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# Lex und Ius
# Lex and Ius

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Alexander Fidora, Matthias Lutz-Bachmann,
Andreas Wagner (Hrsg. / Eds.)

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RECHTSTHEORIE DES MITTELALTERS
UND DER NEUZEIT

*Texte und Untersuchungen*

POLITICAL PHILOSOPHY AND
THEORY OF LAW IN THE MIDDLE AGES
AND MODERNITY

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TEORÍA DEL DERECHO EN LA EDAD MEDIA
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LEX UND IUS

Beiträge zur Begründung des Rechts in der Philosophie des Mittelalters und der Frühen Neuzeit

LEX AND IUS

Essays on the Foundation of Law in Medieval and Early Modern Philosophy

Herausgegeben von / Edited by
Alexander Fidora, Matthias Lutz-Bachmann, Andreas Wagner

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# Vorwort

Im Zentrum der Rechtstheorie des lateinischsprachigen Mittelalters und der Neuzeit stehen die Begriffe »Lex« und »Ius«. Sie spielen eine wichtige Rolle bei der Grundlegung des Rechts aus den unterschiedlichen Perspektiven der Disziplinen der Philosophie, der Jurisprudenz und der Theologie. Dabei greifen die Autoren des Mittelalters und der Neuzeit auf eine Bedeutungsvarianz der Begriffe »Lex« und »Ius« zurück, die sich selbst heute noch im deutschen Sprachgebrauch der Worte »Recht« und »Gesetz« reflektiert. Was die Autoren des Mittelalters und der Neuzeit in ihrer Verwendung der Begriffe im Einzelnen jeweils unter »Lex« und »Ius« verstehen, wie sie das in diesen Begriffen näher bestimmte »Recht« begründen und welche normative Bedeutung sie diesem »Recht« zuerkennen, ist genauso vielfältig wie die hinter den Begriffsdefinitionen stehenden juristischen Traditionen und philosophisch-theologischen Deutungsmuster.

Einer genauen Bestimmung der Begriffe »Lex« und »Ius« sowie ihres Verhältnisses kommt für eine Rekonstruktion der Beiträge zur Grundlegung des Rechts in Mittelalter und Neuzeit eine Schlüsselfunktion zu. Es ist Anliegen der in diesem Band versammelten Beiträge, die Bedeutung und Funktion dieser Begriffe anhand ausgewählter zentraler Autoren in der Zeit zwischen dem 12. und 17. Jahrhundert darzustellen und zu diskutieren. Die Aufsätze dieses Bandes verstehen sich aber nicht nur als Beiträge zur Begriffsgeschichte, sondern sie beziehen sich ausdrücklich auch auf die zentrale Bedeutung, die in den heutigen Debatten zur Grundlegung des Rechts der Frage einer Verhältnisbestimmung von Recht und Gesetz, von Verfassung und juristischer Norm, von Öffentlichem Recht, Privatrecht und Völkerrecht zukommt.

Die Beiträge gehen zurück auf eine von uns im Dezember 2007 an der Johann Wolfgang Goethe-Universität in Frankfurt am Main durchgeführte Konferenz, die im Rahmen der Forschungsschwerpunkte des Exzellenzclusters 243 »Die Herausbildung normativer Ordnungen« zu den Fragen der Normativität, Begründung und Geschichte des Rechts durchgeführt worden ist. Wir danken dem Direktorium des Exzellenzclusters 243 an der Johann Wolfgang Goethe-Universität für die finanzielle Unterstützung der Konferenz und der Buchpublikation.

Alexander Fidora     Matthias Lutz-Bachmann     Andreas Wagner

# Foreword

In the Latin-speaking Middle Ages and the Early Modern Period the terms "Lex" and "Ius" were at the centre of the theory of law. They played an important role in the formation of law as regards the different perspectives offered by the disciplines of philosophy, jurisprudence and theology. In this context, authors from the Middle Ages and the Early Modern Period referred to a variety of meanings attaching to the terms "Lex" and "Ius", a variety which to this day is reflected in modern linguistic usage of the German words "Recht" and "Gesetz" or the English "Law" and "Right". Depending on their diverse legal traditions, philosophical schools and theological commitments, authors from the Middles Ages and the Early Modern Period developed highly distinct definitions and applications of the concepts of "Lex" and "Ius".

The exact definition of and relation between the terms "Lex" and "Ius" play a key role in the foundation of law in the Medieval and Early Modern Periods. The particular concern of the articles within this volume is to outline and discuss the meaning and function of these notions by reference to notable authors from within the period spanning the twelfth to the seventeenth centuries. However, it is the aim of the articles in this volume not only to contribute to the history of the concepts of "Lex" and "Ius", but also to contemporary debates concerning the formation of law and the corresponding question of how to define the relation between rights and law, constitution and legal standards, public law, private law and public international law.

The articles of this volume date back to a conference held at the Goethe-University in Frankfurt in December 2007 which was organized by the Cluster of Excellence 243 "The Formation of Normative Orders". We wish to offer our special thanks to the board of the Goethe-University's Cluster of Excellence 243 for the financial support they have lent both to the conference and the publication of this volume.

Alexander Fidora     Matthias Lutz-Bachmann     Andreas Wagner

# Prefacio

Durante el Medievo Latino y en la Edad Moderna las palabras «lex» y «ius» eran centrales en la teoría del derecho. Éstas desempeñaron un importante papel en la fundamentación del derecho, a partir de las distintas perspectivas de disciplinas como la filosofía, la jurisprudencia y la teología. Los autores de estas épocas manejaron una variación en los significados de estos términos que se vería reflejada en el moderno uso lingüístico de las palabras alemanas «Recht» y «Gesetz» o españolas «derecho» y «ley», uso que llega hasta nuestros días. Dependiendo de las respectivas tradiciones legales, filosóficas y teológicas, los autores del Medievo y de la Edad Moderna desarrollaron diferentes definiciones de estos términos latinos llevándoles a interpretaciones muy diversas del derecho y de su fuerza normativa.

Así pues, la definición exacta y la relación de ambos términos, «lex» y «ius», juega un rol decisivo en la reconstrucción de la fundamentación del derecho en el Medievo y la Edad Moderna. La intención de los artículos de este libro es perfilar y debatir el significado y la función de estos términos a través de importantes autores del periodo comprendido entre los siglos XII y XVII. De esta manera, los artículos del presente libro no sólo pretenden contribuir a aclarar la historia de los conceptos «lex» y «ius», sino también indicar la relevancia que puede tener, para el debate actual sobre la fundamentación del derecho, una determinación exacta de la relación entre derecho y legalidad, constitución y normas jurídicas, derecho público, derecho privado y derecho internacional.

Los artículos de este libro tienen su origen en un congreso que tuvo lugar en la Goethe-Universität en Frankfurt am Main en diciembre del 2007, organizado por el Centro de Excelencia 243 «La formación de sistemas normativos». Queremos agradecer especialmente al Centro de Excelencia 243 de la Goethe-Universität su aportación económica para el congreso y la publicación de este libro.

Alexander Fidora    Matthias Lutz-Bachmann    Andreas Wagner

# Avant-propos

Les termes «lex» et «ius» sont au cœur de la théorie du droit du Moyen-Âge latinophone et de l'époque moderne. Ils jouent un rôle important dans l'élaboration du droit, quelle que soit la perspective disciplinaire adoptée: philosophie, jurisprudence ou théologie. Les différents auteurs ont de fait recours à un large éventail de significations des termes «lex» et «ius», que l'on retrouve encore aujourd'hui dans l'usage des termes français «loi» et «droit». Ce que les auteurs du Moyen-Âge et de l'époque moderne entendent par «lex» et «ius» dans les différents emplois qu'ils en font, la manière dont ils les utilisent pour fonder et expliquer leur propre théorie du droit, la signification normative qu'ils attribuent à ce «droit», sont en fait aussi variés que les traditions juridiques et les modèles d'interprétations philosophico-théologiques qui sous-tendent ces concepts et leur définition.

Pour définir avec précision les concepts de «lex» et de «ius» et pour bien saisir leur relation, il est essentiel de reconstituer les différentes contributions qui ont été apportées au Moyen-Âge et à l'époque moderne à l'élaboration du droit. C'est précisément le but des essais rassemblés dans le présent ouvrage d'éclairer et de discuter la signification et la fonction de ces concepts, tels qu'ils sont employés chez les principaux auteurs de cette époque, entre le XIIe et le XVIIe siècle. Ces essais ne sont pas seulement des contributions à l'histoire des idées; ils entendent également apporter des éléments de réponse à la question, posée aujourd'hui dans les débats sur la formation du droit, des rapports existant entre loi et droit, constitution et norme juridique, droit public, droit privé et droit public international.

Les différentes contributions de ce volume ont d'abord été présentées lors d'un colloque que nous avons organisé en décembre 2007 à l'université Johann Wolfgang-Goethe de Francfort-sur-le-Main, dans le cadre du Centre d'Excellence 243: «La formation d'ordres normatifs». Nous remercions les directeurs du Centre d'Excellence pour le soutien financier qu'ils ont apporté à l'organisation du colloque et à la publication de ce livre.

Alexander Fidora     Matthias Lutz-Bachmann     Andreas Wagner

# Prefazione

I concetti di «legge» e di «diritto» sono al centro della dottrina giuridica medievale. Essi rivestono un importante ruolo nella fondazione del diritto nelle diverse prospettive disciplinari della filosofia, della giurisprudenza e della teologia. In tal senso gli autori del Medioevo e della prima età moderna utilizzano quella variabilità semantica dei concetti di «legge» e di «diritto» che ancora oggi si riflette nell'uso italiano o tedesco dei termini «legge» e «diritto». Che cosa gli autori del Medioevo e della prima età moderna intendano con «legge» e con «diritto» quando utilizzano questi concetti per i singoli casi, come essi giustifichino il «diritto» specificato da questi concetti e quale valore normativo essi attribuiscano a tale «diritto», a tali domande vengono date risposte tanto varie quanto varie sono le tradizioni giuridiche e i modelli interpretativi filosofici e teologici alla base delle diverse dottrine.

Alla definizione esatta sia dei concetti di «legge» e «diritto» sia del loro rapporto reciproco spetta una funzione fondamentale quando si ricostruiscono i singoli apporti alla fondazione del diritto nel Medioevo e nella prima età moderna. L'intento dei contributi raccolti in questo volume è di presentare e discutere il significato e la funzione che questi concetti hanno avuto nella dottrina dei più importanti autori vissuti tra il XII e il XVII secolo. I saggi di questo volume non si concepiscono tuttavia solamente come contributi di storia concettuale, bensì fanno anche esplicito riferimento alla discussione attuale circa la fondazione del diritto e all'importanza cruciale che in essa riveste la domanda sul rapporto tra diritto e legge, tra costituzione e norma giuridica, tra diritto pubblico, privato e internazionale.

I contributi si riferiscono a un convegno che abbiamo realizzato nel dicembre 2007 alla Johann Wolfgang Goethe-Universität di Francoforte sul Meno e che è stato realizzato nel quadro delle ricerche del Gruppo di eccellenza 243: «La formazione degli ordini normativi» e, in modo particolare, in riferimento alle questioni della normatività, della fondazione e della storia del diritto. Ringraziamo la direzione del Gruppo di eccellenza 243 presso la Johann Wolfgang Goethe-Universität per il sostegno finanziario concesso al convegno e alla pubblicazione di questo libro.

Alexander Fidora    Matthias Lutz-Bachmann    Andreas Wagner

# *Lex* and *ius* in the Twelfth and Thirteenth Centuries

*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?

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

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 Gratian who taught canon law in Bologna. In the first half of the twelfth century he compiled a *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:

> 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.[2]

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:

> 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 nation 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

2 Gratian, *Decretum* [= DG] 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 quecunque 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'". In: *Revue historique du droit français et étranger* 15 (1936). See also John Marenbon, "Abelard's Concept of Natural Law". In: *Mensch und Natur im Mittelalter*, ed. by A. Zimmermann and A. Speer. Berlin: de Gruyter, 1991.

> natural reason of men establishes and is used by all men equally, is called the *ius gentium*, almost as if all human beings use that *ius*.[4]

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*: "Justice is the constant and perpetual will of giving everyone their *Ius*."[5] 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:

> 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*".[7]

4 *The Digest of Justinian*. Ed. by A. Watson and Th. Mommsen. Philadelphia: University of Pennsylvania Press, 1985, D.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 vocaturque ius civile, quasi ius proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur."

5 D.1.1.10pr.: "Ulpianus 1 reg. Iustitia est constans et perpetua voluntas ius suum cuique tribuendi."

6 D.1.1.10.1: "Ulpianus 1 reg. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum ⟨ius⟩ cuique tribuere."

7 D.1.1.11: "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."

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, 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*:

> *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.[9]

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:

> *Lex* commands what is just and prohibits the contrary. *Lex* is so named because it binds, or because it is read as writing, or because it legitimately functions by rewarding those who observe it and punishes those who transgress its rules.[10]

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

9 DG D.1 c.5; Isidore, Etym 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.iiii. 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

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

> *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.[11]

It is important to notice that the jurists never attributed the rich penumbras[12] of meanings to *lex* that they did to *ius*. *Lex* was a plebeian 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 not concentrated 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 twelfth century graphically illustrates this point. In a gloss to Justinian's *Codex* he described the relationship between *ius* and justice:

c.1)." *Summa decretorum*. Ed. by O. Přerovský. Città del Vaticano: Biblioteca Apostolica Vaticana, 2006, 25.

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. (D.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 DG 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."

> 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.[14]

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 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" as justice. And "justice", he went on, "is the tacit contract of nature discovered to help many people".[16] Early glosses to the *Decretum* repeated Paucapalea's connection of *ius naturale* and justice.[17] Abelard seems to have been one of the

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 ⟨iustitia⟩ dissonet ⟨ius⟩. Quod cum fit iustitia ipsa siue equitas sic interpretatur ut siquid ius ab equitate aperte dissonet eius omissa auctoritate equitatem sequamur.»

15 Stephan Kuttner, "A Forgotten Definition of Justice". In: *Mélanges Gérard Fransen*. Ed. G. Forchielli. Rome: Salesiano, 1976, 76: "habitus animi communi utilitate conservata, suam cuique tribuens dignitatem", Cicero, *De inventione* 2.53.160.

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

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.

first theologians to make the connection between justice and the common good. Referring to the theological and the legal traditions, he declared:

> 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.[18] Justinian defined this concept in his definition when he would say, "[j]ustice 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 ⟨his right⟩ ought to be regulated by the preservation of the common good. Justice refers to the common good in all matters.[19]

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 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 commen-

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

19 Peter Abelard, *Sententie magistri Petri Abaelardi*. Ed. by D. Luscombe et al. Turnhout: Brepols, 2006, 134f.: "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 sic 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 178.1750f. and Sandro Buzzetti's edition (Bu), *Sententie magistri Petri Abelardi (Sententie Hermanni)*. Firenze: La Nuova Italia, 1983, 145.

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

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

22 PL 118.536: "'Quaecumque vultis ut faciunt vobis homines, et vos eadem facite illis.' Ista est lex naturalis, quae in duobus consistit praeceptis, et in his duabus sententiis tota

tary on Genesis.[23] In the late eleventh and early twelfth century Rupert of Deutz († 1129–1130) declared that natural law was written in the hearts of men and that 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 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*.

lex pendet et prophetae. Et hoc est unum quod tibi dicitur: 'Quaecumque vultis ut faciunt vobis hominess' et aliud est quod alibi dicitur 'Quod tibi non vis fieri, alii ne feceris.' Quia quidquid lex et prophetae 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 faciunt vobis hominess, 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 hujiusmodi: 'Quod tibi non vis fieri, alii nec feceris'." Also PL 169.1304 and PL 170.474.

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

26 D.1.1.10.1: "Ulpianus 1 reg. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum ⟨ius⟩ cuique tribuere."

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 1140s.[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 1120s and early 1130s. 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 adiuvare."[30] As we have seen the two precepts of natural law that the theologians embraced over the centuries were "Do onto others as you would have them do onto 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: honeste vivere, alterum non laedere, suum ⟨ius⟩ 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

27 I have reviewed this discussion and the literature in "The Birth of the 'Ius commune': King Roger II's Legislation". In: *Rivista internazionale di diritto comune* 17 (2006) and "'The Big Bang': Roman Law in the Early Twelfth-Century". In: *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*". In: *Bulletin of Medieval Canon Law* 26 (2004–2006), 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. by H. Vogt and M. Münster-Swendsen. Copenhagen: DJØF, 2006 and "Neither Free nor Slave: Theology and Law in Gratian's Thoughts on the Definition of Marriage and Unfree Persons". In: *Medieval church law and the origins of the Western legal tradition*. Ed. by M. E. Sommar and W.P. Müller. Washington, D.C.: Catholic University of America Press, 2006.

29 Carlos Larrainzar, "El borrador del la 'Concordia' de Graziano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg)". In: *Ius ecclesiae: Rivista internazionale di diritto canonico* 9 (1999); Kenneth Pennington, "Gratian, Causa 19, and the Birth of Canonical Jurisprudence". In: *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico*. Ed. by E. de León and N. Álvarez. Milano: Giuffrè, 2003; Atria Larson, "The Evolution of Gratian's *Tractatus de penitentia*". In: *Bulletin of Medieval Canon Law* 26 (2004–2006).

30 PL 179.182 (JL 7625). First printed by Johann Martin Lappenberg, *Hamburgisches Urkundenbuch*. Vol. 1, Hamburg, 1842, 134f.

teaching of Roman and of canon law in Bologna must have already been in full swing by the late 1120s and early 1130s.

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 "*lex naturalis*" and "*ius naturale*".[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 compatible 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 fre-

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. 36f., 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.corpusthomisticum.org/it/index.age (last accessed 2008-09-30).

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), 389–420.

35 Brian Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law 1150–1625*. Atlanta: Scholars Press, 1997, 22–27 and passim. Tierney's

quently 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. 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 *lex naturalis* when he defined the term in question 94.

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.* Oxford: Oxford University Press, 1998, 134f. 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, *Idea of Natural Rights*, 23.

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 *naturalis lex* with *habitus*, and Thomas shaped his definition of *naturalis lex* 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 counterarguments, including the text of Isidore of Seville that Gratian included at Distinction 1, canon 7. 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.[43] The canonists quickly glossed "nations" as all persons who

39 Thomas Aquinas, STh I-II 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." Ibid., q. 2 4: "Quandoque vero dicitur habitus, quo quis disponitur ad consciendum; 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 136–166.

42 STh I-II q. 94 a. 4 arg. 1: "Ad quartum 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."

43 Ibid., 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.

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: 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:

> 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.[46]

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.

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*, 31.

45 STh I-II 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 DG 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 deposite rei vel commendate pecuniae restitutio, violentie per vim repulsio. Nam hoc, aut si quid huic simile est, nunquam iniustum, sed naturale equumque habetur."

47 This right and duty was already embedded in Roman testamentary law. Children could not be disinherited unless they committed certain serious crimes. Later the can-

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:

> 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.[49]

onists 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*. Grand Rapids, Michigan: Eerdmans, 2004, 82–93, 165–205 and passim. For the English common law context, see Richard Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*. Oxford: Oxford University Press, 2004, 244, 256, 377, 425f. and 560f.

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

49 STh I-II 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 impugnandam patriam. Et hoc tanto magis invenitur deficere, quanto magis ad particularia descenditur, puta si dicatur quod deposita 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."

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 contract 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 property 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:

> "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 of what was deposited with me or was entrusted to me.[50]

50 Huguccio, *Summa decretorum*, 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 restituendum fore quod apud me est depositum uel michi est commodatum."

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

> 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".[52] But whatever constitutes natural law is fully contained there. Consequently Gratian said immediately, as an example and as a clarification, "[t]he *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".[53]

Thomas' summary of Gratian's meaning is correct. What he did not understand is 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 the-

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

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

53 STh I-II 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."

ology 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 ca. 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 to have not 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 aeterna*."[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

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

55 Orazio Condorelli, "La dottrina delle fonti del diritto nel Commentario del Panormitano sulla Distinctio prima del Decretum". In: ZRG Kan. 91 (2005). His Commentary was discovered by Antony Black; see Kenneth Pennington, "Nicholaus de Tudeschis (Panormitanus)". In: *Niccolò Tedeschi (Abbas Panormitanus) e i suoi Commentaria in Decretales*. Ed. by O Condorelli et al. Roma: Il Cigno, 2000, on p. 16.

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. xci[a] articulo ii. (I–II 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 delle fonti".

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. (I–II q. 91 a. 1; *rectius* I–II q. 93 a. 1) Et clarius idem beatus Thomas attingens hanc materiam xci.[b] dis. ar. ii. (I–II