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LEX NATURALIS AND IUS NATURALE

KENNETH PENNINGTON

After the air attacks of September 11, 2001 the United States government decided to fortify all public government buildings and spaces of importance in Washington, D.C. that might be targets of future attacks. The expenditures for these projects ran to millions of dollars and included the White House, Congress, and the Supreme Court. These extensive fortifications were inspired by widespread fear at all levels of the American government that extreme measures were needed to protect themselves and government buildings. This culture of fear quickly became an accepted part of American political discourse. Fear was no longer cowardly; it became a badge of courage. Streets around government buildings were closed. Streets that remained open were provided with retractable barriers. A security cordon around the White House was greatly expanded. The public was denied entrance to the grand staircase on the West side of the Capitol buildings. Armed police were placed on every corner of Capitol Hill twenty-four hours a day. To secure perimeters metal bollards were placed around buildings and public spaces at a cost of \$10,000 each. They could not protect against air attacks or suicide bombers—only truck and car bombs—but that fact did not deter the frenzy of construction that still continues. Thousands of bollards were put in place. The directors of every government agency stumbled over one another to arrange that their spaces be surrounded by these symbols of fear. The question that every director in Washington must have asked themselves again and again was “How could their buildings be bereft of these symbols that made a public statement of their importance?” Even the coal burning steam plant on Capitol Hill—the worst source of pollution in Washington—was fortified.¹ The bollards around the Supreme Court were the only ones decorated with a Latin word: *Lex*. Why did the judges choose *lex* and not *ius* for those protective fences?

To answer that question we have to go back to the Renaissance of law in the twelfth century. *Ius* and *lex* were terms of Roman law. The first jurist to examine *lex* and *ius* in detail was named Gratian who taught canon law in Bologna. In the first half of the twelfth century he compiled a

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¹ Since my home is two blocks away from the steam plant I have mixed feelings about efforts to guarantee its continued existence.

Tractatus de legibus with which he introduced his students to law. He explored the different meanings of *ius* and *lex* for the first time in European jurisprudence. Gratian began his *Tractatus* with a statement that would remain a standard statement for centuries:²

The Human Race is ruled by two things: namely, natural *ius* and *mos*. The *ius* of nature is what is contained in the *lex* and the Gospel. By it, each person is commanded to do to others what he wants done to himself and is prohibited from inflicting on others what he does not want done to himself. This indeed is the *lex* and the prophets.

Gratian recognized two major elements of human law: *ius* and *mos*. He connected *ius* with natural law and *lex* with the Old and New Testaments. Human *lex* did not enter into his discussion—yet. To understand Gratian’s awkward introduction one must remember that legislative institutions were just beginning to appear in twelfth century society; custom regulated society not *leges*. If Gratian had written his introduction a century later he very likely might have written: “Humanum genus duobus regitur, naturali uidelicet et positivo iure.”³ But the canonists had not yet invented the term “*ius positivum*.” To define “*ius naturae*” he relied on Matthew 7:12. *Ius* commands each person to render onto others what each person would want others to render onto her—the Golden Rule. Gratian patterned his thought after texts that he found in Justinian’s *Digest*. There he found a statement by the ancient jurist Gaius who also defined the law that governed human society:⁴

All peoples who are ruled by *lex* and *mos* partly use their own *ius* and partly the *ius* that is common to all men. The *ius* that each na-

² Gratian, *Decretum*, ed. Emil Friedberg (Leipzig: B. Tauchnitz, 1879, repr. Graz: Akademische Druck- und Verlagsanstalt, 1959), D.1 d.a.c.1: “Humanum genus duobus regitur, naturali uidelicet iure et moribus. Ius naturae est, quod in lege et euangelio continetur, quo quisque iubetur alii facere, quod sibi uult fieri, et prohibetur alii inferre, quod sibi nolit fieri. Unde Christus in euangelio: ‘Omnia quaecunque uultis ut faciant uobis homines, et uos eadem facite illis. Haec est enim lex et prophetae.’ [Matthew 7:12, cf. Luke 6:31]”

³ Stephan Kuttner, “Sur les origines du terme ‘droit positif,’” *Revue historique du droit français et étranger* 15 (1936) 728–740. See also John Marenbon, “Abelard’s Concept of Natural Law,” *Mensch und Natur im Mittelalter*, ed. A. Zimmermann and A. Speer (Miscellanea Mediaevalia 21; Berlin-New York: Walter de Gruyter, 1991) 609–621.

⁴ Justinian’s *Digest*, ed. Alan Watson (Philadelphia: University of Pennsylvania Press, 1985) 1.1.9 “Gaius 1 inst. Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur. Nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est uocaturque ius civile, quasi ius proprium ipsius civitatis: quod uero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur uocaturque ius gentium, quasi quo iure omnes gentes utuntur.”

tion has constituted for itself for each city is called the *ius civile*; almost as if it were a *ius proprium* of that city. What, however, the natural reason of men establish and is used by all men equally, is called the *ius gentium*, almost as if all human beings use that *ius*.

Gaius began with *lex* but quickly switched his terminology to *ius*. *Ius* can be common to all men, but *ius* also governs each city. This *ius proprium* is also called *ius civile*. The *ius gentium* that is common to all men is established by human reason. Gaius' statement is followed by an excerpt from Ulpian, which was the Roman version of the Golden Rule and gives another meaning to *ius*:⁵ "Justice is the constant and perpetual will of giving everyone their *ius*." Ulpian implicitly pointed out that *ius* also means right and that justice can be defined by rendering everyone their proper rights. He continued by observing that there were three precepts of *ius*, to live honestly, to not injure other people, and to render everyone their *ius*.⁶ The Roman jurist Paul discussed the equivocal meanings of *ius* immediately after Ulpian's text:⁷

The term "ius" can be used in several ways. In one way "ius" means what is always equitable and good, as "Ius naturale". In another way what is in the interest of all or of many in a state (civitas), such as the "Ius civile" . . . Yet another meaning of "ius" is to describe the place in which "ius" is vindicated, the name having been given by him who renders "ius" on the place where he does it. We can know where that place is by wherever the praetor decides to exercise his jurisdiction, preserving the majesty of his authority and respecting the 'mos' of our ancestors. That place is correctly called "ius."

Paul's definition is interesting for two reasons. First, he gave *ius* a meaning that connects it with equity and equity's handmaiden justice. Second,

⁵ Dig. I.1.10pr.: "Ulpianus I reg. Iustitia est constans et perpetua voluntas ius suum cuique tribuendi."

⁶ Dig. I.1.10.1: "Ulpianus I reg. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere."

⁷ Dig. I.1.11: "Paulus 14 ad sab. Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile . . . Alia significatione ius dicitur locus in quo ius redditur, appellatione collata ab eo quod fit in eo ubi fit. Quem locum determinare hoc modo possumus: ubicumque praetor salva maiestate imperii sui salvoque more maiorum ius dicere constituit, is locus recte ius appellatur."

he calls upon a very old tradition in Roman law that defined *ius* as the place where justice was rendered.⁸

Gratian and the jurists had these texts of Roman law to draw upon for their ideas about *ius* and *lex*, but Gratian exploited another source, Isidore of Seville's *Etymologies* for much of his thinking about the two terms. Isidore discussed law in book five of his great encyclopedia, but his ideas about law did not enter into the Western tradition until Gratian. He incorporated a text of Isidore in which a contrast was drawn between, *ius*, *mos*, and *lex*:⁹

Consuetudo is a sort of *ius* established by *mos* and recognized as *lex* when *lex* is lacking. It does not matter whether it is confirmed by writing or by reason, since reason also supports *lex*. Furthermore, if *lex* is determined by reason, then *lex* will be all that reason has already confirmed—all, at least, that is congruent with religion, consistent with discipline, and helpful for salvation. *Consuetudo* is so called because it is in common use.

Custom was related to *ius* when grounded in *mos* and could be recognized as *lex* when there is no *lex*. Reason was the fundamental core principle of custom and *lex*. Early glossators on Gratian's *Decretum* were careful to point out that custom did not have to be in writing, but *lex* was *lex* because it was written. Gratian underlined the written character of *lex* by citing Isidore in the only place in his *Tractatus* where he offered a definition of *lex*: *Lex* is a species of *ius*; *lex* is a written constitution. Fifty years later Huguccio, the greatest canonist of the age, commented:¹⁰

Lex commands what is just and prohibits the contrary. *Lex* is so named because it binds, or because it is read as writing, or be-

⁸ The Law of the Twelve Tables began "In *ius* vocando" that undoubtedly shaped this definition of *ius*.

⁹ Gratian, D.1 c.5: Isidore, *Etymologies* Book 5 c.3: "Consuetudo autem est *ius* quoddam moribus institutum, quod pro lege suscipitur, cum deficit *lex*. Nec differt, an scriptura, an ratione consistat, quoniam et legem ratio commendat. Porro si ratione *lex* constat, *lex* erit omne, iam quod ratione constiterit, dumtaxat quod religioni congruat, quod disciplinae conueniat, quod saluti proficiat. Vocatur autem consuetudo, quia in communi est usu."

¹⁰ Huguccio (ca. 1190), D.1 c.3 s.v. *Lex est constitutio scripta*: iustum precipiens et contrarium prohibens, ut xxiii. q.iii. Si ecclesia (C.23 q.4 c.42). *Lex* dicitur quia ligat, uel quia legatur utpote scripta, uel quia legitime agat dum sui obseruatores remunerat et transgressores plectit et mulctat, ut infra di. iii. Omnis et d.iiii. Facte (D.3 c.4 and D4 c.1). *Summa decretorum*, 1: *Distinctiones I-XX*, ed. Oldřich Přerovský (Monumenta iuris canonici, Series A, 6; Città del Vaticano: Biblioteca Apostolica Vaticana, 2006) 25.

cause it legitimately functions by rewarding those who observe it and punishes those who transgress its rules.

At the end of the twelfth century the Roman jurist Azo expanded on the meaning of *lex* in his *Summa* on Justinian's *Codex*:¹¹

Lex is sometimes defined narrowly and sometimes broadly. An example of a narrow definition is when a statute of the Roman people is called a *lex* . . . A *lex* is the common opinion of men who are learned in the law . . . *Lex* is broadly defined when it is used to describe all reasonable statutes. Whence *lex* is a sacred command, ordering honesty and prohibiting the contrary. Consequently it is the rule that governs just and unjust people.

It is important to notice that the jurists never attributed the rich penumbras¹² of meanings to *lex* that they did to *ius*. *Lex* was a plebian hod carrier of the law; *ius* was a term rich in resonances. *Ius* reminded the jurists constantly of the transcendental significance of a legal system. It existed not just to establish right and wrong and to punish the wicked. It was the source of justice, equity, and rights.

The jurists created a penumbra for *lex* that was concentrated not only on what was reasonable but also on consent. Gratian was the first jurist in the European tradition who connected *lex* and consent. In a famous passage he declared that *leges* are established when they are promulgated, but that they are valid when they are approved by the *mos* of those who use the *leges*.¹³ In contrast, from early on, the penumbras of *ius* were justice, equity, and the common good. An anonymous jurist in the early

¹¹ Azo (ca. 1200–1220), *Summa Codicis*, De legibus et constitutionibus principis Cod. 1.14, Aschaffenburg Stiftsbibliothek Perg. 15, fol. 4v, (Lyon 1564) fol. 8r: “Lex autem ponitur quandoque stricte quandoque large, ut cum ponitur stricte pro statuto populi Romani et lex est hoc quod dicitur . . . Lex est commune praeceptum virorum prudentium consultum . . . Quandoque ponitur pro rationabili large omni statuto. Vnde et dicitur lex est sanctio sancta, iubens honesta prohibens contraria. Et ita regula est iustorum et iniustorum, ut dicitur in translatione greci, ut ff. eodem l.ii. (Dig. 1.3.2).”

¹² “Penumbra” is a term that has evolved in American constitutional law to mean concepts that are attached to a specific rule or term or norm. Justice William O. Douglas famously used the term in this sense in the American Supreme Court decision, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

¹³ D.4 d.p.c.3: “Leges instituuntur, cum promulgantur, firmantur, cum moribus utentium approbantur. Sicut enim moribus utentium in contrarium nonnullae leges hodie abrogatae sunt, ita moribus utentium ipsae leges confirmantur.”

twelfth century graphically illustrates this point. In a gloss to Justinian's Codex he described the relationship between *ius* and justice:¹⁴

Justice and *ius* are in effect the same or ought to be the same. Whatever justice wants, *ius* strives to follow. It happens that sometimes . . . *ius* is not in concord with justice. When this occurs justice or equity interprets that, if *ius* openly departs from equity, we may ignore the authority of *ius* and follow equity.

Equity and justice belong in the realm of *ius*; no jurist would have thought about *lex* in the same way. This fact is illustrated by the way in which the jurists talked about the hierarchy of laws. They talked about *ius divinum*, *ius naturale*, and *ius gentium*. These were not *leges*; they were *iura*.

For the later jurists Ulpian's and Gratian's definition of justice dominated their thought. Justice was the will to respect the *ius* of others. It was a platitude in the legal tradition. The platitude led them to consider other definitions that did not focus on *ius*. The most prevalent of these was a definition of justice that focused on a social contract. The idea that justice must not only be connected with *ius*/rights but also with the common good can be traced back to Cicero. Many Christian thinkers followed this stoical line of thought.¹⁵ However, as we have seen, the ancient Roman jurists did not connect either justice or *ius* with the common good. That changed in the twelfth century. One of the first jurists to write a gloss on Gratian's introductory definition of law and *ius naturale*, Paucapalea, undoubtedly influenced by theological thought, defined as justice Gratian's "each person is commanded to do to others what he wants done to himself and is prohibited from inflicting on others what he does not want done to himself." And "justice," he went on, "is the tacit contract of nature discovered to help many people."¹⁶ Early glosses to the Decretum

¹⁴ Anonymous Jurist (ca. 1130?), to Cod. 1.13.2 s.v. *Que religiosa mente*, Paris, B.N.F. 4517, fol. 18r: (Bottom margin); Vat. lat. 1427, fol. 22r (next to Cod. 1.12.6.6–9): "Iustitia et ius in effectu idem sunt uel esse deberent. Quid enim iustitia uult, idem et ius persequi studet. Accidit tamen ut quandoque . . . ab ea dissonet. Quod cum fit iustitia ipsa siue equitas sic interpretatur ut siquid ius ab equitate aperte dissonet eius omnia auctoritate equitatem sequamur."

¹⁵ Stephan Kuttner, "A Forgotten Definition of Justice," *Mélanges Gérard Fransen* (Studia Gratiana 20; Rome: 1976) 76–110, reprinted in *The History of Ideas and Doctrines of Canon Law in the Middle Ages* (London: Variorum, 1980) 76: "habitus animi communi utilitate conservata, suam cuique tribuens dignitatem," Cicero, *De inventione* 2.53.160.

¹⁶ Paucapalea (ca. 1145–1150), *Summa*, ed. Johann F. von Schulte (Giessen: E. Roth, 1890) 4: "Iustitia est natura tacita conventio in adiutorium multorum inventa." See Kuttner, "A Forgotten Definition of Justice," 80.

repeated Paucapalea's connection of *ius naturale* and justice.¹⁷ Abelard seems to have been one of the first theologians to make the connection between justice and the common good. Referring to the theological and the legal traditions, he declared:¹⁸

The philosophers define justice as the "habitus" of the mind to render to every person what is his as long as the common good is preserved.¹⁹ Justinian defined this concept in his definition when he would say, "Justice is the constant and perpetual will," etc. "His" can refer to the receiver as well as to the giver. If it refers to the receiver then <this right> ought to be regulated by the preservation of the common good. Justice refers to the common good in all matters.

Gratian shaped his first dictum that introduced the Decretum from the theological and the legal traditions. He made a key connection between the two that has gone unnoticed. The theological tradition had long connected the Golden Rule with natural law. The juridical tradition did not. The first person who connected the Golden Rule with natural law was in a letter that a disciple of Jerome wrote at his death.²⁰ Prosperus of Aquitaine linked the Golden Rule to natural law in his commentary on the Psalms.²¹ Haimo of Halberstadt († 853) declared in two sermons and his biblical commentaries that natural law consisted of two precepts: "Do

¹⁷ E.g., Cologne, Dombibl. 128, fol. 10v: "Iustitia est tacita conuentio nature in adiutorum multorum inuenta" in a marginal gloss opposite Gratian's first dictum.

¹⁸ Peter Abelard, *Sententie magistri Petri Abaelardi*, ed. David Luscombe et al. (Corpus Christianorum, Continuatio Mediaevalis 14; Turnhout: Brepols, 2006) 134–135: "Iustitiam uero sic definiunt philosophi: Iustitia est habitus animi [om. Bu] reddens unicuique quod suum est, communi utilitate seruata. Hoc idem Iustinianus sua diffinitione notauit cum diceret sic[sic diceret tr. Bu]: Iustitia est constans et perpetua uoluntas, etc. . . . 'Suum' potest referri tam ad accipientem quam ad tribuentem. Si ad accipientem referatur, tunc determinandum est communi utilitate seruata. Iustitie siquidem est omnia ad communem utilitatem referre." It is not certain that this text is Abelard's. It had been attributed to a certain Hermannus; see Luscombe's introduction to his edition, pp. 10*–12*. The text is the same as in PL 178.1750–1751 and Sandro Buzzetti's edition (Bu), *Sententie magistri Petri Abaelardi (Sententie Hermanni)* Pubblicazioni della Facoltà di Lettere e Filosofia dell'Università di Milano 31; Firenze: La Nuova Italia, 1983) 145.

¹⁹ See Kuttner, "A Forgotten Definition of Justice" for the lineage of this concept of justice.

²⁰ PL 22.239–240: "Lex naturalis hoc praecipit: ut quod ab aliis desideramus, hoc aliis faciamus."

²¹ PL 51.354, to Psalm 118, verse 119: "sed omnem hominem teneri lege naturae ut quod pati non vult, sciat alii non esse faciendum."

onto others . . .” and “What you do not want done to yourself, you should not do to others (cf. Tobias 4.16). Whatever the law and the prophets will ordain can be comprehended within these two precepts.”²² Remigius of Auxerre († 980) rehearsed the tradition in his commentary on Genesis.²³ In the late eleventh and early twelfth century Rupert of Deutz († 1129–1130) declared that natural law is written in the hearts of men and its expression was the Golden Rule.²⁴ Hugh of St. Victor († 1141), whose work Gratian might have known, and Honorius Augustodunensis († 1156) repeated the tradition. The Golden Rule was a precept and command of natural law.²⁵

When Gratian proclaimed at the beginning of his *Decretum* that natural law was based on the *Lex* and the Gospels and that the Golden Rule was the *Lex* and the Prophets, he drew upon a long theological tradition. He also incorporated the two traditional theological definitions of the Golden Rule: “One should do to others what one would have others do to you,” and “You should not do to others what you should not want done to you.” These two precepts, one positive and the other negative, were very similar to Ulpian’s definition of *ius* that I quoted earlier.²⁶ Gratian, however, combined the Roman law and the theological traditions in a way that would be of fundamental importance for the future. He combined

²² PL 118.536: “Quaecumque vultis ut faciant vobis homines, et vos eadem facite illis.” *Ista est lex naturalis, quae in duobus consistit praeceptis, et in his duabus sententiis tota lex pendet et prophetarum. Et hoc est unum quod tibi dicitur: “Quaecumque vultis ut faciant vobis homines” et aliud est quod alibi dicitur “Quod tibi non vis fieri, alii ne feceris.” Quia quidquid lex et prophetarum latius describunt in his duobus praeceptis breviter est comprehensum.”* See also PL 118.237, PL 116.830, PL 116.889, 116.430.

²³ PL 131.98, Genesis 24, verse 25: “Rebecca apud se esse dicit lex est naturalis quam sancta ecclesia antequam ad Christum veniret, habebat, qua dicitur ‘Quaecumque vultis ut faciant vobis homines, eadem et vos facite illis.’ Ergo per hanc legem naturae praeparabatur ingressus legi evangelicae.”

²⁴ Rupert of Deutz, *Super Matthaeum* PL 168.1407: “Saltem per legem naturalem quae in cordibus scripta est, quae est huiusmodi: ‘Quod tibi non vis fieri, alii nec feceris.’” Also PL 169.1304 and PL 170.474.

²⁵ Hugh of Saint Victor, *De sacramentis*, PL 176.38–39: “lex naturalis . . . unum tantum praeceptum in corde hominis posuit: ‘Quod tibi vis, id alii feceris; quod tibi non vis, aliis ne faceris.’” PL 175.659–660: “Sub lege naturali duo praecepta fuerunt, tria sacramenta. Duo praecepta: ‘Quod tibi non vis, alii ne faceris’ et ‘Quaecumque vultis ut faciant vobis homines, eadem et vos facite illis.’” Also PL 177.668. Honorius Augustodunensis, *Speculum ecclesiae* PL 172.919: ‘Homini de pardiso ejecto inditur lex naturalis: ‘Quod tibi non vis, alii ne feceris.’” Also PL 172.362.

²⁶ Dig.1.1.10.1: “Ulpianus 1 reg. iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.”

both traditions and named them not “lex naturalis” but “ius naturale.” His change of vocabulary enabled later jurists to incorporate the rich penumbras of meaning for *ius*, which as we have seen, were completely lacking in the definitions of *lex*.

Gratian added his *Tractatus de legibus* to the second recension of his *Decretum*. Recently scholars have vigorously debated the chronology of Gratian’s work.²⁷ Some have placed his teaching activity in Bologna to the 1140’s.²⁸ Others have argued for a much earlier date.²⁹ A letter of Pope Innocent II provides evidence for Gratian’s having taught and compiled his *Decretum* during the 1120’s and early 1130’s. In the arena of a letter written in 1133 to the bishop of Lund, Innocent proclaimed that “Quemadmodum iuris naturalis est alterum non laedere, ita nimirum nostri officii laesum adiuvere.”³⁰ As we have seen, the two precepts of natural law that the theologians embraced over the centuries were “Do unto others as you would have them do unto you” and “Do not injure others.” We have also seen that the same two ideas can be found in Justinian’s *Digest* through Ulpian’s formulation: “Iuris praecepta sunt haec:

²⁷ I have reviewed this discussion and the literature in “The Birth of the ‘Ius commune’: King Roger II’s Legislation,” *Rivista internazionale di diritto comune* 17 (2006) 23–60 and “The Big Bang”: Roman Law in the Early Twelfth-Century,” *Rivista internazionale di diritto comune* 18 (2007).

²⁸ Anders Winroth has given a summary of recent scholarship on Gratian in “Recent Work on the Making of Gratian’s *Decretum*,” *Bulletin of Medieval Canon Law* 26 (2004–2006) 1–29, with a complete bibliography to 2006. See especially Winroth’s two essays defending a later date for the teaching of Roman and canon law, “The Teaching of Law in the Twelfth Century,” in *Law and Learning in the Middle Ages*, ed. Helle Vogt and Mia Münster-Swendsen (Copenhagen: DJØF, 2006) 41–62 and “Neither Free nor Slave: Theology and Law in Gratian’s Thoughts on the Definition of Marriage and Unfree Persons,” in *Medieval Foundations of the Western Legal Tradition: A Tribute to Kenneth Pennington*, ed. Mary E. Sommar and Wolfgang P. Müller (Washington, D.C.: Catholic University of America Press, 2006) 97–109.

²⁹ Carlos Larrainzar, “El borrador del la ‘Concordia’ de Graziano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg),” *Ius ecclesiae: Rivista internazionale di diritto canonico* 9 (1999) 593–666. Kenneth Pennington, “Gratian, Causa 19, and the Birth of Canonical Jurisprudence,” *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico*, edd. Enrique de León and Nicolás Álvarez (Pontificia Università della Santa Croce, Monografie Giuridiche 22; Milano 2003) 215–236 and in an expanded version in “*Panta rei*”: *Studi dedicati a Manlio Bellomo*, ed. Orazio Condorelli (Roma 2004) 4:339–355. Atria Larson, “The Evolution of Gratian’s *Tractatus de penitentia*,” *Bulletin of Medieval Canon Law* 26 (2004–2006) 59–123.

³⁰ Migne, PL 179.182 (JL 7625). First printed by Johann Martin Lappenberg, *Hamburgisches Urkundenbuch* (Vol. 1, Hamburg: Perthes-Besser & Mauke, 1842) 134–135.

honeste vivere, alterum non laedere, suum cuique tribuere.” Consequently, whoever composed Innocent’s letter must have known Gratian’s *Tractatus de legibus* and the Digest, and since no one before Gratian had attributed the Golden Rule to *Ius naturale*, Innocent’s letter is evidence that Gratian must have finished his first draft of the *Tractatus* before 1133. It is also evidence that the teaching of Roman and canon law in Bologna must have already been in full swing by the late 1120’s and early 1130’s.

We have seen that until the twelfth century the theologians always used the term *lex naturalis*. In the thirteenth century they gradually began to incorporate the change from *lex naturalis* to *ius naturale* into their thought. Thomas Aquinas’ works demonstrate the slow penetration of the term *ius naturale* into theological thought. In his early works, especially his commentary on the Sentences of Peter Lombard (ca. 1256), Aquinas discusses natural law in depth but never uses the term *ius naturale*, only *lex naturalis*.³¹ When Thomas Aquinas discussed natural law in his *Summa theologiae* (ca. 1265–1272), he vacillated in his terminology between *ius naturale* and *lex naturalis*.³² As far as I can see, he used the two terms interchangeably, and he never drew upon the rich jurisprudential discussions of the meanings of “*ius*.” Other evidence points to Thomas’ having turned to and his becoming familiar with the legal tradition only in his later works. He cited Gratian’s *Decretum* seven times in his Commentary on the Sentences and 81 times in his *Summa theologiae*. It is not that Thomas was unaware or uninterested in law in his early writings. He cited papal decretals 32 times in his Commentary on the Sentences. I suspect that Thomas’ own *Tractatus de legibus* forced him to confront Gratian’s *Tractatus* as he was writing about law in his *Summa theologiae*.³³

Much of the debate about Aquinas’ thought on natural law has focused on his ideas about rights and whether his theory of natural law was com-

³¹ Peter Lombard also used only *lex naturalis* when he discussed natural law. If Thomas had known Gratian’s introductory remarks, he might have connected the Golden Rule with natural law when he commented on Lombard’s *Sentences* in Book 3 dist. 36–37, but he did not.

³² According to the word count in the *Corpus Thomisticum* he used *lex naturalis* more than *ius naturale*.

³³ I have gleaned all these statistics here and elsewhere in this paper from the *Index Thomisticum* on the web: <http://www.corpusthomicum.org/it/index.age>

patible with the idea of subjective rights.³⁴ Brian Tierney has argued that Aquinas had no theory of subjective natural rights, although Thomas did recognize that *ius* could mean right and that right could be a human “*facultas*.”³⁵ Aquinas frequently used the term “*facultas*” to describe a person’s right and power to act.³⁶ He only rarely substituted the term *ius* for *facultas*.³⁷ This fact is, I think, some support for Tierney’s argument that Thomas did not normally think of *ius* as a right or power and did not have a theory of subjective rights. As Tierney has written for Aquinas “*ius* was primarily a thing (*rem*), something existing in external nature.”³⁸

I would like, however, to make a slightly different argument from the concerns of Tierney, Finnis, and Zuckert. As I have shown, Thomas came to the concept of *ius naturale* late, and he never fully grappled with the full implications of how Gratian and his successors thought of natural law as a set of precepts and as well as a set of rules or laws. As far as I can tell, Aquinas did not know the theological tradition that Gratian drew upon when he attributed the Golden Rule to natural law. He only seems to have cited the Golden Rule in his later works, the *Summa theologiae* and his Commentary on Matthew; and in them Thomas never called it a precept of natural law. Most importantly I think that Thomas’ discussion of natural law is dominated by his language. For him natural law was *lex naturalis* not *ius naturale*. I believe that his language shaped his thought.

It would go far beyond the scope of this paper to prove conclusively (or to disprove) the points that I have made in the previous paragraphs.

³⁴ There is a clear presentation of the issues by Brian Tierney, John M. Finnis, and Michael P. Zuckert in *The Review of Politics* 64 (2002) 289–420.

³⁵ Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Emory University Studies in Law and Religion 5; Atlanta: Scholars Press, 1997) 22–27 and passim. Tierney’s discussion of Suarez’ thought, pp. 301–315, illuminates the difference between later thinkers and Aquinas.

³⁶ Many examples can be found in Thomas’ works: *Facultas rebellandi, nubendi, vendendi, implendi, dimittendi, petendi, docendi, praedicandi, peccandi, coeundi, et alia*. The jurists also used *facultas* as an equivalent of *ius*.

³⁷ Finnis points out several instances in which Thomas used *ius* instead of *facultas*; but these exceptions are so few that they prove the rule that he did not normally associate *ius* with the concept of the right or power to do something. See John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Founders of Modern Political and Social Thought; Oxford: Oxford University Press, 1998) 134–135. It is not by chance that when Thomas does use *ius* it is almost always when he is drawing upon canonistic thought (marriage, tithes, property). On the other hand, Finnis makes a point in these pages with which I am in full agreement: Thomas did not distinguish between *lex* and *ius* and used the terms interchangeably.

³⁸ Tierney, *The Idea of Natural Rights* 23.

All of Thomas' use of *lex naturalis* and *ius naturale* would have to be examined and compared in contextual and chronological order. For purposes of the argument in this paper let me here just give a couple of examples of Thomas' discussion of *ius naturale* when he defined the term in question 94.

Thomas confronted natural law and Gratian's definition of natural law directly in his *Tractatus de legibus*.³⁹ He began question 94 by discussing *naturalis lex* as a *habitus*. He had already connected *habitus* to *lex naturalis* in his Commentary on the Sentences.⁴⁰ In doing so Thomas drew upon recent theological thinking about natural law. As we have seen, since Cicero, justice had been described as a *habitus* in theology and law, but natural law was never connected with *habitus* until the thirteenth century. Alexander of Hales and Albertus Magnus had connected *lex naturalis* with *habitus*, and Thomas shaped his definition of *lex naturalis* around their opinions.⁴¹

Gratian's definition of *ius naturale* did not fit into Thomas' scheme of definitions. But it was such a well-known text by the time Thomas wrote that he had to deal with it. He sidled up to Gratian belatedly when he asked whether the *lex naturae* was the same for all human beings in article 4 of question 94 and quoted Gratian's statement that *ius naturale* is what is contained in the Old and New Testaments. But since, he noted, these Judeo-Christian texts are not accepted by everyone, *lex naturalis* is not common to all people.⁴² He put forward several counter arguments, including the text of Isidore of Seville that Gratian included at Distinc-

³⁹ Thomas Aquinas, *Summa Theologiae* 1–2, q.94 a.

⁴⁰ Thomas Aquinas, *Super Sententiis*, lib. 2 d.24 q.2 4 arg. 5: "Praeterea, Damascenus dicit, quod conscientia est lex intellectus nostri. Sed lex intellectus est ipsa lex naturalis, quae est habitus principiorum iuris. Ergo videtur quod conscientia sit habitus, et non actus." *Super Sent.*, lib. 2 d.24 q.2 4: "Quandoque vero dicitur habitus, quo quis disponitur ad sciendum; et secundum hoc ipsa lex naturalis et habitus rationis consuevit dici conscientia. Quidam etiam dicunt, quod conscientia quandoque potentiam nominat; sed hoc nimis extraneum est, et improprie dictum: quod patet, si diligenter omnes potentiae animae inspiciantur."

⁴¹ See Michael Bertram Crowe, *The Changing Profile of the Natural Law* (The Hague: Nijhoff, 1977) 157 and more generally his discussion on pp. 136–166.

⁴² Thomas Aquinas, *Summa theologiae* 1–2, q. 94 a. 4 arg. 1: "Ad quantum sic proceditur. Videtur quod lex naturae non sit una apud omnes. Dicitur enim in decretis, dist. I, quod *ius naturale est quod in lege et in Evangelio continetur*. Sed hoc non est commune omnibus, quia, ut dicitur Rom. X, *non omnes obediunt Evangelio*. Ergo lex naturalis non est una apud omnes."

tion 1, canon 7.⁴³ In this text, the most important one on natural law in Gratian's *Decretum*, Isidore had declared that *ius naturale* was common to all nations. The canonists quickly glossed "nations" as all persons who had been born, "nascentium."⁴⁴ Natural law was common to all human beings.

Thomas resolved the contradiction that he had posed by relying on Aristotle not the jurists. Those rules to which people are "naturally" inclined through reason pertain to natural law.⁴⁵ He was not comfortable—or perhaps it is more accurate to say—or sympathetic with Gratian's approach to natural law. The entire text of Isidore that Gratian included in his discussion of natural law listed a series of precepts to illustrate his assertion that natural law was based on the Golden Rule:⁴⁶

Natural law is common to all nations. It has its origins in nature not in any constitution. Examples of natural law are the union of men and women, the procreation and raising of children, the common possessions of all persons, the equal liberty of all persons, the acquisition of things that are taken from the heavens, earth, or sea, the return of property or money that has been deposited or entrusted. This also includes the right to repel violence with force. These things and similar are never unjust but are natural and equitable.

⁴³ Ibid. 1–2 q. 94 a. 4 s. c: "Sed contra est quod Isidorus dicit, in libro *Etymol.*, *ius naturale est commune omnium nationum.*" Editors and translators cite this text as coming from Isidore's *Etymologies* (which it does), but Thomas took it from Gratian.

⁴⁴ The earliest gloss that I know is an interlinear gloss in Köln, Dombibl. 127, fol. 9r: D.1 c.7 s.v. *nationum* "idest nascentium." The idea became mainstream when Huguccio glossed the text, s.v. *omnium nationum*: "idest omnium nascentium, idest animalium." *Summa decretorum*, 1: *Distinctiones I–XX*, ed. Oldřich Přerovský (Monumenta iuris canonici, Series A, 6; Città del Vaticano: Biblioteca Apostolica Vaticana, 2006) 31.

⁴⁵ Thomas Aquinas, *Summa theologiae* 1–2 q. 94 a. 4 co. "Respondeo dicendum quod, sicut supra dictum est, ad legem naturae pertinent ea ad quae homo naturaliter inclinatur; inter quae homini proprium est ut inclinetur ad agendum secundum rationem. Ad rationem autem pertinet ex communibus ad propria procedere, ut patet ex I Physic."

⁴⁶ Gratian, *Decretum* D.1 c.7: "Ius naturale est commune omnium nationum, eo quod ubique instinctu nature, non constitutione aliqua habetur, ut viri et femine conjunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae celo, terra marique capiuntur; item depositae rei vel commendatae pecuniae restitutio, violentie per vim repulsio. Nam hoc, aut si quid huic simile est, nunquam injustum, sed naturale equumque habetur."

Isidore/Gratian's list of precepts were not *leges*. The list is a set of human relationships having their origins in nature (*instinctu naturae*). All of these relationships are encompassed by rights and duties. Men and women have the right and the duty to mate. Men and women have the right and the duty to raise children. Children have the right to be raised, and the duty to honor their parents.⁴⁷ Isidore/Gratian turned to Roman law to describe other precepts. People have the right to claim ownership of "*res nullius*" and the right of self defense.

Thomas, however, stumbled when he confronted "the return of property or money that has been deposited or entrusted" in Gratian/Isidore's text. Modern readers have not always understood that Thomas was reading Isidore in Gratian and not Isidore divorced from its place in the *Decretum*. Thomas almost certainly understood that returning a deposit was a common norm of natural law because it was in accord with reason. This idea had a long tradition. Thomas always emphasized that reason was central to natural law norms. However, he must have asked himself, how could the Roman law contract of deposit and *commodatum* be a general norm of natural law? After all, there were exceptions. Thomas did not understand that Gratian expected Isidore's text to be interpreted through the prism of his opening statement on natural law. Instead Thomas approached the text literally. Is it a norm of natural law that a gratuitous contract of deposit or *commodatum* should always be fulfilled?⁴⁸ The obvious answer to his literal question is no:⁴⁹

⁴⁷ This right and duty were already embedded in Roman testamentary law. Children could not be disinherited unless they committed certain serious crimes. Later the canonists developed the right of children to be nurtured and supported; on both issues see Charles J. Reid, Jr. *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Emory University Studies in Law and Religion. Grand Rapids, Michigan-Cambridge: William B. Eerdmanns Publishing Company, 2004) 82–93 and 165–205 and *passim*. For the English common law context, see Richard Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (The Oxford History of the Laws of England, 1; Oxford-New York: Oxford University Press, 2004) 244, 256, 377, 425–426, 560–561.

⁴⁸ On the Roman law of deposit, see Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996) 205–220.

⁴⁹ Thomas Aquinas, *Summa theologiae* 1–2 q. 94 a. 4 co. "Apud omnes enim hoc rectum est et verum, ut secundum rationem agatur. Ex hoc autem principio sequitur quasi conclusio propria, quod deposita sint reddenda. Et hoc quidem ut in pluribus verum est, sed potest in aliquo casu contingere quod sit damnosum, et per consequens irrationabile, si deposita reddantur; puta si aliquis petat ad impugnamdam patriam. Et hoc tanto magis invenitur deficere, quanto magis ad particularia descenditur, puta si dicatur quod deposita

It is right and true that all things should be done according to reason. From this principle it follows as an almost inevitable conclusion that deposits must be returned. And indeed this is true in many cases. But it can happen that in a case it might be damaging and consequently would be irrational if a deposit was returned. For example if someone would use the deposit to wage war against his homeland. <Reason> can be deficient as one descends into particular cases. Consider if it were said that deposits must be returned with a stipulation or in another manner with particular conditions attached. In that case the many more reasons can arise that would make it not right to either return or keep the deposit.

Thomas' loses his grip on the legal rules governing the contract of deposit at the end. "Cautiones" or "conditiones" could not be attached to the deposit because the contracts of deposit and *commodatum* would then lose their unilateral and gratuitous nature. Nonetheless, it is clear; and that is the main point, Thomas thought of this section of Gratian/Isidore's text more as a "lex"—that is the rules of positive Roman law governing these contracts than as Gratian meant it to be: an example of the precept "ius suum cuique tribuere" He also misunderstood the rules that regulated gratuitous contracts. However, Gratian certainly and Isidore possibly were thinking of deposit and *commodatum* as the manifestation of the foundational precept of *ius naturale* in this area of law: do unto others as others would do unto you. The depositor or lender had to depend on the depositary's or borrower's honor to return the property. The exceptions that Thomas proposed would not have posed difficulties for Gratian or Isidore. If returning a deposit resulted in harm to others or to herself, then it should not be returned. No other contracts would have fallen into this category. Consequently, the Golden Rule had great moral and ethical force in gratuitous contracts and not in others that had consideration (*do ut des*) and conditions attached to them. That is why Gratian and Isidore chose these contracts for their illustration of a fundamental precept of natural law. Thomas analyzed the contract of *depositum* and *commodatum* in positivistic terms. His first argument would have been persuasive to Gratian and the jurists: if the return of the prop-

sunt reddenda cum tali cautione, vel tali modo, quanto enim plures conditiones particulares apponuntur, tanto pluribus modis poterit deficere, ut non sit rectum vel in reddendo vel in non reddendo."

erty resulted in damage to the common good and was unreasonable, it should not be returned. Gratian and Isidore, however, were propounding a much larger precept that Thomas just did not see.

The jurists, however, understood Gratian's point. If Thomas had read Huguccio's gloss on Isidore's text, he might have seen gratuitous contracts in a different light. Huguccio made Gratian's point exactly in his gloss to Isidore's text at the end of the twelfth century:⁵⁰

"The return of property or money that has been deposited or entrusted": This by right (*ius*) or evangelical command, in which anyone is ordered to do unto others what he wishes to be done to him, and anyone is prohibited from doing unto others what she would not wish to be done to her. Reason and the judgment of reason approves restitution that was deposited with me or was entrusted to me.

Huguccio and the canonists saw that Gratian was using Isidore to give an illustration of a precept. He was not claiming that the Roman contracts of deposit and *commodatum* were in some sense an absolute principle of natural law. Rather, they were an illustration of a precept of natural law. Thomas did not see the connection. This is not surprising. Thomas was not a jurist. He did not understand the intricacies of juristic thought. As we have seen, he came to Gratian's doctrine of natural law late in his career; and there is little evidence in his work that he knew more about jurisprudence in general and natural law in particular than he found in Gratian's *Decretum*.⁵¹

When Thomas came back to Gratian at the end of article 4 of question 94, he returned to the question of whether all law contained in the Old and New Testament constituted natural law. The question that he posed in the beginning of the question is, to a certain extent, specious. No jurist or theologian ever claimed that all the precepts in the Judeo-Christian texts were tenets of natural law. Thomas conceded that he had con-

⁵⁰ Huguccio, *Summa decretorum*, ed. Přerovský, D.1.c.7, s.v. *item deposite*: "Hoc de iure uel precepto euangelico, quo quis iubetur alii facere quod sibi uult fieri et prohibetur alii facere quod sibi non uult fieri. Ratio etiam et iudicium rationis approbat id restituentum fore quod apud me est depositum uel michi est commodatum."

⁵¹ I speak narrowly about his understanding of natural law jurisprudence. As I have indicated earlier, Thomas cited Gratian and the decretals frequently in his works.

structed a straw man that did not reflect Gratian's text accurately. He concluded:⁵²

It must be said to the original question that Gratian's comment ought not be understood that almost all law contained in the Old and New Testament are laws of nature, since many things there are "above nature."⁵³ But whatever constitutes natural law is fully contained there. Consequently Gratian said immediately, as an example and as a clarification, "The ius of nature is what is contained in the *lex* and the Gospel. By it, each person is commanded to do to others what she wants done to herself."

Thomas' summary of Gratian's meaning is correct. What he did not understand is how Gratian's conception of natural law as a precept that could be expressed by the Golden Rule of the Judeo-Christian and Roman legal traditions and how it was linked with Isidore of Seville's text in D.1 c.7.

Thomas may not have understood Gratian, but his commentary on natural law in his *Summa theologiae* became a touchstone for all later discussions in theology and law. In part this was because the later canonists did not write commentaries on Gratian's *Decretum* and his *Tractatus de legibus*. Consequently, the jurists had to turn to Thomas and the theological tradition. The only commentary on Gratian that circulated widely in the later Middle Ages was Guido de Baysio's *Rosarium* that he finished around 1300. Guido was, as far as we know, the first canonist to use Thomas' commentary on natural law.⁵⁴

Nicholaus de Tudeschis (Panormitanus) wrote one of the only detailed commentaries on the first few chapters of Gratian's *Tractatus de legibus* in the late Middle Ages. He dealt with Thomas and Gratian in his discussion of natural law.⁵⁵ Although his extensive commentary seems not to

⁵² Thomas Aquinas, *Summa theologiae* 1–2 q. 94 a. 4 ad 1 "Ad primum ergo dicendum quod verbum illud non est sic intelligendum quasi omnia quae in lege et in Evangelio continentur, sint de lege naturae, cum multa tradantur ibi supra naturam, sed quia ea quae sunt de lege naturae, plenarie ibi traduntur. Unde cum dixisset Gratianus quod ius naturale est quod in lege et in Evangelio continetur, statim, exemplificando, subiunxit, quo quisque iubetur alii facere quod sibi vult fieri."

⁵³ I am not sure I understand what Thomas means by "supra naturam."

⁵⁴ Tierney, *The Idea of Natural Rights* 27.

⁵⁵ Orazio Condorelli, "La dottrina delle fonti del diritto nel Commentario del Panormitano sulla *Distinctio prima* del *Decretum*," *Zeitschrift der Savigny-Stiftung für Rechts*

have circulated widely and was not generally known, it is a good example how important Thomas' discussion of natural law had become by the middle of the fifteenth century.

At the beginning of his commentary Panormitanus quoted Thomas' definition of natural law that had become lapidary: "natural law (*lex naturalis*) is nothing other than the impression of divine illumination on us. Consequently, *lex naturalis* is every rational creature's participation in the *lex eternalis*."⁵⁶ He expanded upon Thomas' definition using his language and terminology. In spite of the legal tradition that eschewed the term *lex naturalis*, Panormitanus repeatedly adopted Thomas' terminology.⁵⁷ Thomas had stated that the first principle of law and therefore of

geschichte, Kanonistische Abteilung 91 (2005) 299–354; his Commentary was discovered by Antony Black; see Kenneth Pennington, "Nicholaus de Tudeschis (Panormitanus)," *Niccolò Tedeschi (Abbas Panormitanus) e i suoi Commentaria in Decretales*, ed. Orazio Condorelli (Rome: Il Cigno, 2000) 9–36, on p. 16. Also published on CD Rom with Panormitanus' Commentary: *Nicholaus de Tudeschis (Abbas Panormitanus) Commentaria in Decretales Gregorii IX et in Clementinas Epistolas* (Edizioni Informatiche, Rome: Il Cigno, 2000).

⁵⁶ Panormitanus, Lucca, Biblioteca Capitolare Feliniana, 160, fol. 253rb, D.1 c.1 (Omnes leges): "Nota ex isto textu quod omnes leges distinguuntur in duas species dumtaxat, aut enim sunt divine aut humane. Et nota quod divine constant natura, humane vero moribus. Ex quibus infero ad duo. Et primo quod *lex naturalis* potest dici divina: non enim humana, ergo divina. Et quod dici posset divina patet per illud verbum 'natura'. Hinc dicit beatus Thomas in prima secunde q. xcia articulo ii. (1–2 q.91 a.2) quod *naturalis lex* nihil aliud est quam impressio divini luminis in nobis, unde secundum eundem *lex naturalis* est participatio legis eterne in rationali creatura." Condorelli prints the excerpts from Panormitanus' text that I have used (with a few of my own additions from the Lucca manuscript) in his essay "La dottrina."

⁵⁷ *Ibid.* fol. 253rb-253va: "Ego tamen puto quod *lex naturalis* non proprie comprehendatur sub lege divina, licet participet de lege eterna, que est summa ratio in Deo existens, ut notat beatus Thomas in prima secunde q. xci. ar. i. (1–2 q.91 a.1; *rectius* 1–2 q.93 a.1) Et clarius idem beatus Thomas attingens hanc materiam xci.b dis. ar. ii. (1–2 q.91 a.2) in parte preall. dicit quod, cum omnia, que divine providentie subduntur, a lege eterna regulentur et mensurentur, manifestum est quod omnes participant aliquantulum legem eternam, in quantum scilicet ex impressione eius habent inclinationes in propriis actus et fines. Inter cetera autem, etiam rationalis creatura excellentior quodammodo divine providentie subiacet, in quantum et ipsa sit providentie particeps sibi ipsi et aliis providens, unde et in ipsa participatur ratio eterna, per quam homo naturalem habet inclinationem ad debitum actum et finem, et talis participatio legis eterne in tali creatura *lex naturalis* dicitur secundum eum, quod est bene notandum. Et sic videtur quod *lex naturalis* non sit proprie ius divinum sed participatio legis eterne. Ad idem facit c. Quo iure viii. dist. (D.8 c.1) ubi textus dicit quod ius divinum in divinis scripturis habetur, *lex autem naturalis* non continetur in aliqua constitutione, ut patet ex precedenti et probatur infra ead. dist. Ius naturale (D.1 c.7), ubi dicitur quod naturale ius non habetur constitutione aliqua, sed instinctu nature, id est naturali inspiratione seu inclinatione."

natural law was the necessity to do good and avoid evil. Guido de Baysio had incorporated Thomas' text into his definition at the end of the thirteenth century but obscured Thomas' influence by attributing the text to Laurentius Hispanus († 1248). Panormitanus corrected him and changed Thomas' text in a small but significant way. It was the first principle of the law (*lex*) of nature to do good and avoid evil.⁵⁸ When Panormitanus reached Gratian's central text on natural law at D.1 c.7, his terminology began to become unstable. As we have seen when he wrote about natural law drawing upon Thomas' *Summa theologiae*, he adopted Thomas' *lex naturalis* consistently. When he began to discuss Isidore's text, however, he began to vacillate in his terminology:⁵⁹

Note that there is only one *lex naturalis* for all people, and therefore all people have one natural instinct. . . . Note that *lex naturalis* is stamped naturally on the hearts of people . . . Note the nine examples of *ius naturale* that are placed here in the text. Do not think that *naturale* is restricted to these examples or that *lex naturalis* can be defined through them. Many other examples might be given.

As he analyzed Isidore's list of examples of natural law, he reverted completely to the language of the jurists.⁶⁰

⁵⁸ Ibid. fol. "Sed adverte quod ista dicta Archidiaconi que attribuit Laurentio sunt ad literam beati Thome in prima secunde dis. xciv. articulo ii. ad aliud tamen effectum quam queratur hic. Ibi enim beatus Thomas format questionem an *lex naturalis* contineat unum preceptum an plura. Et tandem videtur concludere quod multa sunt legis nature precepta in se ipsis, omnia tamen communicant in una radice, scilicet ad unum primum preceptum. Primum autem preceptum legis nature est per eum quod bonum est faciendum et prosequendum et malum vitandum. Et super hoc fundantur omnia alia precepta legis nature, ut scilicet omnia facienda vel vitanda pertineant ad precepta legis nature, que ratio practica naturaliter apprehendit esse bona humana." Thomas had written in 1–2 q. 94 a. 2 co. "Hoc est ergo primum praeceptum legis, quod bonum est faciendum et prosequendum, et malum vitandum. Et super hoc fundantur omnia alia praecepta legis naturae, ut scilicet omnia illa facienda vel vitanda pertineant ad praecepta legis naturae . . ."

⁵⁹ Ibid. fol. 261r: "Nota quod unica est *lex naturalis* omnibus hominibus, et sic omnes habent unum instinctum naturale. . . . Nota quod *lex naturalis* est in cordibus hominum naturaliter impressa. . . . Nota novem exempla iuris naturalis que ponuntur hic in textu. Non enim intelligas quod naturale restringatur ad ista exempla, vel quod per ista *lex naturalis* diffiniatur. Nam multa alia exempla poni possunt."

⁶⁰ Ibid. "Et inter cetera exempla nota quod maris et femine coniunctio est de iure naturali, et in hoc notat glosa I (D.1 c.7 s.v. *coniunctio*) in quantum dicit quod, si intelligatur in hoc textu de coniunctione corporum, tunc debet intelligi de iure naturali ex sensualitate proveniente; si autem de coniunctione animorum, tunc quasi *ius naturale* ex ratione proveniens."

Among other examples note that the coupling of men and women is a norm of *ius naturale*, as the gloss notes, in so far as he says that, if this text is understood as the coupling of bodies then it ought to be understood as being a norm of *ius naturale* deriving from sensuality. If however, it is understood as a coupling of souls, then the norm is just as *ius naturale* derived from reason.

Panormitanus used Thomas' terminology, mixed in with the jurists' *ius naturale*, and did not seem to object to or perhaps even to have noticed his unstable terminology for describing natural law.

Panormitanus' mixing of juristic and theological terminology was not typical of the jurists—although theologians, as far as I can see, adopted Thomas' *lex naturalis* by the early modern period.⁶¹ For example Francisco Suárez († 1617) used *lex naturalis* almost exclusively when writing about natural law in his comprehensive treatise on law—except when he turned to juristic thought.⁶² But Aquinas formed the bedrock of his discussion. Yet Suárez was far from a positivist. In the debate about who was and who was not an advocate of natural subjective rights most scholars have agreed that Suárez had a clear doctrine of rights.⁶³

Manuel González Téllez († 1649) wrote one of the last extended canonistic discussions of natural law that was framed by the medieval jurisprudential tradition in the preface to his commentary on the Decretals of Gregory IX.⁶⁴ Like Panormitanus Téllez used and cited Thomas

⁶¹ In order to justify this generalization, the use of *lex naturalis* and *ius naturale* would have to be examined in all the major jurists and theologians of the late medieval and early modern periods—which is far beyond the scope of this essay.

⁶² The most convenient edition of his work is Francisco Suárez, *De legibus*, 3 (II 1–12): *De lege naturali*, edd. L. Pereña, and V. Abril with E. Elorduy, C. Villanueva, and P. Suñer et al. (Corpus hispanorum de pace 13; Madrid: Consejo Superior de Investigaciones Científicas-Istituto Francisco de Vitoria, 1974) and *De legibus*, 4 (II 13–20): *De iure gentium*, edd. L. Pereña, E. Elorduy, V. Abril C. Villanueva and P. Suñer et al. (Corpus hispanorum de pace 14; Madrid: 1973) and the other volumes in this series.

⁶³ Tierney, *The Idea of Natural Rights*, 301–315.

⁶⁴ On Téllez, see Kenneth Pennington, "Sovereignty and Rights in Medieval and Early Modern Jurisprudence: Law and Norms without a State," in *Rethinking the State in the Age of Globalisation: Catholic Thought and Contemporary Political Theory*, ed. Heinz-Gerhard Justenhoven and James Turner (Politik: Forschung und Wissenschaft, 10; Münster: LIT Verlag, 2003) 117–141 at 126–136 and in *Roman Law as Formative of Modern Legal Systems: Studies in Honour of Wiesław Litewski*, ed. J. Sondel, J. Reszczyński, and P. Ściśllicki: 2 volumes (Kraków: Jagiellonian University Press, 2003) 2.25–36.

Aquinas extensively.⁶⁵ Only once, however, when discussing Thomas and natural law, did he slip into Thomas' terminology.⁶⁶ What is particularly striking is that Téllez wrote about natural law primarily in terms of "*praecepta* (precepts or maxims)" not in terms of "*leges*." The most fundamental of these norms, wrote Téllez, was that human beings should and can distinguish between good and evil.⁶⁷ For the remainder of these norms he turned to the jurisprudential tradition. Human beings should live honestly and should not injure their neighbors.⁶⁸ Lastly, to give each person his *ius* in contracts, restitutions, and payments of debts, whose rendering may be assigned to reason and natural equity.⁶⁹ All of these norms, Téllez concluded by turning back to Gratian's dictum at the beginning of the *Decretum*, can be found in the divine wisdom of Christ's admonition found in Matthew, chapter 7, "Do unto others as you would others do unto you."⁷⁰

When Pope Benedict XVI addressed the participants of the International Congress on Natural Moral Law in Rome on February 12, 2007 he talked about natural law:⁷¹

⁶⁵ Emanuelis Gonzalez Téllez, *Commentaria in quinque libros decretalium* 5 vols. (Venice: Apud Haeredes Balleonios, 1766) 1.3–6.

⁶⁶ Ibid. 3: "Priori modo natura rationalis fundamentum est legis naturalis; posteriori vero modo est ipsa lex naturalis, quae humanae voluntati praecipit, vel prohibet, quod agendum est, ut docent D. Thomas 1.2 q.94 art. 1 et 2."

⁶⁷ Ibid. 5: "Primum et communissimum praeceptum est secundum eundem Angelicum Praeceptorem (Saint Thomas) . . . 'BONUM FACIENDUM' et per contrarium 'MALUM VITANDUM'."

⁶⁸ Ibid. "Praecepta huius iuris a consultis indicata, non alia in effectu sunt quam quae recensentur in l. Iustitia 10 § 1 ff. de iustitia et iure (Dig. 1.3.10.1), § Iurispraecepta Inst. eodem titulo (Inst. 1.1) . . . Hosneste vivere continent decentiam naturalem erga se, tam famae quam corporis intuitu . . . Alterum non laedere proximum, est iustitiae, quae est ad alios; ergo contra naturalem rationem est alterum damno afficere uel in rebus per furtum vel in vita aut persona per vulnus illatum . . . Unde deducit Florentinus nefas esse hominum homini insidari."

⁶⁹ Ibid. "Postremum est ius suum cuique tribuere, quod ad pactiones, restitutiones, et solutiones rerum debitarum proprie spectat, quarum implementum merito rationi, et aequitati naturali assignatur sive attribuitur."

⁷⁰ Ibid. "Haec omnia praecepta respectu omnium hominum hoc uno clausit divina sapientia Christi Domini apud Matth. 7: 'Omnia quaecumque vultis, ut faciant vobis homines, et vos facite illis. Haec est enim lex et propheta'."

⁷¹ The entire text reads: "La capacità di vedere le leggi dell'essere materiale ci rende incapaci di vedere il messaggio etico contenuto nell'essere, messaggio chiamato dalla tradizione *lex naturalis*, legge morale naturale. . . Proprio alla luce di queste constatazioni che appare in tutta la sua urgenza la necessità di riflettere sul tema della legge naturale e di ritrovare la sua verità comune a tutti gli uomini. Tale legge, a cui accenna anche l'apostolo Paolo (cfr *Rm* 2,14–15), è scritta nel cuore dell'uomo ed è, di conseguenza,

The capacity to see the laws of material being makes us incapable of seeing the ethical message contained in being, a message that tradition calls *lex naturalis*, natural moral law . . . From it flow the other more particular principles that regulate ethical justice on the rights and duties of everyone. So does the principle of respect for *human life* from its conception to its natural end, because this good of life is not man's property but the free gift of God. Besides this is the duty *to seek the truth* as the necessary presupposition of every authentic personal maturation. Another fundamental application of the subject is *freedom*. Human freedom is always a freedom shared with others. It is clear that the harmony of freedom can be found only in what is common to all: the truth of the human being, the fundamental message of being itself, exactly the *lex naturalis*. And how can we not mention, on one hand, the demand of *justice* that manifests itself in giving *unicuique suum* and, on the other, the expectation of *solidarity* that nourishes in everyone, especially if they are poor, the hope of the help of the more fortunate?

Unwittingly Benedict separated the two traditions that we have been examining. The jurists made no distinction between *ius naturale* and justice, and an important aspect of justice was preserving the common good.

anche oggi non semplicemente inaccessibile. Questa legge ha come suo primo e generalissimo principio quello di *'fare il bene ed evitare il male.'* È, questa, una verità la cui evidenza si impone immediatamente a ciascuno. Da essa scaturiscono gli altri principi più particolari, che regolano il giudizio etico sui diritti e sui doveri di ciascuno. Tale è il principio del rispetto per la *vita umana* dal suo concepimento fino al suo termine naturale, non essendo questo bene della vita proprietà dell'uomo ma dono gratuito di Dio. Tale è pure il *dovere di cercare la verità*, presupposto necessario di ogni autentica maturazione della persona. Altra fondamentale istanza del soggetto è la *libertà*. Tenendo conto, tuttavia, del fatto che la libertà umana è sempre una libertà condivisa con gli altri, è chiaro che l'armonia delle libertà può essere trovata solo in ciò che è comune a tutti: la verità dell'essere umano, il messaggio fondamentale dell'essere stesso, la *lex naturalis* appunto. E come non menzionare, da una parte, l'esigenza di *giustizia* che si manifesta nel dare *unicuique suum* e, dall'altra, l'attesa di *solidarietà* che alimenta in ciascuno, specialmente se disagiato, la speranza di un aiuto da parte di chi ha avuto una sorte migliore?" It can be found on the Vatican website at:

http://212.77.1.245/news_services/bulletin/news/19718.php?index=19718&po_date=12.02.2007&lang=it

The translation is based on:

http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/february/documents/hf_ben-xvi_spe_20070212_pul_en.htm

More significantly when Benedict thought about what constituted an example of *lex naturalis*, he proposed an universal *lex*: the respect for human life from conception to its natural end. Thomas Aquinas might have found fault with this *lex* in the same way that he objected to gratuitous contracts being called general principles of natural law. Do not human reason and human ideas of justice find ways to end lives between conception and death, he might ask. The death penalty and the killing fields of war are two examples that he would certainly have cited. As Thomas pointed out, how can something be called a principle of natural law if there are generally held exceptions to it?⁷²

What Benedict overlooks is his Church's own jurisprudence. It is what every jurist, even the pagan Roman jurists, had understood for centuries: *ius* embodies justice; and *ius naturale* in its purest form contains equity, justice, and reason in its DNA. I would argue that the shift in terminology that we have traced has impoverished natural law thought. *Ius naturale* shifted the emphasis both yesterday and today from a set of precepts, rights, and duties encapsulated in *ius* to positivistic sets of rules and norms, shaped and fashioned according to each person's belief system, that are and always have been the defining feature of *lex*. Human beings may never agree on universal rules of a *lex naturalis*, but they might agree on universal precepts of a *ius naturale*.

Finally, to answer the question that I posed at the beginning of this essay: why were the bollards surrounding the Supreme Court provided with the word "Lex"? The answer is undoubtedly "Ignorantia iuris."

⁷² Another example of how language can shape thought is Thomas Hobbes' attempt to distinguish between *ius naturale* and *lex naturalis*: "The RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for preservation of his own Nature . . . A LAW OF NATURE, (*Lex Naturalis*), is a Precept, or general Rule, found out by Reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit, that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound *Jus* and *Lex*, *Right* and *Law*; yet they ought to be distinguished; because RIGHT consisteth in liberty to do, or to forbear; Whereas LAW determineth and bindeth to one of them: so that Law and Right differ as much as Obligation and Liberty, which in one and the same matter are inconsistent." Thomas Hobbes, (1588–1679), *Leviathan* (London-New York: Penguin, 1968) 189, Part 1, chapter 14.