THE UNITED STATES CONSTITUTION – AN EVOLUTION TOWARDS UTOPIAN SOCIETY**

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November 2009

**BACKGROUND**

Thomas More, as a barrister, jurist and trusted advisor to the King, was acutely aware of the inequities in European society. Much of his early professional life was devoted to resolving entitlement issues within a system that invariably protected the interests of those with power. Or as More stated, he took so long to tell the story of *Utopia* because he was “kept hard at work in the law courts, either at the Bar or on the Bench, either in civil or criminal cases.” (*Utopia at P. 7.*)

One might argue that *Utopia* is simply an expression of More’s legal and political experiences that the ideal of a “*more perfect society*” is incompatible with a system that requires protection of personal property. As presented in *Utopia*, there can never be a truly fair distribution of goods, or a satisfactory organization of human life without the abolishment of private property. (*Utopia at P. 43.*) Based on pure logic, this argument would make sense - for if nearly all disputes involve someone wanting what others have - removing the object of desire should resolve nearly all disputes.

As More recognized, we do not, however, live in purely logical and perfect world. Things will not be done perfectly until human beings are perfect. (*Utopia at*

P.42.) *Utopia* is not merely a simple discussion of whether society would be better in the absence of a need to protect personal property. *Utopia* causes the reader to question whether man is compelled in some manner, divine or otherwise, to seek a more fair and equitable system and whether all persons have the right to pursue happiness.

More in a classic legal style sets-up this as a debate as if the reader is the jury who must decide the issue. Arguably, Book One is analogous to opening statements, in which the advocates frame the issues and tell the jury what they believe the evidence shows. Using Raphael, Peter Giles and More, all agree that the current economic and political structure is unfair and that the issue for deliberation is the best manner to effect that change. Or as More sets-up in the end of Book One, the reader will believe this once they see “how well it works in Utopia.” (*Utopia* at P. 46.) And, as later stated, “So you’ll probably think it incredible, until you’ve actually seen it for yourselves.” (*Utopia* at 67.) Book Two is then presented as the evidence proffered in support of the proposition.

After hearing the arguments and the evidence, the reader is left to ponder whether true reform can ever occur without a radical restructuring of the balance and relationships between the legal, economic, political and religious *status quo*. As more so simply states, no law can prevent a man from stealing food if that man lacks the ability to earn enough to survive. A society that ignores the immorality of such a system and does not constantly strive to be “more perfect” is by its nature unjust, incompatible with religious principals and invariably cannot thrive.

This paper discusses how the founders of the United States Constitution share More's struggle to create a system in balance with God's supremacy and the realities of human nature in relation to the context of religious freedom and humane punishment.

### **DISCUSSION**

On the surface it would appear that a creation of a society protecting capitalism is incompatible with a *Utopia* society adopting "communism." This apparent contradiction disappears, however, when one goes below the surface. More never advocated the religiously voided communism of the Soviet Union. Nor is it offered from a purely political perspective. Rather, capitalism and the monarchy as they existed at the time were incompatible with More's Monastic background, Christian beliefs and an equitable distribution of wealth. (*See Utopia at P. 44.*)

More also was not advocating that everything that exists in European structure and society should be discarded. Indeed, More himself never totally abandoned his comfortable life. Rather, More advocated that one should strive to "alter" or steer the "ship of state" back on course to protect those rights ordained by God. (*See Utopia at 42.*) More even used the Cardinal to suggest that there is nothing wrong with testing new ideas and approaches and that "if at first you don't succeed, try, try again." (*Utopia at 32 and 33.*) Or, as More stated in his final words, "I freely admit that there are many features of the Utopian Republic which I should like – though I hardly expect – to see adopted in Europe. (*Utopia at P112.*)

The embodiment of a desire to create a more Utopian-like society and the struggle between what is ordained by God as that which is necessary to govern is

arguably no more evident than in the framing of this democracy in relation to religion and humane treatment. Whether as a nation-state, we have strayed from those principals, and abused the system to disenfranchise the poor and less powerful, is an issue left for a different day.

The Declaration of Independence is not an allegiance to capitalism or homage to an agnostic political system. Rather the Declaration of Independence is a proclamation that “*all men are created by God*” with certain inalienable rights, including “*life, liberty and the pursuit of happiness.*” And, when a government is destructive to these ends, it is the right of the people to alter or institute a system that keeps these rights at its foundation.<sup>1</sup>

It is not by chance that the preamble to the Constitution begins with the express goal to “*form a more perfect Union.*” The Constitution as originally adopted, also does not have as its goal the protection of individual wealth and personal property. Instead, a *more perfect Union* is one that would “establish justice insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”

### **Freedom of Religion**

It is often thought that Constitutional protections of religion were adopted to prevent religion from intruding into government, when in fact the opposite was the case. The foundation of religious protection in this country is contained in the First Amendment to the Constitution. As to religion, the First Amendment provides simply that “Congress shall make no law respecting an establishment of religion, or

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<sup>1</sup> That slavery was not abolished in the Constitution until 1865 with the Thirteenth Amendment, notwithstanding.

prohibiting the free exercise thereof . . .” The first clause is referred to as the “establishment” clause and the second is known as the “free exercise” clause. There is an inherent tension between a command not to establish religion and a command not to inhibit its practice.<sup>2</sup> It is this tension that has led to voluminous court cases testing the fluid boundaries of religious freedom.

James Madison is often regarded as a leading architect of the religious protections found in the United States Constitution.<sup>3</sup> Madison and the other framers embraced the ideals that a more perfect Union must be understood by the masses and not devoid of moral and religious principals. The framers were not atheists and they were not attempting to stifle religion. Religious life was a part of their social fabric and many fled, or were decedents of those that fled, European homelands because of religious persecution.

The desire to protect religion led to considerable debate whether the government can be involved in the establishment of religion with limits or whether a “more perfect” society requires the total absence of government involvement in the establishment of religion. According to Madison and the viewpoint eventually contained in the First Amendment, there must not be government endorsement of any religion because God’s law is supreme and allowing a government to interpret God’s law would inevitably lead to a loss of liberty and religious freedoms.

The framers of the Constitution also understood that the “free exercise” of religion was a cornerstone of religious protections. It is generally accepted even

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<sup>2</sup> Treatise on Constitutional Law Substance and procedure, Fourth Edition (2008) by Ronald D. Rotunda and John E. Nowak, Volume 6, Chapter 21.1(a), p.3.

<sup>3</sup> See *Waltz v. Tax Commission of the City of New York*, 397 U.S. 664,722-23 (1970).

today that the government may not inhibit the content of religious speech or the manner in which it is practiced unless it conflicts with the rights of others to be protected in their welfare.

While inevitably the framers of the Constitution concluded that this freedom of expression was necessary for the pursuit of life, liberty and the pursuit of happiness, it was done so based on the religious belief that God alone may decide what religious beliefs are followed. God's teachings also could only be imposed by reason and not military or other force of government.<sup>4</sup>

Specifically, Madison in arguing against a bill in Virginia to tax its citizen's to fund Christian education, Madison stated:

Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions.<sup>5</sup>

More's views expressed in *Utopia* regarding religious protections are very similar to those of Madison and others like him. For example, More believed that the few man-made laws should be required, and this held true for protection of religion. (*Utopia at 87.*) Any system is more likely to work, according to More, when it is uncomplicated, less easily manipulated and understandable to the masses. (*Utopia at 87.*) The evidence that the framers of the Constitution and the First Amendment shared this belief is plainly evident in the language, Congress

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

“shall make no law” respecting an establishment of religion, or prohibiting the free exercise thereof.

So few government laws related to religion are necessary because in More's view, the ideals of a more *Utopian* society can only be achieved when the moral and religious teachings are taught by religious leaders at an early age and fostered throughout life. By this means, the true divine word of Christianity will be understood and adopted into society. As More stated, in the *Utopian* society religious leaders are responsible for the education of children. (*Utopia* at 103.) The priests, stress moral education as much as academics because the practice of moral behavior is “best calculated to preserve the structure of society.” (*Utopia* at 105.)

More and the framers of the Constitution shared their beliefs that religious expression without force of government was essential because it was man's duty to follow God's teachings but it was only through reasoning and learning that this could be accomplished. More believed that freedom of expression, without force, was necessary to move people towards Christian beliefs. He believed that if man was given the opportunity to learn about Christian teachings in private without coercion that reason would prevail and the true way would be accepted. As More stated in *Utopia*:

Apparently, he considered it possible that God made different people believe different things, because He wanted to be worshipped in many different ways. But he was evidently quite certain that it was stupid and arrogant to bully everyone else into adopting one's own particular creed. It seemed to him perfectly obvious that, even if there was only one true religions and the rest were nonsense, truth would eventually prevail of its own accord – as long as the matter was discussed calmly and reasonably, But if it was decided by force of arms, the best and most spiritual type of religion would go down before the silliest forms of superstition, jus as corn is liable to be over-

grown by thorns and brambles – for the worst peoples are the most obstinate.

(*Utopia at pp. 100- 101.*) The Utopian society is moving towards more enlightened religions such as Christianity, not because it is forced upon its inhabitants, but because it is human nature to “unite in adopting what seems to be the most reasonable religion.” (*Utopia at P. 99.*) Most notably, in Utopian society freedom of religious expression is not done merely to preserve the peace, but like the framers thought, because it is was thought to be “in the best interest of religion itself.” (*Utopia at P. 100.*) Similarly, Utopians are free to express their religious viewpoints provided it is in a not “too aggressive” manner. (*Utopia at P. 100.*) Utopians do not argue religion in public, but are encouraged to do so in private discussion, where presumably reason would prevail over intimidation. (*Utopia at P. 101.*) Similarly, in Utopian Society like under the First Amendment, when one is prosecuted for over-zealous public remarks involving religion, prosecution is not for the content of the speech, but for “disturbance of the peace.” (*Utopia at P. 100.*)

The exception under More’s of the freedom of expression is that persons should not be allowed to hold or express an opinion that the “soul dies with the body, and the universe functions aimlessly, without any controlling providence.” (*Utopia P. at 101.*) By holding these views one forfeits his right to be classified as a human being. (*Utopia at P. 101.*) While the framers of the Constitution undoubtedly all held the public view of the immortal soul and a divine being, they would not have found that the government could take action against persons for holding those views.



As an historical note, one can certainly argue that over the years More became increasingly frustrated with those not reasoning in his manner to reach his religious beliefs, which lead to well documents religious intolerance. This is at odds with the *Utopian* belief that all but a few will eventually accept the one true religion if they are given the tools to see the truth. One can also debate whether to protect religious freedoms it is necessary to separate religion from government, as many modern countries have long histories of religious tolerance with state-endorsed religions. And argue that even in this Country there is at least tacit support of a monotheistic form of religion in that it is not unconstitutional to pledge allegiance to God in schools, our currency states in “God We Trust” and oaths in court and to assume government offices are sworn to God.

What is not debatable, however, is that Madison correctly recognized the dangers of an absence of protection from government intrusion into religion. More would not swear to the Oath of Succession because it conflicted with his religious beliefs. This was found to be treason and the sentence was death. Under Madison’s view of *Utopian* society embodied in the free exercise and freedom of speech clauses of the Bill of Rights as ordained by God, More could not have been punished.

### **Humane Punishment**

Finally, it should be noted that in most respects the manner in which crimes are punished in *Utopian* society is very different than what is embodied in the United Constitution. In *Utopia*, lawyers do not exist and citizens are required to tell the “judge” the same story he would otherwise tell a lawyer. (*Utopia at P. 87*). There are few fixed penalties and the “Council” decides in each case what sentence

is appropriate. (*Utopia* at 83.) The normal penalty for most major crimes is slavery and recalcitrant, but with an opportunity to be rehabilitated. “Only” recalcitrant criminals are “slaughtered.” (*Utopia* at P. 83.) More suggests that this type of morality based criminal system can exist because *Utopians* understands that all laws are intended to remind people what they already have been taught through religious and moral teachings. Within a system that does not promote wealth accumulation, all but a few will naturally understand and accept this.

The framers of the Constitution, however, had to devise a system that they believed would actually work. In non-*Utopia* human urges and temptations are far less moderated and protecting life, liberty and the pursuit of happiness requires checks and balance, due process and equal protection rights. However, at least as envisioned by Raphael, the notion of “humane” punishment is similar to the protections in the Eighth Amendment against cruel and unusual punishment.

As wise Raphael points out, capital punishment for those committing thefts “as a punishment it’s too sever, and a deterrent it’s quite ineffective. Petty larceny isn’t bad enough to deserve the death penalty, and no penalty on earth will stop people from stealing, if it’s their only way of getting food.” (*Utopia* at P. 22.) Punishment for economic crimes will continue to exist until the system is reformed so that those able can provide for their needs and wealth is shared in a more socially desirable manner. In other words, one cannot create thieves, and then punish them for stealing. (*Utopia* at P. 27.)

According to Raphael the better system to deter crime, which is used in *Utopian* society, is to put those who commit crimes to public works and allow them

to earn their way back into society. (*Utopia* at P. 30.) Or as Raphael stated, the system that works, like the one envisioned by the founders of our democracy, is one that promotes the economics of the society but is also humane. (*Utopia* at P. 30.)