

## **NUSQUAMA AND NATURAL LAW**

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In the context of More's qualifications for entering into the royal circle through ambassadorial service, the relation of *Nusquama* presented a society governed both internally and externally by the universal rules of natural law as conceived by jurists. His primary authority would seem to have been Gratian's *Decretum*. Natural law was supplemented internally by Roman civil law and Utopus' legislation, externally by *jus gentium* and expediency in the conduct of war. More thus demonstrated his mastery of these subjects. The hierarchy of natural and conventional laws is analyzed in terms of their order of presentation in Book II; significant for More's ranking is the division formed by the heading *De servis*. His implied evaluation of these legal standards is compared with those of his contemporaries Vitoria, Sepúlveda, and Luther. The transformation of this generally temperate exercise into the more fervent *Utopia* under the influence of Erasmus is reviewed.

**Key words:** canon law, civil law, *jus gentium*, *relazione*.

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*Dans le contexte de l'ambassade qui conduisit More dans les Pays Bas au service du roi, le récit de l'Utopie présente une société gouvernée, à l'intérieur comme à l'extérieur, par les règles universelles du droit naturel tel que le conçoivent les juristes. Sa référence de base semble avoir été le Décret de Gratien. Le droit naturel était complété à l'intérieur par le droit romain et la législation d'Utopus, à l'extérieur par le droit des gens et l'opportunisme dans la conduite de la guerre. C'est ainsi que More démontrait sa maîtrise de ces sujets. L'article analyse la hiérarchie des lois naturelles et conventionnelles selon l'ordre où elles sont présentées dans le Livre II. La place que More leur assigne est éclairée par la section intitulée De servis. Elle révèle implicitement son évaluation de ces normes légales, qui est comparée avec celle de ses contemporains Vitoria, Sepúlveda et Luther. Puis l'on examine la transformation de cet exercice, généralement modéré, dans l'Utopie plus fervente, sous l'influence d'Erasmus.*

**Mots-clés:** droit canon, droit civil, *jus gentium*, droit naturel, *relazione*.

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En el contexto de la embajada que llevó a Tomás Moro hacia los Países Bajos para servir al rey, el relato de la *Utopía* presenta una sociedad gobernada, tanto en el interior como en el exterior, por las reglas universales del derecho natural, tal como lo conciben los juristas. Su referencia habrá sido, según parece, el *Decreto* de Graciano. El derecho natural se completaba en el interior por el derecho romano y la legislación de Utopus; en el exterior, por el derecho de la gente y el oportunismo en la conducta de la guerra. Así es como Tomás Moro manifestaba el dominio que ejercía sobre esos asuntos. El artículo analiza la jerarquía de las leyes naturales y convencionales según el orden adoptado por el Libro II°. El sitio que les atribuye Moro sale bien claro merced a la sección titulada *De servis*. Revela implícitamente su propia evaluación de aquellas normas legales, que viene cotejada con la de sus contemporáneos Vitoria, Sepúlveda y Lutero. Luego se examina la transformación de este ejercicio, generalmente moderado, en la *Utopía*, más ardiente, bajo la influencia de Erasmo.

**Palabras claves:** derecho canónico, derecho civil, *jus gentium*, derecho natural, *relazione*.

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Over one-seventh of Book II of *Utopia* concerns the republic's foreign relations and methods of warfare. Despite this weight of treatment, these sections have been problematic to many of the work's commentators.<sup>1</sup> Students of the law of nations, however, have noted the precocity of some of the islanders' practices. M. I. Finley notes that during the very first years of transatlantic colonization, Utopians regarded opposition by mainlanders to the republic's occupation of unused land as justification for war.<sup>2</sup> In his short essay, "The Just War," Jonathan Barnes notes that Utopians added the novel offence of subjection to tyranny to the conventional injuries that justified war on

<sup>1</sup> George M. Logan, *The Meaning of More's "Utopia"* (Princeton UP, 1983), 221-45, esp. n85. Michael D. Wentworth, *The Essential Sir Thomas More* (New York: C. K. Hall, 1995) was of help in preparation of this article. I would like to express my thanks to Abbé Germain Marc'hadour for his precise suggestions and support.

<sup>2</sup> "Colonies - an Attempt at Typology," *Royal Historical Society Transactions*, 5th ser., 26 (1976): 179.

behalf of friends and allies.<sup>3</sup> In fact More's career to 1515 suggests that his trenchant account of the republic's foreign relations, far from being a discrepant byway, sprang from the original impetus for his masterpiece. This article will explore that inspiration and its expression in the *Nusquama* draft. The novel elements of the fabled island's principles of foreign policy will be evaluated with respect to More's sources and by comparisons with a selection of contemporary authorities on the law of nations.

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While still testing the religious life, More pursued a demanding legal preparation for public service. He began with the study of Civil<sup>4</sup> and canon law at New Inn before completing English common law training at Lincoln's Inn.<sup>5</sup> His admission to Doctors' Commons on 3 December 1514<sup>6</sup> was a sign that he was qualified for diplomatic employment.<sup>7</sup> More's oratorical debut had already taken place in September 1509 (the year following his visits to the universities of Louvain and Paris), when he welcomed the Pensionary

<sup>3</sup> *Cambridge History of Later Medieval Philosophy*, ed. N. Kretzmann et al. (Cambridge UP, 1982), 778 and see 777, 780, 782, but see note 37 below.

<sup>4</sup> Unlike other legal systems referred to in this article, Roman civil law and its medieval and modern European descendant is throughout capitalized in order to distinguish it from the various indigenous civil codes of other countries.

<sup>5</sup> This was a standard progression, John P. Dawson, *The Oracles of the Law* (Ann Arbor: U Michigan Law School, 1968), 41.

<sup>6</sup> G. D. Squibb, *Doctors' Commons* (Oxford: Clarendon Press, 1977), 133; K.R. Massingham, "Thomas More, 'Laicus,' Gent." *Moreana* 87-88 (Nov 1985): 31-35.

<sup>7</sup> William Nelson, "Thomas More, Grammarian and Orator," in *Essential Articles for the Study of Thomas More*, eds. R. S. Sylvester and G. P. Marc'hadour (Hamden, Conn: Archon, 1977), 150-51, 156-60, see 159 (bottom) re *ambition* etc.; Jerry Mermel, "Preparations for a Politic Life: Sir Thomas More's Entry into the King's Service," *The Journal of Medieval and Renaissance Studies* 7 (1977): 55-59; see also C. T. Allmand, "The Civil Lawyers," in *Profession, Vocation, and Culture in Later Medieval England*, ed. Cecil H. Clough (Liverpool UP, 1982), 157, 171.

of Antwerp for the Mercers' Company/Merchant Adventurers and managed their successful negotiations.<sup>8</sup> Those of ambassadorial rank were expected to act as publicists,<sup>9</sup> so More developed his skill in all types of rhetoric according to the latest humanist standards. He was properly trained, according to Vives' later essay *In Pseudo-Dialecticos*, like those who were "to be legates or ambassadors, to be arbitrators in public or in private, or to deal with social problems."<sup>10</sup>

Comparison between his standing in the 1515 intercursum embassy and the version of it given in Book I of *Utopia* provides an indication of his professional potential, ability, at that time. Previous English trade missions to the Netherlands were usually led by the Merchant Adventurers' governor (William Caxton so acted several times). Particularly important or difficult embassies like More's, however, were headed by royal servants such as the Master of the Rolls, the king's secretary, or, exceptionally, bishops and peers.<sup>11</sup> More had been put forward by London merchants for the 1515 mission, but received pay from the king. During a recess he visited Antwerp to coordinate its proceedings with that city's leaders and presumably the resident Merchant Adventurers. *Utopia* opens with More's statement that Henry VIII sent him as his ambassador

<sup>8</sup> Orator, the Latin term for ambassador, was favored by humanists. G. D. Ramsay, "A Saint in the City: Thomas More at Mercers' Hall, London," *English Historical Review* 97 (1982): 282-84; R. J. Schoeck, "Canon Law in England on the Eve of the Reformation," *Medieval Studies* 25 (1963): 140.

<sup>9</sup> J. H. Burns, *Lordship, Kingship, and Empire: The Idea of Monarchy, 1400-1525* (Oxford UP, 1992), 12 and 58-59.

<sup>10</sup> Carlos G. Noreña, *Studies in Spanish Renaissance Thought* (The Hague: Nijhoff, 1975), 32; More said he had thought to write on the same theme, 33. See also *In Defense of Humanism*, ed. Daniel Kinney, Complete Works of St. Thomas More 15 (Yale UP, 1986), cxviii [hereafter cited as CW].

<sup>11</sup> Anne F. Sutton, "Caxton was a Mercer: His Social Milieu and Friends," *England in the Fifteenth Century*, ed. Nicholas Rogers, Harlaxton Medieval Studies, IV (Stamford: Paul Watkins, 1994), 118-120, 125-130, 132. Similar patterns occurred in English embassies to the Hanse, T. H. Lloyd, *England and the German Hanse, 1157-1611* (Cambridge UP, 1991), 117, 122, 147, 209, 246; and see François L. Ganshof, *The Middle Ages: A History of International Relations* (New York: Harper & Row, 1971), 288-89.

(*oratore me legavit*). The embassy leader, Cuthbert Tunstall, is only mentioned secondarily, and More describes himself as his "*comitem et collegam*" (companion and colleague).<sup>12</sup> Yet in the ambassadorial commission of 2 October 1515, only William Knight was bracketed with Tunstall as "our councillors."<sup>13</sup> More did not sign the final treaty nor did John Clifford, Governor of the Merchant Adventurers, who also served on the embassy. Furthermore, the king paid More less than Tunstall and Richard Sampson, a fifth emissary. More did perform diplomatic business, but ranked between a royal and mercantile envoy; he was not the mission "spokesman" (41/12).<sup>14</sup>

The adjournment of negotiations from 21 July to 25 October 1515 gave More the opportunity to write the major portion of Book II, the account of Nusquama, a society that operated on the principles of law then held to be common to all political societies both internally and externally. This in part filled his time, but also would advertise his abilities as a humanist international lawyer (Allen 481, 499).<sup>15</sup> The stimulus for the work was the same as for his riddling contest with a member of Prince Charles' suite on an issue of Civil law.<sup>16</sup> It

<sup>12</sup> *Utopia, Latin Text and English Translation*, ed. George M. Logan, Robert M. Adams, and Clarence H. Miller (Cambridge UP, 1995), 40/11-12; parenthetical page/line references in the text are to this edition, cited in notes as Cambridge *Utopia*.

<sup>13</sup> G. R. Elton, "Thomas More, Councillor," in *St. Thomas More: Action and Contemplation*, ed. Richard S. Sylvester (Yale UP, 1972), 88.

<sup>14</sup> *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, ed. J. S. Brewer, vol. 2 (London, 1864), nos. 422, 534, and pp. 1467-68; Edward Surtz, "Sir Thomas More and His Utopian Embassy of 1515," *Catholic Historical Review* 39 (1953-54): 278, 290-92, 294-95. While More had received an invitation to join Henry's council in 1516, when he was finishing the account of the embassy in *Utopia*, it was not his status during the negotiations.

<sup>15</sup> More fretted about the response to *Utopia* of the jurists Busleyden, Tunstall, Jean le Sauvage, and Giles. See *The Correspondence of Erasmus*, trans. R. A. B. Mynors and D. F. S. Thomson, Collected Works of Erasmus Vol. 4 CWE4 (U of Toronto P, 1977), 116, 163.

<sup>16</sup> J. D. M. Derrett, "Withernam: A Legal Practical Joke of Sir Thomas More," *The Catholic Lawyer* 7 (1961): 211-22. This motive for writing Nusquama would explain the strong interest of Giles, who was researching the sources of Justinian's

will not be news to students of *Utopia* that the republic was based on natural law, but that source has generally been treated in terms of classical political philosophy and the Erasmian presumption that More was writing as a literary humanist.<sup>17</sup> The argument here is that Nusquama reflected the concerns of a Renaissance jurist-diplomat with Civil and Canon law expressions of natural law.<sup>18</sup> To underline this emphasis during the following exposition, I refer to the work by the Latin *Nusquama*, the title More consistently used during the time of its composition.<sup>19</sup>

That More intended a fantasy based on legal standards common to all men and which governed international relations can be inferred from several features of the work in addition to its lengthy discussion of the island's methods of war and foreign policy. First, the introduction of his narrator. One of Hythloday's personae is that of a

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code; see P. R. Allen, "Utopia and European Humanism: The Function of the Prefatory Letters and Verses," *Studies in the Renaissance* 10 (1963): 94.

<sup>17</sup> For a recent study of this type on *Utopia* see R. S. White, *Natural Law in English Renaissance Literature* (Cambridge UP, 1996), ch. 5; he does not treat the juristic tradition discussed in this article. Richard J. Schoeck, "Sir Thomas More, Humanist and Lawyer," *University of Toronto Quarterly* 34 (1964-65): 1, challenged the Erasmian tradition of More's aversion to the law and stressed its positive role in his intellectual development. Although not neglectful of More's Civil law activities, his emphasis was on More the common lawyer, his knowledge of Canon law, and the use he made of it in his trial, "Canon Law in England," 125-47.

<sup>18</sup> See "Appendix: Definitions," for discussion of Roman legal terms. Gaines Post, *Studies in Medieval Legal Thought* (Princeton UP, 1964), ch. II, esp. 508-12, 21-36, traces an analogous use of Civil law to create a natural law basis for society by 12<sup>th</sup> century scholars before Aristotle was rediscovered. On *jus gentium* see James T. Johnson, *Ideology, Reason, and the Limitation of War* (Princeton UP, 1975), 9, 58-61. Such a motivation would help explain why Nusquama did not prove to be a serious basis for reform for More.

<sup>19</sup> *Nusquama* was the creation of More in the early sixteenth century; as I am principally interested in the work's relationship to More's historical situation, my account refers to it in the past tense. Likewise, I use the past tense when referring to versions of the published *Utopia* in comparisons with the teachings and reactions of his contemporaries. The present tense is used when taking up present interpretations. For the importance to historians of such an approach in the understanding of texts, see G. R. Elton, *Return to Essentials* (Cambridge UP, 1991), 60-61.

visitor: *oppida atque urbes ... ac non pessime institutas magna populorum frequentia respublicas* (46/22-24) [of towns and cities, and commonwealths that were both very populous and not badly governed (47/24-25)]. These had many ill-considered usages, but he also found much good: *haud pauca recensuit unde possint exempla sumi corrigendis harum urbium, nationum, gentium ac regnorum erroribus idonea* (48/24-25) [quite a few other customs from which our own cities, nations, races and kingdoms might take lessons (49/28-30)].<sup>20</sup> As a philosophic observer of the laws of many nations, Hythloday was fit to describe a society based on their common standards.<sup>21</sup>

Secondly, the *sermo* (40/1) of Book II resembles the oral *relazioni* required of returning Venetian ambassadors. They were not records of a mission's specific accomplishments but descriptions of the country visited and its history, with emphasis on the person of the ruler, his court, government, revenues, armies, and preparations for war.<sup>22</sup> Under humanist influence these reports included an even wider depiction; in the words of a 1506 *relazione*: "the power and disposition of all great lords and princes ... as well as of the condition of lands and of the people who dwell in them."<sup>23</sup> The topics More required of Hythloday conformed to this expansive type: *agros, fluvios, urbes, homines, mores, instituta, leges* (106/21-22) [fields,

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<sup>20</sup> Polylerites were probably not completely imaginary; their physical location strongly resembles Tsanica. See Procopius, *History of the Wars*, trans. H. B. Dewing (New York: Macmillan, 1914), I: 137. More's accounts of outlandish cultures are usually related to recently discovered new lands; cf. J. R. Hale, "Sixteenth-Century Explanations of War and Violence," *Past & Present*, No. 51 (May 1971), 6-25. But the court of Justinian, a bastion of classical culture for a humanist, had strong ethnographic interests; I owe this reference to Michael Maas.

<sup>21</sup> Philip Dust so characterizes him in "Alberico Gentili's Commentaries on Utopian War," *Moreana* 37/31.

<sup>22</sup> Donald E. Queller, "The Development of Ambassadorial *Relazioni*," in *Renaissance Venice*, ed. John R. Hale (London: Faber & Faber, 1973), 180, 184, reprinted in Queller, *Medieval Diplomacy and the Fourth Crusade* (London: Variorum Reprints, 1980); and see R. S. Sylvester, "'Si Hythlodaeo Credimus,'" *Essential Articles*, 295.

<sup>23</sup> Queller, "Ambassadorial *Relazioni*," 176, 179, 181, 187.

Distinctio

I.

Quia nouis supuententibus causis: nouis e remedijs succurrenda. Idcirco ego Bartholomeus brixienfis ostendens de magnificentia creaturis apparatu decretorum duri in meliorem reformanda: non detrahendo alicui: nec attribuendo mihi gloriam quas non feci

si supiedo odo ubi nra vide subera l e dmi uvel p enerat d itas solu i q pterer Jobane. uel oipofie roma tliciamem is in iure

genus. distinctio s partes. at q quat humani duob? scy tudinib? ac incipit dicit septem rium. Jo c. sic ponit. so sunt in genus hu r guberna rale r o huc Jus natu ge r i eui r: quo iure

Decretum Aureū diuī

Striant. In quo est discordantium canonum concordia: ac primum de iure diuine r humane cōstitutionis. Distinctio prima.



Manū genūis duob? regit. natu rali r videlicet iure: r mou b? Jus natu rale est qd i lege r i euā

gelio continetur quo quisq iube tur abij facere qd subiuu? fieri r p biberetur: alij inferre qd sibi nolit fieri. vñ ip s in euāgelio. Dia q cūq vultis: vt faciant vobis bo mines: r vos eadē facite illis. Nec est enim lex r prophete.

Unde Hsidorus i. v. libro etymo mologiarū ait. Diuine leges natura: humane moribus constant.

Omnes leges aut diuine sūt aut humane: diuine na

illud verū est: sic extra de ap. significante. In fi. r extra t dudū. r extra de rescrip. ex parte. sic. f. q. q. in pūmā r demon. falsa. r. ff. de sta. bo. sūma.

Edi fere p ant. Itā tamen sunt cōtrarie. nā r iure per diuina lex permittit: humana p biber: s p biberitio r pe

tura: humane morib? p hāt. Jōes de discrepāt? qm alie alijs? genti b? placent. Gas lex diuina est: ius lex humana. Transire per agrū alicuius? fas est: ius nō est.

Ex hīs verbis bur? aucto rita tis euidenter datur intelligi in quo differ. It inter se lex diuina r huma na: cū oē q d fas est noie diuine v l naturalis legis accipiatur: noie ve ro legis humane mores iure con scripsi r traditi intelligantur. Est autem ius: generale nomen mul tas sub se continens species.

Unde in eodem libro etymo logiarum Hsidorus ait.

Ius gen? lex aut ip s eius ē.

Is generale? nome est: lex autez iuris est species. Jus autē est dictū: quia iustū est. Iu me autem ius legibus r moribus constat.

Quid sit lex. Lex est constitutio scripta.

Quid sit mos. Mos est longa cōsuetudo d moribus? r qm tūmodo tra cta.

Quid sit cōsuetudo.

agrū. Item si thesaurum suū quis vult cōdere. s laurus in fi. Itē si glans mea decidit in agrū tuū. s. vnicia. r oī quero domine fugiū. ff. de seruis fugi cāsu. xxiij. q. ij. c. vi. Item dum via publica cōstruc modum ser. amir. s. locus. s. vi. Jo.

Ex his. Calus. Cōcludit Gratianū ex l differentiā esse inter legē diuinā r legē humanā: cū ē diuine vel naturalis legis intelligat. Note vero le res cōscripti r traditi intelligant. In fine dicit q li mine multas cōtinens species. r hoc p bar per leg

Is generale. Calus trium capitulorū si est r per te videbis.

Jus generale. Quia iustū ē: nec iudex of nō si q. ij. c. i. q. hō ē aliqō ius qd nō ē equū nec iustū: vt si

Ita. may di rem infidel stois pbi q. sam na o. E. H. q. r. J. r. r. d p. E. H. ment re naturalis nia. vt. J. c. J. d. v. d. q. aliquis ag ideo expo est aliena q. E. H. c. c. h. d. c. c. v. J. d. i. cum ē con agro alie tate. cōde medere li s. c. f. sed cem. vt. J. d. d. c. p. h. o. d. i. ius nō d. E. H. c. i. d. c. r. tū est vt mū licy ius d de aqua ma. s. in h. r. d. p. c. d. b. s. beat. vt.

rivers, towns, people, manners, institutions, laws (107/22)]. Basing his argument on the full title, George Logan claims that More was writing a "best commonwealth" encomium. As the utilitarian *relazioni* derived from the same humanist matrix, it is arguable that Nusquama originated from this secondary, diplomatic model.<sup>24</sup>

Nusquama

Natural law is common to all nations because it exists everywhere through natural instinct not because of any convention. For example: the union of men and women, the succession and rearing of children, common possession of all things, the identical liberty of all, or the acquisition of things that are taken from the heavens, earth, or sea, as well as the return of a thing deposited or of money entrusted to one, and the repelling of violence by force. (Gratian, *Decretum* 1.1.7)<sup>25</sup>

The moral organization of the imaginary island was surprisingly close to this reductionist version of natural law by Gratian. Virtually everyone worked, so ample necessities for the body—but no vain

<sup>24</sup> More's list of topics better fits a *relazione* than the Aristotelian enumeration Logan cites in the Cambridge *Utopia*, 109n 1 and *Meaning*, xii. Venetian practice was evidently known in diplomatic circles; More would have had to go no further than the Paduan trained Tunstall to learn of it, and there is ample later evidence that he cultivated Venetian friendships. A *relazione* model would explain why Book II has less plot than the traveller's tale, a genre to which it is often assigned; see Hubertus Schulte Herbrüggen, "More's *Utopia* as a Paradigm," in *Essential Articles*, 252-53, 260-61. Andrew M. McLean's argument in "Thomas More's *Utopia* as Dialogue and City Encomium," *Acta Conuentus Neo-Latini Guelpherbytani*, 1985, ed. Stella P. Revard, Fidel Rädle, and Mario A. Di Cesare (Medieval & Renaissance Texts & Studies: Binghamton, N.Y., 1988), 94-96, should also be measured against the *relazioni* form.

<sup>25</sup> Gratian, *The Treatise on Laws (Decretum DD. 1-20)*, trans. Augustine Thompson, *Studies in Medieval and Early Modern Canon Law 2* (Washington, D.C.: Catholic U of America P, 1992), 6-7; hereafter cited as *Decretum*.

From Gratian's *Decretum*, glossed by Bartholomaeus Brixienfis, and printed in Lyon in 1509. Russell Library, Maynooth College. For a reproduction of this page showing its original rubrication, see *Moreana* 127-128/16.

luxuries—were produced in minimum time.<sup>26</sup> Freed hours became available to all for cultivation of the mind—the gloss More gave to natural liberty (134/3-6). Through increased use of reason, nature's ethical and physical laws could better be understood (162/11-12). The exemption of the few students, rulers, and priests from farming and craft occupations furthered this end. So, too, did the pervasive role of education: vocational training and higher academic studies, early morning lectures, edifying mealtime readings and conversation, even the simple law code that taught the citizens their duty.<sup>27</sup> The more that natural law was apprehended through reason, the more technically efficient the islanders became (as in their implementation of the *ideas* of printing and paper [182-84, see also 106/8-10, 120/4-15]). Time to develop reason and virtue [freedom] was thus augmented in a self-reinforcing process.

The natural law institution that underlay Nusquama's social relations was the biological family in which children served adults and women, men. The familial principle was stressed in the communal meals and order of public worship, which integrated the civic community. By sharing material goods, the whole island acted as a single family; the *oeconomia* of the island literally returned to the natural state of household management, and the natural right of acquisition was fused with common possession. The *politeia* was informed by the principle of rule by the most rational, whether elected scholars or the island's senatorial elders. Its basic unit, however, was a family ruled by the eldest male; its primary standard, paternal care.

<sup>26</sup> Absent from Gratian's definition, however, is civic structure, which Aristotle and Cicero deemed conformable to nature and is central to Nusquama. I judge Gratian to be More's leading juridic source because of his overtly Christian expression of natural law; for the profundity of Gratian's orientation to natural law in his first Distinction see John Van Engen, "From Practical Theology to Divine Law: The Work and Mind of Medieval Canonists," *Proceedings of the Ninth International Congress of Medieval Canon Law*, 1992, ed. Peter Landau and Joers Mueller, *Monumenta Iuris Canonici*, Series C, 10 (Biblioteca Apostolica Vaticana, 1997), 884-89.

<sup>27</sup> Edward Surtz, *The Praise of Pleasure* (Harvard UP, 1957), 78 omits the pedagogic function of the laws. *Cambridge Utopia*, 196/5-6.

In the extreme of defensive war, families took their stand together.<sup>28</sup> The natural law base of Nusquama is again conspicuous. Only the duty of returning goods and money in Gratian's definition of natural law was omitted in More's description of the internal workings of Nusquama, though not in its foreign dealings.

The culmination of Hythloday's account of the island's natural law order described the program of education, Nusquama's achievements in understanding the physical and ethical laws of nature, and their rational religious beliefs (154-162). At the apex was the Golden Rule (*Decretum* 1.1, "Natural law is the Law and the Gospel" [Matt. 7:9-12, 22:39-40]). In its obvious sense, nature's admonition to charity was the root of Nusquamans society. But More further asserted that the rule should be taken reflexively: the injunction to alleviate others' misery bids humans to remove sadness from their own lives and maximize pleasure (162-64). Nusquamans so take the rule, but with proper understanding: the statement of the island's central principle was followed by a long essay on true and false pleasure (166-82).<sup>29</sup>

Utopian society is often disparaged as static and restrictive. Its foundation in traditional natural law imparts that character. A. P. d'Entrèves explains: for medieval jurists, "it is not from the individual that we are asked to start, but from the Cosmos, from the notion of a world well ordered and graded, of which natural law is the

<sup>28</sup> *Cambridge Utopia*, 138-42, 236, 146/5-6, 120-22, 194/17, 210-12 and see 240/30-33. Hexter stressed the key role of the family in Utopia and suggested that the prohibition of *conciliabulum* (144/26) excluded medieval society's competing array of corporations: *Utopia*, ed. E. Surtz and J. H. Hexter, CW4, xli, xlv, hereafter cited as CW4. The natural law role of the family would explain the use of London's household-based officers to the exclusion of its other ruling bodies as the model for Amaurot magistracy, *Moreana* 130 (June 1997), 3-17.

<sup>29</sup> Martin Fleisher, *Radical Reform and Political Persuasion in the Life and Writings of Thomas More* (Genève: Droz, 1973), 52-55, relates this discussion to natural justice. As Nusquama was transformed into *Utopia*, there may have been more humanist additions, as this discourse may be.

expression."<sup>30</sup> That ideal makes estimable Utopia's changeless laws and uniform quality of life. D'Entrèves further discloses that when natural law came to rest on the primacy of unique individual development, a society based on the older standard became an illegitimate restraint on natural right and free expression.

Some of Nusquama's internal social relationships were based on Roman Civil law, which most medieval jurists regarded as the embodiment of natural law. But the major heading that announces these institutions in *Utopia* is "De servis" (Slaves), a status common to most societies but conventional, not natural, in origin; it is therefore part of *jus gentium*.<sup>31</sup> The implication is that More regarded Civil law as a conventional, not natural, standard of justice. That this is the significance of the jarring, apparently arbitrary appearance of the heading "De servis" is demonstrated by the preceding paragraph, which treats of external commerce (184/12-17), following Hythloday's discussion of the books his party brought to the island. More thereby indicated that the sharing of ideas and goods through trade (*jus communicationis*) had a higher natural standing than those Nusquamans rules that followed "De servis."<sup>32</sup>

Among the latter were the precepts governing marriage, the basis of the family: it was monogamous and the grounds for divorce were limited to adultery, severe incompatibility, and intolerable behavior. Violation of the marital bond by attempted seduction or

<sup>30</sup> A. P[asserin] d'Entrèves, *Natural Law: An Historical Survey* (New York: Harper Torchbooks, 1965), 46; chap. 3 for the rest of this paragraph.

<sup>31</sup> *Justinian's Institutes*, trans. Peter Birks & Grant McLeod (London: Duckworth, 1987), 1.2.2, 1.3.2-3 and passim; 2.1.17 for the *jus gentium* basis for enslavement of war captives (hereafter cited as *Inst.*); note its inclusion in Gratian's definition, below p. 15. Quentin Skinner reminds us that the exposition of slave versus free status was central to the *Digest in Liberty Before Liberalism* (Cambridge UP, 1998), 40-41.

<sup>32</sup> Elizabeth McCutcheon, "Puns, Paradoxes, and Heuristic Inquiry: The 'De Servis' Section of More's Utopia" in *Acta Conventus Neo-Latini Torontonensis, 1988*, ed. Alexander Dalzell, Charles Fantazzi, and Richard J. Schoeck (Medieval & Renaissance Texts & Studies: Binghamton, N.Y., 1991), 91-93, observes that many think the section is a hodgepodge.

adultery was severely punished (the latter by enslavement); recidivists were executed.<sup>33</sup> Minimum ages were set for males and females to marry, but they differed from those of the Civil law, indicating that More felt free to alter its conventions. Inclusion of divorce and the provision for suicide in this section based on Civil law gives additional evidence that More conceived its rules to be inferior to natural law.

Administration of justice in Nusquama generally conformed to Roman law. Most punishment was carried out in families by the father. Scholar-magistrates who administered public punishment followed the rule of equity.<sup>34</sup> This principle was allegedly carried to an extraordinary degree in Nusquama. Except for fixed penalties for violation of marriage and therefore of the family foundation of society, *Ceteris facinoribus nullam certam poenam lex ulla praestituit, sed ut quodque atrox aut contra visum est, ita supplicium senatus decernit* (192/7-9) [No other crimes carry fixed penalties; the senate decrees a specific punishment for each misdeed, as it is considered either atrocious or venial (193/9-11, emphasis added)]. Despite the ideal, slavery and death for the incorrigible were common punishments.

Concluding remarks on law and government (194) glide into a discussion of foreign relations. The first reference to the island's overseas contacts occurred, however, much earlier (134-36), in connection with the maintenance of static adult numbers in Nusquama's political divisions. If not attainable by internal transfers, colonies were sent to vacant neighboring lands according to

<sup>33</sup> *Inst.*, 1.9.1, 1.10, 4.18.4; mutual physical inspection reflected Roman law of contract, the base of matrimony. As in Roman law on ravishment, Nusquamans guilty of premarital intercourse were barred from marrying their victim. Cambridge *Utopia*, 189 n92, 191 n95 for Canon law rules, but permitting divorce makes Civil law the more important source. See also Edward Surtz, *The Praise of Wisdom* (Chicago: Loyola UP, 1957), 244-49. Was More's placement of marriage under "De Servis" also a wry evaluation of the institution?

<sup>34</sup> *Inst.* 1.9.2-3, 4.18 and see 4.17.2-6. Principal family heads or sypogranths could jointly pardon enslaved criminals but so, too, could the *princeps*, corporate father of the *civitas*, following Roman doctrine (192/19-21).

the *natural* right of acquisition. Thus if nearby natives opposed settlement, Nusquama thought it a just ground for war.<sup>35</sup>

Foreign contacts through trade were also earlier described (146, 148), but a word must be said about the market's place in Nusquama before discussing the island's overseas commerce. More presented a Ptolemaic theory of civilization in which equatorial regions were inhabited by beastlike men (46/30-31); cities only existed at higher latitudes on both sides of the line.<sup>36</sup> Thus commerce is a test of civility. But highly civilized Nusquama had no internal, only foreign trade. The explanation for this paradox seems to lie in the Neo-Platonic hierarchy of laws implicit in More's account: Nusquama's internally governing natural law evidently holds a position higher than the *jus communicationis* of trade, but the latter was higher than either Civil law or *jus gentium*, let alone barbarism.

In Nusquama's foreign trade, customers usually paid with promissory notes secured by local city governments. Payment was only required when war required Nusquamans to hire mercenaries and pay bribes for treason and defection. Islanders also gave one-seventh of their trading profits to the poor of the importing country (146/12-21). These beneficial policies brought the island's trade under the natural precept of charity; this helps account for its discussion in the early section of Book II dealing with the internal operation of natural law.

As few foreign merchants visited Nusquama because of its forbidding harbor entrance and the absence of money among its citizens (136/23), islanders conducted their own overseas commerce.

<sup>35</sup> Corresponding to Gratian's formulation. Under Civil law, only navigable waters and shores were free to everyone by natural law, *Inst.*, 2.1.1-5, 11, 2.6.

<sup>36</sup> John Major (Mair) similarly described equatorial peoples in his *Commentaries* of 1510 (Lewis Hanke, *All Mankind is One* (Dekalb, Ill: Northern Illinois UP, 1974), 101). King Duarte of Portugal so portrayed Canary Islanders in his 1436 letter to Eugenius IV that resulted in the bull *Romanus Pontifex*; see James Muldoon, *Popes, Lawyers, and Infidels* (U of Pennsylvania P, 1979), 121 and 134-35. This is the best work in English on the doctrine of *jus gentium* among late medieval canonists.

Except for governors requested by some neighboring peoples and the managers of mainland estates retained as war reparations, the traders were apparently the only islanders resident in foreign countries—as distinct from overseas colonists (184/13-14, 196/17, 216/14-18). If its merchants were cheated, the republic retaliated by cessation of traffic with the offenders, in effect depriving them of Nusquamans charity. Should they or Nusquamans administrators be maimed or killed, however, envoys were dispatched to determine the facts and demand surrender of the guilty. Refusal brought immediate war. These sanctions appeared in the later part of Book II, where foreign and military affairs were directly addressed, but war in self-defense was, like colonial settlement, in accord with natural right.

War might also result if merchants of a friendly neighbor were plundered or subjected to legalized extortion. The difference in response compared with that for cheated Nusquamans resulted from the fact that merchants of a friendly people lacked the islanders' security of communal possessions. Retribution against those who preyed on allied merchants was in any event but a special case of a general ground for Nusquamans war, protection of friends from the oppressions of invasion and tyranny (196, 200-02). According to Gratian this was obligated by natural justice.<sup>37</sup> A specific process was necessary, however, before the republic did battle to redress their friends' wrongs:

*Verum id ita demum faciunt, si re adhuc integra consulantur ipsi, et probata causa, repetitis ac non redditis rebus, belli auctores inferendi sint:* (202/4-6) [But they enter a conflict only if they themselves have been consulted in advance, have approved the cause, and have demanded restitution, but in vain, and only if they are the ones who begin the war (203/3-6)].

<sup>37</sup> *Gratiani Decretum, La traduction en ancien français*, Vol. III: Causae 15-29, ed. Leena Löfstedt, *Commentationes Humanarum Litterarum* 105 (Helsinki: Societas Scientiarum Fennica, 1996), 122-23, 126-27 (Causa 23 Q 1.6, Q 3.7, 11), hereafter cited as *Gratiani*. For a discussion of this Causa see James A. Brundage, "Holy War and the Medieval Lawyers," in *The Holy War* (Columbus: Ohio State UP, 1991), 106-10, 113; on Roman grounds for war (which were also those of Nusquama), 102.

As with many of the island's practices, this procedure was based on Roman custom.

All occasions which provoked Nusquamans to engage in war thus fell under natural law, not *jus gentium*. If we examine Gratian's definition of *jus gentium*,

the occupation of habitations, with building, fortification, war, captivity, servitude, postliminy [reparations], treaties, armistices, truces, the obligation of not harming ambassadors, and the prohibition of marriage with aliens,<sup>38</sup>

it is evident that for Nusquamans its rules, as they related to war, applied to *jus in bellum* (standards for conduct in battle) and not, with the exception of protection for its representatives abroad, to *jus ad bellum* (proper grounds for commencing war).

Once the restraint of natural law failed and war began, the republic posted inducements for the assassination or overthrow of enemy leaders. In battle they concentrated their attack on opposing generals, and intransigent military commanders of besieged cities were subject to retribution. Nusquamans were skilled in ambushes and sought the latest advances in war technology. Ferocious mercenaries were hired with stockpiled gold; after them the soldiers of friends and allies were used before a single islander did combat. Most of these practices were contrary to contemporary military norms, but innocent peasants or inhabitants of besieged cities were spared according to *jus gentium*.

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The hierarchy of Nusquamans laws as they would have been understood by More's contemporary international jurists may now be reviewed. Its apex was natural law. Secondly, *jus communicationis* was observed most notably in foreign commerce. Internally a variety

<sup>38</sup> *Decretum* 1.1.9. Habitation was conformable to natural commonality in Nusquama under rules of public access and periodic rotation (112, 118-20); as will be apparent, More adhered less to Gratian's definition of *jus gentium* than to that of natural law.

of precepts from Civil law, the highest form of *jus gentium*, held sway, but these were freely overridden or supplemented by More. Such were various rules governing the natural family, the basis of society; restraints on travel in order to insure the natural necessity to work; and the island's governmental structure, the remedy for failure of natural and other restraints. The most striking example was the fundamental law of religious toleration imposed by Utopus; but he seems to have imposed the full panoply of laws from natural to idiosyncratic at the time he conquered the Abraxans, and they remained unchanged from that time.<sup>39</sup>

Crucially absent was private *dominium*, with its dual meaning of rule and ownership; this indicates that More held it to be not natural but conventional in origin.<sup>40</sup> Corporations were likewise proscribed. The absence of lawyers resulted from the fact that the law of nature, if not self-evident to all, was inculcated through education. Lawyers only manipulate human conventions; Nusquamans magistrates sufficed for the limited need to arbitrate (194-96). Legal services were further obviated because the island's laws either embodied eternal natural law or were kept few and clear.

Nusquamans justification for waging war was also governed by natural law. *Jus gentium* had expedient moral weakness; Nusquamans consequently impugned treaties: *Quorsum enim foedus, iniquum, quasi non hominem homini satis natura conciliet, quam qui contempserit, hunc verba scilicet putes curaturum?* (196/31-198/1) [If nature, they say, doesn't bind man adequately to his fellow man, what good is a treaty? (197-99) If a man scorns nature herself, is there any reason to think he will care about mere words? (199/1-2)]. More thus dissented from late medieval juristic belief that contracts, the

<sup>39</sup> See my "The Governmental Structure of Utopia," *Moreana* 130/24.

<sup>40</sup> The word occurs but three times in Book II, with negative reference to landlords (112/15, 128/23, 152/13), ref. Ladislaus J. Bolchazy, ed., *A Concordance to the Utopia of St. Thomas More* (New York: Georg Olms, 1978), 76.

essence of human convention, sprang from natural law.<sup>41</sup> Only with the failure of natural law in its dealings with foreigners did Nusquamans resort to the imperfect standards of *jus gentium*, such as the exemption of cultivators from penalties inflicted on combatants; usually, however, they resorted to unrestricted, harsh expediency.

### Further Comparisons that Reveal the Distinctive Character of More's Juridic Thought in *Utopia*

Given More's debt to St. Augustine and the latter's perennial juristic authority, it is not surprising that the saint's belief that warfare could be justified by defense of the innocent and his famous dictum that the goal of war is peace were central to Nusquaman practice.<sup>42</sup> Significant is the failure to mention what St. Augustine insisted upon, that the prince's authority was necessary in order for warfare to be rightfully undertaken.<sup>43</sup>

As we have indicated, More drew heavily on Civil and Canon law authority for many Nusquaman practices. Their standards for the conduct of warfare, such as fidelity to truces, skill in ambushes, and use of advanced military technology (212/21, 214/9 & 28, 216/1) indicate he was abreast of recent canonist thinking on these contentious issues. With regard to the first two issues, some canonists distinguished between the clandestine and prevarication: ambushes

<sup>41</sup> But see Cambridge *Utopia*, 164/18 on private agreements. For the natural law status of contract among late medieval jurists, see Kenneth Pennington, *The Prince and the Law, 1200-1600* (Berkeley: U of California P, 1993), 206-08, 227.

<sup>42</sup> Especially (232/22, 32); St. Augustine, *The City of God against the Pagans*, ed. R. W. Dyson (Cambridge UP, 1998), 933-34 [XIX, 12]; St. Augustine, *Earlier Writings*, trans. John H. S. Burleigh, Library of Christian Classics 4 (Philadelphia: Westminster Press, 1953), 118-20 [On Free Will, I.v. 12-13].

<sup>43</sup> St. Augustine, *Earlier Writings*, 118-20; St. Augustine, *Select Library of the Nicene and Post-Nicene Fathers*, ed. Philip Schaff, 1<sup>st</sup> ser., 4 (Rpt. Grand Rapids: Wm. B. Eerdmans, 1983), 301 [Reply to Faustus the Manichean, XXII, 75]; and see Herbert A. Deane, *The Political and Social Ideas of St. Augustine* (New York: Columbia UP, 1963), 156-66.

were admissible secrecy but tactical breaches of truce constituted immoral lying.<sup>44</sup> As for technology, the second Lateran Council of 1139 forbade use of crossbows, but later canonists generally held that all means were allowed to prosecute a just war.<sup>45</sup>

Turning to the sixteenth century, Budé and later Oxford's Regius Professor of Law, Alberico Gentili,<sup>46</sup> recognized that *Utopia*, to now use the published title, was a work seriously concerned with standards governing relations between states. But More's devaluation of *jus gentium* and positive law in favor of natural law was counter to the major trend of thinking among international lawyers, who found natural law primitive and morally neutral; instead they embraced legal convention as the key to man's moral progress.<sup>47</sup> More joined other sixteenth century jurists, however, in the extent to which in *Utopia* he allowed nominally secular standards to replace Christian ones in determining the just basis for war.<sup>48</sup>

While the great Spanish authority on international law, Francisco de Vitoria, like More, made natural law normative for international relations, the two differed in their understanding of the

<sup>44</sup> See for example the 14th century canonist Giovanni da Legnano, *Tractatus de Bello*, ed. Thomas E. Holland (Washington: Carnegie Institution, 1917), 271; Brundage, "Limits of the War-Making Power: The Contribution of the Medieval Canonists," in *The Crusades, Holy War and Canon Law* (Aldershot: Variorum, 1991), 76.

<sup>45</sup> Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge UP, 1975), 7, 70-71, 156-57, 243-44; Brundage, "The Limits of the War-Making Power," 77-82.

<sup>46</sup> *De Jure Belli Libri Tres*, ed. 1612, trans. John C. Rolfe, vol. 2 (Oxford: Clarendon, 1933), 189, 325, 167; Dust, "Gentili," 34-36.

<sup>47</sup> Richard Tuck, *Natural Rights Theories* (Cambridge UP, 1979), 32-50; ch. 1 helped clarify my thinking on these issues.

<sup>48</sup> Francisco de Vitoria, *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge UP, 1991), xiv, hereafter cited as Vitoria. I agree with many commentators like Surtz, however, that *Utopia* was a limited expression of More's moral convictions and that the omitted Christian values were always dominant with him. Furthermore, these "secular" standards had themselves been defined in the moral context of Christianity, which gave them acceptability to More.

relationship between *jus naturalis* and *jus gentium*. More showed aversion to the latter because of its origin in expediency and human convention; Vitoria was closer to mainstream thinking in regarding *jus gentium*, which also included private property and the origin of cities, as the result of a natural necessity that made it virtually inseparable from the formally higher standard of natural law.<sup>49</sup>

Vitoria's influential justification for colonial conquest was the natural right of free passage and access to surplus natural resources that natives held in common.<sup>50</sup> But he rejected any right to unoccupied land on the basis that by *jus gentium* it was the lawful possession of resident natives.<sup>51</sup> This reverses the emphasis found in *Utopia*. Vitoria believed with More that peoples were bound to relieve their allies and neighbors from oppression. He used this duty, however, to sanction Christian conquest and reinforced it by the right under *naturalis communicationis* to teach the truth, i.e. Christianity. Utopians observed freedom to communicate the truth, but it was not one of their justifications for war.<sup>52</sup>

Otherwise there was remarkable agreement on *jus ad bellum*, but Vitoria taught that recovery of expropriated property justified war; and while Utopians held all their wars to be righteous, Vitoria considered that, through error, opposing belligerents could each believe their cause just.<sup>53</sup> On *jus in bellum* there was virtual identity. Vitoria even agreed that territory might be retained, both to pay the

<sup>49</sup> J. A. Fernández-Santamaria, *The State, War and Peace, Spanish Political Thought in the Renaissance, 1516-1559* (Cambridge UP, 1977), 66-76, 97-100, 104-06, and 107-19, 132-43; on More, 153; hereafter cited as Fernández-Santamaria. See also Bernice Hamilton, *Political Thought in Sixteenth-Century Spain* (Clarendon, 1963), 12, 17-18, 34-36, 99-106, 131-33, 144, 151-57; Noreña, *Spanish Renaissance Thought*, 140-44.

<sup>50</sup> Vitoria, 278-83, based on Gratian, *Gratiani*, 124 (C.23.2.3). More's lack of agreement with this, like Nusquamans autarky, is surprising, given the high status he accorded *jus communicationis*.

<sup>51</sup> Vitoria, 264.

<sup>52</sup> *Ibid.* 284-89.

<sup>53</sup> *Ibid.* 300, 304-13; and see Surtz, *Wisdom*, 281-85.

cost of repelling unjust aggression and as punishment, and that a prince might be deposed by a just victor. But in keeping with post-Bartolian political theory, he stressed that the political community, not the conqueror, had the right to choose its rulers.<sup>54</sup>

Of considerable interest is a comparison between More's thinking on natural law, as found in *Utopia*, and that of Juan Ginés de Sepúlveda, humanist correspondent of Erasmus and famed opponent of Vitoria's fellow Dominican Bartolomé de Las Casas in the 1550-51 debate on the forced labor of, and war against, American Indians.<sup>55</sup> He was a leading Aristotelian humanist, and from the Philosopher had developed an aristocratic view of the operation of natural law. As it equalled the rule of reason, he held that the most reasonable had the right of dominion over the rationally inferior. Thence flowed his defense of Spanish rule of native Americans, so they might be trained in humane and virtuous customs.<sup>56</sup> The discipline of *encomiendas* was part of the civilizing process. That many liberal commentators have found *Utopia*, with its universal obligation to work and harsh treatment of shirkers (124-26, 130, 144, 228) as little better than a giant *encomienda*, forms a suggestive tangent to their similar views.<sup>57</sup>

<sup>54</sup> Vitoria, 303-06, 314-27. One wonders if Vitoria read *Utopia*, but he would not cite a work recommended by two men he regarded as heretics, Erasmus and Budé.

<sup>55</sup> For an account of the debate by the leading Spanish authority on Sepúlveda, see Ángel Losada, "The Controversy between Sepúlveda and Las Casas in the Junta of Valladolid," in *Bartolomé de Las Casas in History*, ed. Juan Friede and Benjamin Keen (DeKalb: Northern Illinois UP, 1971), 279-305.

<sup>56</sup> Fernández-Santamaria, 222-30; Sepúlveda included the right of warmaking to enable preaching of the Gospel. Fernández-Santamaria's is the most probing English commentary on Sepúlveda and free of Lascasian distortion. For the humanist's anguished protest against his defamation, see 167-69; but Lewis Hanke, *Aristotle and the American Indians* (London: Hollis & Carter, 1959), ch. 6, has important evidence contradicting his defense.

<sup>57</sup> There is some merit to liberal criticism, as Utopian dress and travel restrictions were identical to those of Polylerite enslaved criminals! (72, 124, 132, 144).

The two humanists held in common most of the traditional doctrines concerning the occasions and means for waging just war.<sup>58</sup> In particular they agreed on the right to settle unoccupied lands and defend that occupation by force. Though Sepúlveda's belief in a *duty* to subdue barbarous peoples to the rule of reasonable governors goes beyond Utopian practice, it rested in part on a shared belief in an obligation to free oppressed peoples from tyranny. But More's doctrine of the gradient of civilization between the equator and temperate latitudes, the rule of Utopia by the most reasonable, Utopian colonists' dominion over their indigenous neighbors, and the requests by some mainlanders to be ruled by virtuous and impartial Utopians (196/15-28) combined to align him with Sepúlveda on the desirability of rule by superior men.<sup>59</sup> They markedly differed, however, over the definition of this aristocracy: Sepúlveda's list of qualities (wealth, birth, accomplishment and wisdom) followed contemporary practice, and he unabashedly admired military prowess.<sup>60</sup> More eliminated this as well as Sepúlveda's first two criteria, but both insisted that education was essential to perfect aristocratic rulers.

Sepúlveda's definition of citizenship, however, matched Utopian practice; the citizen is one who has authority:

to judge and to deliberate on affairs of state. The act of judging, however, implies far more than merely placating controversy between two parties in conflict; it embodies the capacity of the citizens to designate the magistrates, thereby asserting with

<sup>58</sup> Fernández-Santamaria, 216-20.

<sup>59</sup> The Valladolid jurists favored Sepúlveda, *ibid.*, 95. The listed similarities between More and Sepúlveda joined with the republic's control over their allies' warmaking and the policy of fighting to the last drop of their blood (210/9) support Gerhard Ritter's thesis on Utopian imperialism, *The Corrupting Influence of Power* (Haleigh, Essex: Tower Bridge Pub., 1952), 75-88.

<sup>60</sup> Anthony Pagden, *The Fall of Natural Man* (Cambridge UP, 1982), 114; in ch. 5 he presents the negative evaluation of Sepúlveda at full bore.

their vote their right to pass judgment on the dignity and merits of the candidates.<sup>61</sup>

There was further agreement that the *status optimatum* was rule by the most prudent and virtuous, led by a *princeps* and his councillors. But Sepúlveda emphasized a strong national monarch, particularly in the crucial matter of determining when to wage a just war,<sup>62</sup> unlike Utopia's decentralized civic structure.

More and Sepúlveda's shared Aristotelian beliefs were predominantly in the areas of international relations and structure of government. They formally agreed that a state's laws should follow natural law to ensure domestic peace and virtuous activity, but Sepúlveda hardly took it to Utopian lengths. And, in contrast to More, Sepúlveda thought *jus gentium* virtually identical with natural law.<sup>63</sup>

Our third comparison is with a contemporary whose early life paralleled More's, but whom he later opposed in harsh controversy, Martin Luther. At the behest of their fathers, both men were trained in the law (each studied Civil and Canon law); they were attracted to the monastic life and St. Augustine; and each believed the clerical order needed reform.<sup>64</sup> Given their common legal training, their differing views on law and its relation to ecclesiology are of great interest, not least because Luther provoked More to publicly belittle Utopia.

We have argued that the Utopian order was based on Gratian's definition of natural law, yet one of the most dramatic events in Luther's campaign of reform was the burning of the Canon law, including Gratian's *Decretal*, at the Elstergate of Wittenberg in December 1520. Not only was this a denial of the legislative capacity of the Church, it also struck at Gratian's revival of the tenet that the

<sup>61</sup> Fernández-Santamaria, 192; in light of this passage I would modify my discussion of Utopians citizenship in *Moreana* 130: 18-19.

<sup>62</sup> Fernández-Santamaria, 196-200, 217-18.

<sup>63</sup> *Ibid.* 215-16.

<sup>64</sup> On Luther see Harold J. Berman, *Faith and Order*, Emory University Studies in Law and Religion 3 (Atlanta: Scholars Press, 1993), 143-48.

clerical hierarchy's unwritten tradition of Christian doctrine had equal authority with Scripture, a position strongly maintained among canonists. In his *Responsio ad Lutherum* More asserted this tradition against *sola scriptura*.<sup>65</sup> Of most significance for our discussion, however, Luther degraded natural law itself. Ontologically and epistemologically he separated it from the Godhead, which could never be approached by reason, only through grace and faith. For him natural law, *jus gentium*, and Civil law all operated at one terrestrial level to maintain peace and order.<sup>66</sup> More conceived of natural law as an emanation of the divine that occupied a privileged position above *jus gentium* and ordinary codes of law.

Following from his single-minded rejection of any human means for achieving salvation, especially Jewish and Canon law, Luther briefly advocated that society be governed by the Gospel alone: love and the Golden Rule, not written laws, under the equitable jurisdiction of good men.<sup>67</sup> Because the Utopian law code was so simple (it was basically the law of nature) and enforced by judicial equity, and because More asserted that the welfare of a commonwealth depended on the character of its rulers (196/20-21), his ideal society apparently resembled Luther's. Indeed, Budé's endorsement of *Utopia* summarized its argument in the very terms of

<sup>65</sup> *Responsio ad Lutherum*, CW5, ed. John M. Headley, trans. Sister Scholastica Mandeville, 240-42 and "Introduction," 734.

<sup>66</sup> Melancthon, like More, distinguished *jus gentium* from natural law but, following Luther's lead, felt that sinful man could not discover the latter with reason; it was only available through revelation in the Decalogue, Berman, *Faith and Order*, 152-55.

<sup>67</sup> Ironically, in the same year as the *Responsio*, Luther's *On Secular Authority* upheld law and compulsion in the world of fallen man, while Melancthon denounced those who would make Scripture into the sole law of man in terms close to More's *Responsio* argument. See Gerald Strauss, *Law, Resistance, and the State* (Princeton UP, 1986), 206, 208, 198; 199-224 on Luther's fluctuating pronouncements on secular law. For his changing attitude toward natural law, see F. Edward Cranz, *An Essay on the Development of Luther's Thought on Justice, Law, and Society*, Harvard Theological Studies 19 (Harvard UP, 1959), esp. 106-10; CW5, "Introduction," 752. Luther came to believe that law was best delivered by heroic lawgivers (*Wunderleute* or *Wundermänner*), among whom Utopus could find place.

the reformer (10-14, 16),<sup>68</sup> and Busleyden, another contemporary jurist, reiterated that laws were lifeless without good men to administer them (252/18-25).

Despite these significant considerations, More's conception of the operation of natural law within Utopia was distinct from the ideal briefly held by Luther. He did not rely on the naked Golden Rule: the simple, natural laws of Utopia were promulgated and taught (194-96). A specific law was that all should work: *Syphograntorum praecipuum ac prope unicum negotium est curare ac prospicere ne quisquam desideat otiosus, sed uti suae quisque arti sedulo incumbat*. (126/3-4, emphasis added, and 144/24-25) [The chief and almost the only business of the syphogrants is to take care and see to it that no one sits around in idleness, and to make sure that everyone works hard at his trade].<sup>69</sup> Violators of this and other laws were punished as criminals. Thus the *Responsio*'s attack on what More took to be Luther's anarchic and arbitrary lawlessness does not contradict the Utopian legal system, even though it took the same form as Morus' mundane rejoinder to Hythloday (104/7-11).<sup>70</sup>

Nonetheless More felt obliged in the *Responsio* to denigrate Utopia and Nusquama as empty concepts.<sup>71</sup> Nusquama, a generally temperate portrayal of a society based primarily on natural law, might be rejected in the *Responsio*'s terms with few qualms. But as we shall presently argue, Nusquama was not *Utopia*, and the latter's fervent idealism was betrayed in More's anti-Lutheran diatribe. Furthermore, *jus gentium*, based on expedient human conventions, had been

<sup>68</sup> Budé even defined natural law as the right of the strongest (10/19-21), in contradiction to More; for a discussion of Budé's letter in the context of popular utopian legal thought in contemporary Germany, see Strauss, *Law*, 39-47 and 22-23.

<sup>69</sup> From revealed natural law, Gen. 3:19. John M. Parrish, "A New Source for More's 'Utopia,'" *Historical Journal* 40 (1997): 493-98 fails to note this negative aspect of *otium* compared to *negotium* in Utopia.

<sup>70</sup> CW5, 271, 275-81.

<sup>71</sup> CW5, 118/11, 21; but he later gives the correct meaning of *nusquam*: not never-never, but a Platonic idea, *Platonis [idea] ... quae, et in loco sit, et nullo loco sit* (166/21-22).

demoted in Nusquama, but in the *Responsio* More embraced the standard defenses of property and human law.

### From *Nusquama* to *Utopia*

The *relazione* of Nusquama, a society ordered principally by natural and Roman civil law, was largely completed in the slack time of the Netherlands embassy. But it was not yet *Utopia*. Erasmus tells us Book I was added later. Its chief transformations were dialogue in place of narrative, a new theme of obligation to give counsel, and the substitution of mordant condemnation of contemporary social and political abuse for Nusquama's basically deliberate and often humorous reporting. The reasons for these dramatic changes were several.

To begin with the subject of Book I, the corrupt condition of contemporary statecraft: did it represent a new orientation after October 1515, or had its treatment always been intended? The contrasts with European society that recur in the description of the imaginary island, unless added in England, suggest the latter. But if his manuscript was virtually complete when he left the Netherlands, as More's opening letter to Giles indicates, the contrasts would have had to remain implicit.

But More's long account of Nusquamian foreign policy invited a discussion of contemporary international practice. This is realized in the alleged arguments for the invasion of Italy at the French court. Such a portrayal of contemporary international politics might fittingly have come at the end of Book II, where the tone of the Nusquama draft changed to the harshness of Book I as treaties and the lawless world of military practice were taken up (196-216). Several reasons favored presentation of the current political practice at the beginning of the whole work. One would be the *relazioni* form (if, as argued above, it is the genre of Book II), because this form began with a description of a ruler's court, its factions, and their views on foreign

relations and war.<sup>72</sup> The interest of his audience would also have been engaged by opening the work with a delineation of French motives for the invasion of Italy (Allen 619).<sup>73</sup> But the diverse arguments of French counsellors was preceded both by the first portion of the dialogue of counsel and then the dialogue at Cardinal Morton's table, which analyzed the failures of English law and government. This argues for a later decision to include the French debate.

The change from *sermo* to the impassioned dialogue of Book I coincided with More's closer relationship with Erasmus beginning in the fall of 1515, when he took up defense of his friend in the letter to Dorp.<sup>74</sup> The outraged expression of the antagonism between current practices of statecraft and Christian values in *Querela Pacis* and *Dulce Bellum Inexpertis*, already found in Book II's discussion of treaties and warfare, permeates Book I. An actual dialogue between the two on the issue of counsel likely occurred in exchanges during summer 1516, after More had received an invitation to join Henry's council and Erasmus was appointed a councillor to Charles.<sup>75</sup> More practiced the dialogic form of the Morton's table episode in a late June letter to Erasmus that refers to the latter's critique of his style (Allen 424).<sup>76</sup> Additionally, Erasmus probably inspired the outer dialogue of the

<sup>72</sup> This may also account for the awkward insertion of the "Magistrates" section within the early discussion of occupations which begins on pp. 112-14 and continues on 214 ff. Its placement, like that of Utopus' other legislation, does not fit the hierarchical presentation of classes of law in Book II, see 9-12 above.

<sup>73</sup> The most famous was Machiavelli's *The Prince*. Richard Pace also noted the topicality of *Utopia*, *The Correspondence of Erasmus*, CWE 5, 58.

<sup>74</sup> Hexter in CW4, xxxiii, lxvii, lxxi.

<sup>75</sup> Notice of Tunstall's appointment as Master of the Rolls indicates that portions of *Utopia* were written after 7 May 1516.

<sup>76</sup> *The Correspondence of Erasmus*, CWE 3, 313-16. Hexter notes that Hythloday's Augustinian views about the corrupting pressures operating on a councillor were far more pessimistic than Erasmus' perennial optimism, CW4, lxxxii-lxxxv.

parerga and took a leading role in obtaining the letters (Allen 481, 534, 537, 543).<sup>77</sup>

More did not become an attendant councillor until a year and a quarter after the publication of *Utopia*. A variety of explanations have been given for this evident hesitation.<sup>78</sup> To them may be added compelling ones from the world of diplomatic service. More had found his long absence from home during the intercursus embassy unpleasant, and his assignment to negotiate at Calais in 1517 very disagreeable.<sup>79</sup> He had witnessed Pace's frenetic travels and could not have been unaware of Sir Robert Wingfield's virtual exile at the court of the Emperor Maximilian during the years when permanent embassies were becoming normal practice.<sup>80</sup> When the king made him what would later be called a Master of Requests, an appointment probably brokered by Wolsey, he could feel assured that he would be able to continue to reside in England.

Whatever the reasons for this delay in receiving his award, More joined Henry's council in 1518, and until 1529 participated in five more foreign embassies, including the Ladies' Peace of Cambrai. He signed the treaty in August 1527 at Amiens, and in 1529 Margaret of Austria, regent in the Netherlands for her nephew Emperor Charles V, presented More with gifts of silver from the emperor.<sup>81</sup> The French neo-Latin poet Jean Salmon Macrin consecrated one of his 1530 *Odes* (I, 25) to More as a peacemaker at Cambrai. In the meantime his

<sup>77</sup> *The Correspondence of Erasmus*, CWE, 116, 250, 255, 270-71; More gave him editorial carte blanche in September ("you must do what you can for it"); see note 76.

<sup>78</sup> John Guy, *Thomas More* (London: Arnold, 2000), 46-58.

<sup>79</sup> J. H. Hexter, *More's Utopia: The Biography of an Idea*, 1952 (New York: Harper Torchbooks, 1965), 134.

<sup>80</sup> M. S. Anderson, *The Rise of Modern Diplomacy 1450-1919* (London: Longmans, 1993), 5-9; *Letters & Papers Hen. VIII*, vol. 2, nos. 684, 807.

<sup>81</sup> See Elizabeth Frances Rogers, "Margaret of Austria's Gifts to Tunstal, More and Hacket after the Ladies' Peace," *Moreana* 12 (1966), 57-60, and Germain Marc'hadour's review of her book *The Letters of Sir John Hackett 1526-1534* in *Moreana* 36 (1972), 105-110, esp. p. 109.

literary training served his humanist interests—as far as his demanding professional duties allowed. His Latin *Epigrammata* were published in Basel. He corresponded with Erasmus, and defended him against his anti-humanist critics, as in the *Letter to Dorp* and the *Letter to a Monk*. In the *Letter to the University of Oxford* he expounded the importance of Greek studies, against the opposition of the university dons. In the *Epigrammata* he had already criticized the mix of jingoistic history and bombastic poetry in Brixius' Latin epyllion, the *Chordigera*. His much later *Letter to Brixius*, a rejoinder to Brixius' *Antimorus*, amounts to a treatise on the art that both links and distinguishes the one genre and the other—the truth of the history and the quality of the poetry. His literary skills were called on in a different field when religious controversy began. He had a hand in Henry's *Assertio Septem Sacramentorum* against Luther. Two years later More published his own *Responsio ad Lutherum*. His later *Dialogue Concerning Heresies* is a work of literary art as well.

His public service was crowned with the Lord Chancellorship, a post of legal authority second only to the King's. As England's highest judicial officer he ministered also to the King's conscience according to that essence of legal justice, equity. In the end the King's conscience was neither amenable nor equitable.

### Appendix: Definitions

Several terms in the Roman juristic lexicon need explanation. In More's time natural law was a concept, developed in classical Greece, that human beings were subject to moral constraints within the cosmos just as they were to physical ones like the force of gravity, alternations of day and night, or generation and death. Later Roman jurists integrated this belief into their positive legal code of Civil law. See Gratian's enumeration of the content of natural law in the section labeled *Nusquama*.

*Jus gentium* developed in Roman law from agreements that governed Rome's relations with other states. As Rome absorbed most of them over time, their common elements became customary law in

the empire; and because Rome believed that it constituted the civilized world, such law became confused with natural law. Strictly, however, it was a body of customs and agreements among peoples or their sovereigns. This emphasis led to its development as international law, though the term had other valences.

*Jus communicationis* has the root meaning "to share" and was applied to trade and verbal exchanges. Rules of trade were a major component of *jus gentium* in Roman law. During the medieval period, *naturalis communicationis* was often used identically with it, which in turn gave it the status of natural law.

These are but rough definitions. Writers could differ in the conceptions of the terms, as became evident in the course of this article. The reader may wish to refer to the several cited authorities on these subjects, especially d'Entrèves.

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