On the Use of ‘Ius’ (and ‘Lex’)

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1. Introduction

In this essay, I explore a particular instance of the interaction between jurisprudential theory and philology. In outline, my story is the following: In classical Latin, the fundamental meaning of both ‘ius’ and ‘lex’ is ‘law’. Within the tradition of Roman Jurists, it is ‘ius’ that is the usual term for law in general, or a system of laws. However, in the philosophical tradition represented by Cicero, the noun ‘lex’ is also used to signify law in general or, more particularly, the ‘rational principle’ that Cicero believes to undergird all law. Cicero elaborates this philosophical sense of ‘lex’, which appears to owe much to both Academics and Stoics:

law (lex) is the highest reason, inherent in nature, which enjoins what ought to be done and forbids the opposite. When that reason is fully formed and completed in the human mind, it, too, is law (De legibus 1.18).

My contention is that, when St. Thomas Aquinas is faced with reconciling this ‘philosophical’ account of law as lex with what the Jurists say about natural law (ius naturale) and the law of peoples (ius gentium), he develops a particular kind of distinction between lex and ius. These developments, that of the Jurists and that of Aquinas, seem to me to be crucial historical moments along the way to what I shall term the ‘modern’ distinction between lex and ius. One version of the modern distinction is clearly asserted by Thomas Hobbes in his Leviathan:

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 on one and the same matter are
I suggest that Hobbes is here reading a modern conceptual distinction (which came to be marked in English, as he suggests, by ‘right’ and ‘law’—and in French by ‘droit’ and ‘loi’, in German by ‘Recht’ and ‘Gesetz’, in Italian by ‘diritto’ and ‘legge’, in Spanish by ‘dereche’ and ‘ley’) back into what he takes to be ‘proper’ Latin usage.

2. Lexicography, the Jurists, and Cicero

It is not surprising that the *Oxford Latin Dictionary* indicates considerable overlap in its definitions for ‘ius’ and ‘lex’, since ‘law’ is obviously the best English translation for both terms in many contexts. The first definition given for ‘ius’ is “that which is sanctioned or ordained, law,” and the second “a legal system or code (with all its technicalities)” (*OLD*, 984-985). As the seventh definition we find “(in a wider sense) that which is good and just, the principles of law, equity, the right” (*OLD*, 985). It is only at the thirteenth and final definition that anything which approaches the modern conception of a ‘right’ appears: “Rights over others, authority, jurisdiction (conferred by law)” (*OLD*, 986). Then, as a continuation of the same entry: “b (outside the legal sphere, esp trans. or fig.). e mei (etc.) iuris, subject to my (etc.) control, belonging to me: sui iuris (also suo iure, pro suo iure), one’s own master, independent” (*OLD*, 986). So, the fundamental meaning of ‘ius’ is ‘law’ or ‘what is right’; by extension it can sometimes connote what one has jurisdiction or control over (as a matter of law or justice). And, by further extension in idioms such as ‘sui iuris’, a kind of independence or ‘self-mastery’.

The *OLD* entry for ‘lex’ does not look that different from the entry for ‘ius’. As in the entry for ‘ius’, the first definitions of ‘lex’ focus on law: “1 The legal machinery of a state, the law (regarded as an active force)”; “2 An enactment of a sovereign power, law, statute”; “3 (pl)
The laws regarded as a body, the constitution”; “4 Legal right or title”; “5 A rule made by any authority, ordinance, regulation”; “6 A rule or principle of any art or craft; esp the rules of scansion or versification” (OLD, 1021-1022). And, in the ninth and tenth definitions, we find definitions similar to the later definitions of ‘ius’ as what is right: “9 What is allowable or right, the due measure, propriety”; “10 (pl.) Rule, control, dominion” (OLD, 1022).

As I mentioned, the Roman Jurists generally use ‘ius’ to connote law in general, or a particular system of laws. Ulpian, in fact, quotes Celsus’ “elegant” definition of ‘ius’ as “the art of the good and fair (ars boni et aequi)” (Justinian, Digest 1.1. 0). There is one important tradition among the Jurists in which, officially at least, ‘lex’ is regarded as a term with narrower signification. In the Institutes of Gaius, lex is what the (Roman) “populus orders and establishes” and is contrasted with plebiscitum, which is what the (Roman) “plebs orders and establishes” (Institutiones iuris civilis, I, §3, 25), where the populus is the whole (Roman) citizenry, including patricians as well as plebians. Similarly, Justinian’s Institutes defines ‘lex’ narrowly as “what the Roman people was accustomed to establish when the question was put by a senatorial magistrate, i.e., a consul” (Institutes 1.2.4). However, there is an apparently somewhat broader definition attributed to Papinian:

Lex is a general order (praecptum), a resolution (consultum) of practically wise men, a restraint (coercito) of offences (delictorum), which are committed either freely or in ignorance, a general pledge (sponsio) by the state (Dig.1.3.1).

In actuality, this definition is simply a list (praecptum, consultum, coercito, sponsio) of terms with technical legal signficance. So, even Papinian’s ‘broader’ account of lex is limited to particular elements of the Roman legal system.
While the Jurists’ official accounts of lex was perhaps artificially narrow, Cicero’s use is certainly broad—perhaps also artificially so. In his De legibus, he accedes to Atticus’ characterization of his view that the “discipline of ius ought to be derived not from the praetor’s edict (as most nowadays believe) not from the Twelve Tables (as our ancestors believed) but deep down, from the most profound philosophy (sed penitus ex intima philosophia)” (De leg. 1.17). Cicero adds that, in jurisprudence, “the nature of ius ought to be explicated, and that must be deduced from the nature of man” (De leg. 1.17). Particularly noteworthy is his smooth transition from ius to lex: In inspecting the “first principles of ius (iuris principia),” he says,

> the most learned men have favored starting from lex. I am inclined to think that this would be right if, as they define it, lex is the highest reason, inherent in nature, which orders what ought be done and forbids the contrary. That same reason, when it is secured and completed in the human mind, is law (lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria. Eadem ratio, cum est in hominis mente confirmata et perfecta, lex est). And so they judge that lex, whose business is to prescribe acting rightly and to proscribe doing wrong, is practical wisdom (prudentia) (De leg. 1.18-19).

Cicero concludes with an endorsement of the doctrine that “the foundation of ius must be derived from lex. For lex is a principle of nature; it is the mind and reason of the practically wise person; it is the criterion of ius and its opposite (iniuria)” (De leg. 1.19). It seems clear that Cicero is here almost inverting what became the usage of the Jurists. For them, ‘ius’ is a more comprehensive, theoretical and, perhaps, moral-laden term than ‘lex’. Cicero, however, explicitly proposes to give an account of ‘the legal’ (‘ius’, still employed in a general and comprehensive sense) in terms of the more theoretical and, perhaps, moral-laden concept that he associates with the noun ‘lex’. He also points up the rationalistic and the realistic character of that conception of lex: lex is a principle of practical rationality and a “naturae vis,” a primary
element, principle or ‘force’ of nature.

3. The Jurists: *Ius naturale* and *Ius gentium*

Both Justinian’s *Institutes* and his *Digest* (*Pandects*) follow what seems to have been a tradition of the textbooks or *Institutiones* of earlier Roman Jurists: the works begin with a short definition of ‘ius’ and then distinguish various kinds or categories of *ius/iures*. This introductory material typically includes the distinction between three kinds of *ius*—*ius naturale*, *ius gentium*, and *ius civile*. The last type of law is positive law. It is the Jurists’ distinction between *ius naturale* and *ius gentium* with which I am now concerned. Of the former, Ulpian gives the following account, which is adopted verbatim in Justinian’s *Institutes* (1.2.0):

*Ius naturale* is that which nature has taught all animals; for this law is not proper to the human kind but is common to all animals, which are born on the earth and in the sea, and also to birds. Whence derives the union of male and female, which we call marriage; and whence the procreation of children and their rearing; for we see also that the rest of the animals, even wild beasts, are credited with knowledge of this law (*Dig*.1.1.1.3).

In explicit contrast to *ius naturale* is *ius gentium*, according to Ulpian’s account:

*Ius gentium* is that law which (all) human nations use. It is easy to understand that it diverges from *ius naturale* because the latter is common to all animals, while *ius gentium* is common only to humans in their interrelations (*solis hominibus inter se commune sit*) (*Dig*. 1.1.1.4).

Similarly, in the second chapter of the first book of Justinian’s *Institutes*, we find:

but what natural reason has truly established among all peoples, that is observed equally among all peoples and is called *ius gentium* since it is that law which all nations make use of. . . . *Ius gentium* [as opposed to *ius civile*] is common to every human nation (*omni humano generi*). For because of the force of exigencies and human necessities, human nations have established certain measures for themselves. Wars have arisen and given rise to captivity and slavery, which is contrary to *ius naturale* (for by *ius naturale*, in the
beginning all humans were born free). Also from this *ius gentium* have been introduced almost all contracts, such as sale, hire, partnership, deposit, loan, and innumerable others (*Inst. 1.2.1-2*).

Briefly postponing discussion of the issue of slavery, I note that the core of this conception of *ius gentium* seems to be those social and legal institutions and practices which Justinian takes to be the virtually universal results of the application of human practical rationality to problems that all humans at all times and places face in their relations with one another. This is so despite the fact that the list of types of *contractus* said to be derived from *ius gentium* originate, in fact, from Roman ‘private’ (‘civil’ as opposed to ‘public’ and criminal) law. In the *Institutes*, then, the concept of *ius gentium* is associated with what, from the modern perspective, might be termed ‘practically useful’ social and legal institutions. The concept does not seem to present a distinctively ‘moral’ face in a modern sense of ‘moral’ that focuses on duties and obligations. That is, the notion is not clearly tied either to some general and theoretical conception of justice, with attendant conceptions of rights and duties, or to human virtues and *officia*.

However, in the preceding, first chapter of the first book of the *Institutes*, we do find a moralistic account of the precepts of *ius*, in general: “these are the precepts of *ius*: to live with rectitude (*honeste*), not to harm another, and to give to each his due” (*Inst. 1.1.3*). Some of the other Jurists evidently held a noticeably more moralistic conception of *ius gentium* than did Ulpian and Justinian. Justinian’s *Digest* quotes Pomponius as locating in *ius gentium* duties of religion and acts owed to god as well as the duty of submission to parents and country (*Dig. 1.1.2*). And it quotes Florentinus to the effect that the right of self-defense arises from *ius gentium* on the following grounds: “since nature has established a certain kinship among us, it is
a wicked thing (*nefas*) for man to wait in ambush for man” (*Dig.* 1.1.3). This last comment, in particular, could have been made by Cicero and perhaps shows that ‘philosophical’ (Stoic, Ciceronian) influence was not altogether absent in some of the Jurists’ treatment of *ius gentium*.

It seems, then, that the Jurists held that *ius gentium* includes the ‘universal’ manifestations of the application of human reason to the problems of human cooperation and social life. The exiguous evidence suggests that there was perhaps some variation among the Jurists as to what this amounts to. On the one hand, there is the more ‘positivistic’ account of Hermogenian (*Dig.* 1.1.5) and Justinian’s *Institutes*, which focus on what are taken to be universal social and legal institutions as manifestations of *ius gentium*: these are the institutions and practices variations of which have been devised by human reason to facilitate human social life. But it also seems that at least some Jurists, such as Pomponius and Florentinus, were willing to include within the scope of *ius gentium*—perhaps not to the exclusion of the institutions and practices named by Justinian and Hermogenian—certain general moral duties and rights.

Although it is perhaps not certain that *all* the Jurists maintained a clear distinction between *ius naturale* and *ius gentium*, it seems that the distinction as drawn by Ulpian and Justinian and rehearsed above was typical. *Ius naturale* is what “nature has taught all animals”; *ius gentium* is “what natural reason has truly established among all peoples” and “is observed equally among all peoples.” The result is that, in the particular case of the human kind or ‘animal’, *ius naturale* and *ius gentium* can diverge. That is, the application of human reason (*ius gentium*) can override, supplement, or otherwise alter what we would nowadays call the instinctual behaviors that “nature has taught” us (*ius naturale*). Human reason as instantiated in *ius gentium* manifests itself in those cultural, political, and legal elements that are found to be
virtually universally present in human societies. A consequence (to which I shall later return) of
the *ius naturae*/*ius gentium* distinction so understood is that it underwrites a *conceptual*
distinction between something like a ‘state of nature’, which prescinds from the distinctive
products of human reason, and ‘civilized’ human life—that is, from life in human society in some
generic sense of ‘society’.

A concrete example of the divergence between *ius naturae* and *ius gentium*, one that is
bound to fascinate the contemporary reader, pertains to slavery and is found in both Ulpian’s and
Justinian’s *Institutes*. In a passage from the latter that I quoted earlier, we find: “wars have arisen
and given rise to captivity and slavery, which is contrary (*contrariae*) to *ius naturae* (for by *ius
naturae*, in the beginning all humans were born free)” (*Inst.* 1.2.2). The institution of war (itself
in some sense a part of *ius gentium*, it appears) leads to the problem of what to do with
captives—whether to slay them, to set them free, or to find some third alternative? Human reason
has devised a useful third alternative in the form of slavery; and because of its universality as a
solution to a universal human problem, the institution of slavery becomes part of *ius gentium*.

The claim that slavery is “contrary” to *ius naturae* appears to carry with it no odor of
moral opprobrium in either Ulpian or Justinian. Indeed, if there is any moral implication, it is
rather the opposite: that slavery, as an invention of *ius gentium*, is one of the useful and
‘civilized’ universal institutions devised by human practical reason. Since it is *ius gentium* rather
than *ius naturae* that particularly pertains to human beings and their institutions, it is not
surprising that the moral focus, so to speak, of law falls on the former rather than the latter.

Commenting on the *ius naturae*/*ius gentium* distinction, the eminent historian of Roman law
Alan Watson comments:
The notion of natural law appears in various guises among Greek philosophers. Aristotle drew a distinction between natural law, which had the same validity everywhere, and conventional law, which varied from place to place. But nowhere is there anything akin to Ulpian’s proposition that natural law was common to humans and animals alike. As has often been observed since, Ulpian (who is accepted by Justinian) is not describing law or a particular type, but instinct. Whether or not the jurists themselves knew the distinction between law and instinct, they chose this definition precisely to make the idea of natural law meaningless, to cut out any relevance of philosophical notions to the nature of law. The approach of the jurists to law was entirely positivist (The Spirit of Roman Law, 164-165).

I believe that Watson reaches his conclusion by concentrating his attention on what the Jurists say about ius naturale. However, if we turn our attention to ius gentium, the issue of the Jurists’ ‘positivism’ becomes more complex. There are two perspectives one might adopt toward ius gentium. One is empirical: iures gentium are those political/juridical institutions, concepts and principles that are found in all human societies—or at least in all ‘sufficiently civilized’ human societies. The other perspective has what may turn out to be a normative dimension: iures gentium are (virtually) universal political/juridical institutions, concepts, and principles because human practical reason has (virtually) universally concluded that such institutions, concepts, and principles are supportive of the way human social life should be lived.

This combination of the empirical and normative makes for a kind of ‘positivism’ that does not really fit the modern mold. On the one hand, the empirical element suggests that ius gentium is something like an intersection or ‘common core’ of all positive legal systems. On the other hand, the normative element suggests that the (assumed) existence of this intersection is not just an historical accident. Rather, this common core of legal systems exists because human reason has determined, in virtually all times and places, that this is the way things ought to be in
human societies. The Roman Jurists, being Roman, tended to characterize the supposed intersection that is *ius gentium* in terms of Roman legal institutions, concepts, and principles and thereby to invest them with a universality at which the modern reader may balk. So the ‘positivism’ of the Jurists was not, I think, of the distinctively modern type: they are not supposing that positive law is or should be divorced from morality. Rather, they are assuming that there is a common core of positive law that *coincides* with what might be termed ‘morality’. One consequence of this ancient ‘positivism’ is not so different from that of its modern descendent, however. *Ius gentium*, while having a normative dimension, does not constitute some independent normative or ‘moral’ ground against which positive law can be measured. For, according to the Jurists’ assumption, the normative rectitude, so to speak, of *ius gentium* has *already* been incorporated into the core of positive law shared by all societies.

In the next section, I turn to the treatment of *ius* and *lex* by St. Thomas Aquinas in the thirteenth century. In working out his theory of law in Latin, Aquinas is confronted with at least two distinct traditions. There is the tradition of Cicero and of the Greek philosophy that influenced Cicero (and the Vulgate Bible); and there is the tradition of Roman Jurists.


It is significant, I believe, that in St. Thomas Aquinas’ *Summa Theologiae*, the discussions of *lex* and of *ius* occur in two separate locations. The passage discussing *lex* is the longer and better known: the so-called “Treatise on Law,” extending from *pars prima secundae* (I-II) question 90 through question 108 (although most contemporary, separate editions of the “Treatise” omit qq. 98-108, which deal with the Mosaic law and the law of the Gospel). The principal discussion of *ius* occurs in the discussion of the virtues at *pars secunda secundae* (II-II),
q. 57, where it is grouped with questions pertaining to justice and injustice (qq. 58-59).

The introduction to the “Treatise on Law” in question 90 indicates, I think, why Aquinas uses the term ‘lex’ rather than ‘ius’ in this section. Aquinas says that it is necessary to consider the “exterior principles” of (human) acts and proceeds to claim that “the exterior principle moving towards good is God, who instructs us through law and assists us through grace” (ST I-II, q. 90). In an informative, insightful, and extended discussion of law, particularly ‘positive law’ in Aquinas, James Bernard Murphy emphasizes what he terms the ‘statutory’ character of law in Aquinas’ thought (Philosophy of Positive Law: Foundations of Jurisprudence [2005], 62).

What does this amount to? Murphy usefully elaborates an ambiguity that he finds in Aquinas’ conception of ‘positive’ (positum, positivum) law:

Thus Aquinas inherited two distinct concepts of the positivity of law: law is positive in the sense that its source is an authoritative imposition by a legislator, and law is positive in the sense that its content lacks necessary moral force (Philosophy of Positive Law, 81).

But I believe that there is another ambiguity lurking in his use of the term ‘statutory’. Law can be ‘statutory’ in the sense of being “an authoritative imposition by a legislator”; it imposed in the way that the Roman populus imposes lex, in the sense of Gaius). But law can also be ‘statutory’ in sense of being (part of) a code; that is, it is thought of as being constituted by general, rule-like prescriptions and (especially) proscriptions.

In extension, so to speak, these two senses of ‘statutory’ often coincide. But I believe that it is primarily the former sense of ‘statutory’ that leads Aquinas to use the term ‘lex’ as his principal term for law. The idea of law as at once being authoritatively imposed and of its being imposed for a reason is of central importance to Aquinas’ conception of lex as the foundation of
‘law and morality’. Cicero is not often directly quoted in the “Treatise of Law,” even though, I suspect, some of his influence may indirectly have been passed on to Aquinas through Augustine, Isidore of Seville, Gratian, and the *Decretals* of Gregory IX. Murphy emphasizes the influence on Aquinas of the Vulgate Bible’s choice of ‘*lex*’ as the usual term for law, translating the Greek ‘*nomos*’. Whatever the particular story of philological influence, I think that it is no accident that Cicero, the Vulgate, and Aquinas all use ‘*lex*’ as the fundamental term for law. For all three, the connotations of ‘*lex*’ (as opposed to ‘*ius*’) nicely fit their conception of (all) law as statutory in the sense of being “authoritatively imposed for a reason”—more particularly, as what *must* be observed for the attainment of goodness by humans. For Cicero, the ultimate legislator is the ‘impersonal’ Stoic Reason with an upper-case ‘R’, which governs (for the best) all that happens in the universe (Cosmopolis) but which, in the lower-case ‘r’, is localized in human beings and whatever other rational being that may exist as citizens of that Cosmopolis. But for the Vulgate and Aquinas, of course, the ultimate legislator is the Christian Triune Deity: the first person of the Trinity created the universe and, from the beginning, has governed it through the promulgation of His Law through the Eternal *Verbum or Logos*, the second person of the Trinity (see *ST* I-II q. 91, a. 1).

My aim is not to undertake a detailed analysis of the “Treatise on Law,” a task that has often been repeated. Rather, I wish to emphasize the point that Aquinas formally avoids inconsistency with what the Jurists have to say about law by using the term ‘*lex*’, while they use ‘*ius*’. In the “Treatise” Aquinas distinguishes four varieties of law: *lex aeterna* (eternal law), *lex naturalis* (natural law), *lex humana* (human law), and *lex divina* (divine law). I shall say nothing about *lex divina*, which one might term ‘sacred (or religious) positive law’; and I shall only
discuss briefly the distinctions in *lex humana* (which might be termed ‘secular positive law’) drawn by Aquinas at *ST* I-II q.95, a. 4. It seems clear, however, that *lex humana* is the paradigm for Aquinas’ discussion of the “essence” of law. For, all law, in order to be such, must be promulgated, with coercive force, by a legitimate authority to “others”—that is, to whoever (or whatever) is subject to that authority—for the “common good” (See *ST* I-II q. 90).

In the case of the *lex aeterna*, in particular, Aquinas must exert considerable effort to satisfy these conditions. Insofar as Aquinas is successful in showing that *lex aeterna* satisfies the necessary conditions of something’s being *lex*, it is because of his essentially Stoic-Ciceronian conception of this fundamental kind of *lex*:

> Now it is evident, granted that the world is ruled by divine providence . . . , that the whole community of the universe is governed by divine reason. Therefore, the very *ratio* of the governance of things in God as in the ruler of the universe is the *ratio* of law. And because the divine *ratio* conceives of nothing temporally but has an eternal conception, as is said at *Proverbs* 8:23, whence it is that law of this sort ought to be termed eternal” (*ST* I-II q. 91, a. 1).

In question 93 of the “Treatise,” which is devoted to the *lex aeterna*, Aquinas undertakes a more detailed explication of this type of *lex*. It is, he says, the “*summa ratio*, existing in God”:

> God, through his wisdom, is the creator of all things—according to which he is compared as the artificer to his artifacts, as is said in the *Pars Prima*. He is also the governor of all acts and motions which are found in the individual creature, as is said in the *Pars Prima*. Therefore, since the *ratio* of divine wisdom (inasmuch as everything is created through it [the *ratio*]) has the nature of art or exemplar or idea, so the *ratio* of divine wisdom, which moves all things to their due end, becomes the *ratio* of law. And, according to this, *lex aeterna* is nothing other that the *ratio* of divine wisdom, considered as that which directs all acts and motions (*ST* I-II q. 93, a. 1).

The phrase ‘*summa ratio*’ (rendered in rather old-fashioned English as “sovereign type” in the
translation of the *Summa* by the Dominican fathers), as well as the identification of the summa ratio with *lex aeterna*, Aquinas explicitly obtains from Augustine’s *De libero arbitrio*. However, both the phrase and its employment in a definition of ‘lex’ occurs in the first book of Cicero’s *De legibus* that I quoted in section 2: “*lex* is the highest reason, inherent in nature, which orders what ought be done and forbids the contrary. . . (*lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria . . .*)” (*Cicero, De leg. 1.18*).

In substance–even if there is not direct influence–Aquinas’ *lex aeterna* is the sort of *lex* that Cicero characterizes as “*ratio summa, insita in natura*.” The significant difference, of course, is that for Aquinas this *ratio summa* is *insita in sapientia divina*, inherent in the divine wisdom (which is not immanent in nature in the same way that Cicero’s Stoic Reason is). It also seems that Aquinas’ *lex aeterna* comprehends what the Jurists meant by *ius naturale*: “that which nature has taught all animals; for this law is not proper to the human kind but is common to all animals” (*Dig. 1.1.1.3*). The characteristic ‘instinctual’ behavior of any particular kind of animal would certainly be a matter of *lex aeterna* for Aquinas–but certainly not for him a matter of *lex naturalis*.

For an ancient analogue of Aquinas’ *lex naturalis*, I think we can look to the passage from the first book of Cicero’s *De legibus* immediately following his characterization of a (fundamental) conception of *lex* as *ratio summa, insita in natura*: “that same ratio, when it is secured and completed in the human mind, is law (*eadem ratio, cum est in hominis mente confirmata et perfecta, lex est*) (*De leg. 1.18*). I believe that a plausible case can be made that the law which, for Cicero and Aquinas, is the *ratio summa insita in natura (sive Deo)—that is, what Aquinas terms ‘*lex aeterna’—becomes something very like Aquinas’ *lex naturalis* when it is, in
Cicero’s words, “in hominis mente confirmata et perfecta”,

So, since all things that are subject to divine providence are ruled and measured by the *lex aeterna*, as was said above, it is clear that all things participate in some way or other in the *lex aeterna*, insofar as, namely, they each possess from its impression on them inclinations to their proper acts and ends. Among the others, however, the rational creature is subject to the divine providence in a certain, most excellent way—insofar as it itself becomes a partaker of providence, it is provident for itself and for others. Whence the eternal *ratio* participates in it, through which it bears a natural inclination to its due act and end. And such participation of the *lex aeterna* in the rational creature is called *lex naturalis* (*ST* I-II q. 91, a. 2).

This *lex naturalis* of Aquinas also, in at least one of its parts, bears a strong resemblance to the Jurists’ *ius gentium*. In Aquinas’ principal discussion of *lex naturalis* is the “Treatise of Law,” *ST* I-II q. 94, he distinguishes a hierarchy of “natural inclinations” that is the object of natural law. This hierarchy coincides with a hierarchy of objective goods rather than any distinction in the function of human reasoning that Aquinas identifies with *lex naturalis*. Thus, first, there is the good of existence and the consequent inclination in man toward self-preservation “according to the nature he shares with all substances.” Thus, “according to this inclination all those things through which the life of man is preserved and the contrary is impeded pertain to *lex naturalis*” (*ST* I-II q. 94, a. 2).

Second, there is the inclination of man to goods according to the nature he shares with other animals. Accordingly, those things are said to pertain to the *lex naturalis which nature teaches all animals*, such as the coming together of male and female, the education of children (*educatio liberorum*), and so forth (*ST* I-II q. 94, a. 2).

The phrase “which nature teaches all animals,” as well as the list of examples, come from the account of *ius naturale* in Ulpian’s *Institutes* as quoted in the *Digest* (Dig. 1.1.1.3). But there is a significant difference, Aquinas’s *lex naturalis*, as the human participation in the *summa ratio* that
is lex aeterna, is limited to the distinctively human, rational pursuit of certain goods that humans happen to share with all other substances (life, the particularly human form of existence) and with other animals (marriage and the rearing of children, the particularly human forms of sexual union and of procreating offspring). We see that Aquinas does not quote, paraphrase, or allude to the last sentence in the passage from Ulpian quoted at Dig. 1.1.1.3: “for we see also that the rest of the animals, even wild beasts, are credited with knowledge of this law.” So, although his account of lex naturalis includes elements of the Jurists’ conception of ius naturale, Aquinas ‘rationalizes’ and limits those elements to human beings. His conception of lex naturalis definitely is not any conception of ‘innate instinct’, and it significantly differs from the Jurists’ notion of ius naturale. Formal inconsistency is avoided, however, by his use of a different noun—lex instead of ius.

Aquinas’ account of lex naturalis also include an element of the Jurists’ conception of ius gentium. This element is found in the third sort of natural inclination to the good:

In a third way there is in man an inclination to the good according to the nature or reason, which is proper to man. Thus, man has a natural inclination to that truth which he can know about God and to those things by which he can live in society. Accordingly, those things which relate to this sort of inclination pertain to lex naturalis: for example, that man should shun ignorance, that he should not offend others with whom he must have dealings, and the rest of the things which relate to this inclination (ST I-II q. 94, a. 2).

Aquinas’ account of this third sort inclination to ‘peculiar’ human goods nicely tracks the Jurists’ account of ius gentium as “common only to humans in their interrelations” (Dig. 1.1.1.4) and as the produce of “what natural reason has truly established among all peoples” (Justinian, Inst. 1.2.1). It also, like the Jurist Pomponius, includes matters of divine cultus. So, in general, I think that we can say that this element of Aquinas’ conception of lex naturalis includes the
fundamental content of the Jurists’ conception of *ius gentium*: as I earlier characterized it, “those social and legal institutions and practices which are understood to be the virtually universal results of the application of human practical rationality to problems that all humans at all times and places face in their relations with one another.” We also find included in this element of Aquinas’ conception of *lex naturalis* an additional element, which at least some Jurists included in *ius gentium*: at least those elements of divine *cultus* that derive from the ‘natural’ relations between humans and deity (i.e. those elements that later came to be comprehended under the terms ‘natural religion’ or ‘natural theology’).

While Aquinas’ conception of *lex naturalis* includes what might be called the ‘rational basis’ and much of the substantive content of the Jurists’ conception of *ius gentium*, an empirical element of the Jurists’ conception—namely, the (claimed) universality of *ius gentium*—is addressed in Aquinas’ account of *ius gentium*. This account occurs at article 4 of question 95 in the “Treatise on Law,” a question that is devoted to *lex humana*. While ‘lex’ is the term for law used throughout the “Treatise,” in this article, which concerns whether Isidore of Seville “appropriately” (*convenienter*) distinguished the types of *lex humana*, Aquinas follows Isidore in employing the terms “*ius civile*” and “*ius gentium*.” In order to distinguish the two types of *ius*, Aquinas appeals to a distinction that he has just made, in the second article of question 95, between two ways in which *lex humana* is (properly) “derived” (*derivetur*) from *lex naturalis*:

but it must be understood that something can be derived from *lex naturalis* in two ways: in one way, as conclusions from premises; in another way, as certain determinations of other generalities. The first way is similar to that by which, in the sciences, demonstrative conclusions are deduced from premises. The second way is similar to that by which, in the arts, general forms or plans are determined to something particular—as the builder must determine the general plan of a house to this or that particular plan of a house (ST I-II q.
As an example of the former, deductive kind of derivation, Aquinas give the example of the injunction “one must not kill” from the more general principle of lex naturalis, “one must not do evil to anyone.” As an example of the latter, determinatio or ‘filling-in-the-gaps’ kind of derivation, he gives as an example the assignment of a particular punishment for a particular transgression: the “the law of nature holds that he who transgresses is to be punished; but that he is to be punished by a certain penalty is a certain determinatio of the law of nature” (ST I-II q. 95, a. 2).

Aquinas proceeds in the same article to the conclusion that things that are derived from natural law in the first, deductive manner “are contained in lex humana not merely as positive [or posited] law (lege posita), but also have some force from lex naturalis. But those that are derived in the second [determinatio] manner have their force from lex humana alone” (ST I-II q. 95, a. 2). So, were we to think particularly of the criminal-law component of lex humana, we have here an adumbration of the common-law distinction between mala in se and mala (quia) prohibita.

The Roman Jurists, as we saw, seem to accept a tripartite general division of ius into ius naturale, ius gentium, and ius civile. Ius naturale clearly is not ‘posited’ by human legislators, while ius civile clearly is posited by the human legislators of a particular state (civitas). The status of ius gentium in this respect—humanly posited or not—is perhaps not so clear. Justinian’s Institutes seems to suggest that ius gentium (the ius that “is observed by all peoples equally,” according to Inst. 1.2.1) is to be assimilated to ius naturale rather than ius civile:

Now natural laws (naturalia. . . iura), which are followed by all nations equally, and which are constituted
by a certain divine providence, remain always fixed and immutable; but those which the state (civitas) constitutes are always liable to be changed, either by the tacit consent of the people or by other law that is later adopted (Inst. 1.2.11).

Aquinas, however, in his account at ST I-II q. 95, a. 4, of Isidore’s distinction, clearly classifies *ius gentium* as a form of *lex humana*:

In the first place, then, it belongs to the nature (ratio) of *lex humana* to be derived from *lex naturalis*, as has been stated. So, accordingly, positive law (*ius positivum*) is divided into *ius gentium* and *ius civile*, according to the two ways in which something is derived from the law of nature (*lege naturae*), as said above. For those things pertain to *ius gentium* which are derived from the law of nature as conclusions from premises, such as just buyings and sellings, and other things of this sort, without which persons are not able to live together—which is proper to the law of nature, since man is naturally a social animal, as is proved in the first book of [Aristotle’s] *Politics*. But those things which in fact are derived from the law of nature in the manner of particular determination pertain to *ius civile*, according to whatever way each state determines its own accommodations (ST I-II q. 95, a. 4).

Rather conflating the empirical and the normative, Aquinas here identifies the ‘common core’ of all geographically and temporally disparate systems of human positive law—or, perhaps, what *should* be this common core—with *ius gentium*. And, depending on whether one emphasizes the empirical or the normative perspective, he either explains the existence of such a common core of *ius gentium*, or tells us what the common core *should* be, by identifying it with what is deducible “as conclusions” from the *lex naturalis*, which is everywhere the same for humans. Those parts of human positive law that are (or, *should* be) contingent, varying with respect to particular circumstances and particular decisions of human legislators, are collected under the term ‘*ius civile*’. Here again, I think that Aquinas has formally preserved consistency with his sources. There is just enough ambiguity in the Jurists about the positive or natural status of *ius
gentium, that he can finesse the issue. While ius gentium is a (invariant) part of lex humana et positiva, its universality is explained by the fact that its principles are deducible from the inherently universal lex naturalis. None of the contingency or ‘legislative discretion’ associated with determinatio, as it is manifest in ius civile in Aquinas’ sense, is involved in ius gentium.


While Aquinas follows the usage of Isidore with respect to his analysis of ius gentium and ius civile in the “Treatise on Law,” his account of ius, in general, is not found in the “Treatise” but in his discussion of the virtues in pars secunda secundae (II-II) of the Summa Theologiae. The first article of question 57, which is devoted to ius, posed the question whether ius is the object of justice (utrum ius sit obiectum iustitiae) and answers the question affirmatively. In the second objection considered by Aquinas, Isidore is invoked as a spokesperson for the Jurists’ conception of ‘ius’ as the more general term for what is legal or ‘right’ and of ‘lex’ as a term of narrower (and perhaps more technical) signification: “lex, as Isidore says (Etym. 5.3), is a species of ius. However, lex is not the object of justice, but rather of practical reason (prudentiae)” (ST II-II q. 57, a. 1). In response, Aquinas claims that “lex, therefore, is not ius itself, properly speaking, but rather a certain kind of ratio of ius” (ST II-II q. 57, a. 1). Although Aquinas does not cite Cicero, this account closely resembles that of Cicero in the De legibus, where Cicero characterizes lex as a ratio and that “the ground [or beginning: exordium] of ius should be deduced from lex” (De leg. 1.19).

James Bernard Murphy—noting, reasonably enough, that he finds this claim by Aquinas to be “cryptic” (The Philosophy of Positive Law, 62, n. 41)—explicates it as follows:

In his Summa Theologiae (c. 1270), Aquinas attempts systematically to distinguish ius as the general pattern
for what is ethically just from law (lex) as a more particular formulation of that pattern. Where the Roman jurists thought of lex as one source or species of law (ius), Aquinas defines lex as one species of what is ethically just (ius) (The Philosophy of Positive Law, 62).

Agreeing with Murphy’s account of Aquinas’ use of ‘ius’ as well as his characterization of the Jurists’ usual conception of the relation between ius and lex, I would assert something close to the converse of his claim about Aquinas’s conception of the relation between ius and lex. Aquinas conceives of “what is ethically just (ius)” as one ‘species’ of lex in the following sense. In agreement with the Stoic-Ciceronian philosophical tradition, rather than the tradition of the Roman Jurists, he takes lex to be the ratio–in the sense of ‘rational ground or foundation’ or ‘explanatory rationale’–for what is ius, that is, what is ‘right’ or ‘morally correct’ (rectum, honestum), in a general and common sense.

Murphy sometimes speaks of the “strongly statutory character of lex” (Philosophy of Positive Law, 62) and the “broadly ethical sense of ius” (Philosophy of Positive Law, 62) in the Summa. This distinction seems to me to be fundamentally sound and useful. However, several caveats are perhaps in order. First, we should not read the distinction as suggesting that ‘lex’ somehow connotes something that is statutory or positive, as opposed to ethical or moral. Rather, I suggest, Aquinas follows the Stoic-Ciceronian philosophical tradition in seeing lex, in its rational and ‘posited’/positive dimensions, as being the very fons et origo of “the broadly ethical sense of ius.” Second, Aquinas seems quite purposefully to constrict the traditional and “broadly ethical sense of ius” at ST II-II q. 57.

Ius is the object of iustitiae, rather than of prudentia or ratio, more broadly. Consequently,
And thus justice is specially determined, beyond the other virtues, according to its own object, which is called the just (iustum). And ius is this same thing. Whence it is clear that ius is the object of justice (ST II-II q. 57, a. 1).

A consequence of Aquinas’ identification of ius and the just (iustum) is that ius, in the strict and proper sense, does not pertain to virtues other than justice and their ‘acts’:

it is proper to justice, among the other virtues, to direct man in his relations to other persons. For it signifies a kind of equality, as the name itself shows. For things that are made equal are commonly said to be ‘justified/adjusted’ (iustari); and equality obtains in reference of one thing to something else. The other virtues, however, perfect alone in those matters that benefit him in relation to himself (ST II-II q. 57, a. 1).

So, Aquinas’ official doctrine is that ‘ius’ properly applies only to what is ‘right’ or ‘morally correct’ (rectum, honestum) as a matter of justice, which always involves the subject in some of relation (of ‘commutative’ or ‘proportional’ equality) to some other subject or subjects.

Aquinas is somewhat more reluctant to segregate ius from the relations of human persons to divinity. In the third objection to ST II-II q. 57. a. 1, he cites Augustine’s assertion that it is justice that ‘preeminently’ (principaliter) “subjects man to God.” However, Isidore claims that “ius does not pertain to the divine but only to the human. . . . ‘because fas is divine lex, but ius is human lex’.” In his response, Aquinas asserts that the incommensurability of what is due to God in comparison to what is due to man implies that no form of (commutative or proportional) equality can obtain between God and man: “we are not able to make a return to God of what, in a perfect sense, is just. And on account of this, divine lex is not properly said to be ius, but fas.” He proceeds, however, to state that “justice (iustitia) tends toward this: that a man, to the degree he can, should repay God by subjecting his soul (animam) entirely to him” (ST II-II q. 57. a. 1, ad 3).
Before leaving Aquinas’ account of *ius* in the *Summa Theologiae, secunda secundae*, I turn to the second and third articles of question 57, “whether *ius* is appropriately divided into *ius naturale* and *ius positivum*” and “whether *ius gentium* is the same as *ius naturale,” respectively.

It is here clear not only that Aquinas is aware of the Jurists’ standard account of *ius gentium* and *ius naturale*, but that he is able to accept that account as consistent with his conception of *lex naturalis* because of the distinction he has drawn between *lex* and *ius* and the analysis of *ius* that he has developed.

In the second article, Aquinas claims that there is indeed a distinction between *ius naturale* and *ius positivum*. He invokes his account of “*ius*, or the just (*iustum*)” as a “work rectified (*adaequatum*) in reference to someone else according to some mode [commutative or proportional] of equality” in order to draw a distinction. First, a thing may be “adjusted” to a man “by the very nature of the thing itself.” This is *ius naturale*. Second, there is the case where something is

rectified or made commensurate in reference to someone else by agreement or common consent as, for example, when someone judges himself to be content to accept so much. This is able to be done in two ways. In one way, through a private agreement, as that which is confirmed by a contract between private persons. In another way, by public agreement, as when the whole people consent that something has, as it were, been adjusted and made commensurate to someone else; or when a prince orders this, as the one who has the care of the people and acts in its *persona*. And this is called positive *ius* (*ST* II-II q. 57, a. 2).

The following, third article presents a striking example of what might be termed Aquinas’ philosophical method: he seldom is willing explicitly and unqualifiedly to deny what one of his authoritative sources says. Having distinguished positive *ius* and *ius naturale*, he follows the Jurists in further distinguishing *ius gentium* from *ius naturale*, in just the way they do. But he
employs his own conceptual equipment to reach the same conclusion as the Jurists. Another
distinction is drawn: ius naturale pertains to “what is rectified or made commensurate in
reference to another with respect to its own nature. But this can happen in two ways” (ST II-II q.
57, a. 3). First, “as it is considered absolutely, as the male is by its own essence (ex sui ratione)
commensurate to the female in terms of begetting by her, and the parent to the offspring in terms
of feeding it” (ST II-II q. 57, a. 3). It will be noted that these are the very examples used by the
Jurists for what pertains to ius naturale. Second, says Aquinas, “something is naturally
commensurate to someone else not according to its own intrinsic concept (secundum absolutam
sui rationem), but according to something that follows from it, such as possessing property” (ST
II-II q. 57, a. 3).

Following the Jurists, he maintains that “it belongs not only to humans but also to other
animals to apprehend” the first sort of ‘absolute’ or ‘intrinsic’ commensurateness, and

therefore, the ius that is called natural according to the first mode is common to all animals. But ius
gentium falls short (recedit) of ius naturale, as the Jurisconsult says “because the latter is common to all
animals, while the former is common only to humans in their interrelations.” But to consider something by
comparing it with what follows from it is proper to reason. So this is natural to man with respect to his
natural reason, which dictates this comparison. Therefore, the Jurisconsult Gaius says that, “what natural
reason has established among all men, that which is observed by all peoples, is called ius gentium” (ST II-II
q. 57, a. 3).

As an example of ius gentium, Aquinas considers the institution of private property. There is no
reason, when only the ‘essence’ or ratio of a field is considered, why one person rather than
another should possess it. But if the field is considered with respect to its suitability for
cultivation and peaceful use, it “has a certain commensurateness to be the property of this person
rather than another, as the Philosopher says in the second book of the *Politics*” (*ST* II-II q. 57, a. 3).

Aquinas is well aware that the standard doctrine of the Jurists, as we earlier saw, is that slavery is a matter of *ius gentium* rather than *ius naturale*. In the second objection to this article, he considers the assertion that “slavery is natural among men because some are naturally slaves as the Philosopher shows in the first book of the *Politics*.” But, as Isidore says (echoing the standard line of the Jurists), “slavery pertains to *ius gentium*. Therefore, *ius gentium* is *ius naturale*” (*ST* II-II q. 57, a. 3). Aquinas’ response is succinct:

In response to the second objection: considered absolutely, there is no natural reason for this man to be a slave rather than another, but only in respect to some ensuing utility—in that it is useful for this person to be ruled by a wiser one, and the latter to be helped by the former, as is said in the first book of the *Politics*.

Therefore, slavery, which pertains to *ius gentium*, is natural in the second way but not in the first (*ST* II-II q. 57, a. 3, *ad* 2).

Aquinas accepts the standard doctrine of the Jurists that *ius naturale* applies to species other than humans. For him, *ius naturale* becomes a sort of ‘natural justice’ or commensurateness that is, in some sense recognizable by animals as well as humans. Because of his distinction between ‘lex’ and ‘ius’, he can consistently maintain that *lex naturalis* pertains only to humans. Again quite in conformity with the standard doctrine of the Jurists, he at *ST* II-II q. 57, a. 3 sees *ius gentium* as dealing with those (virtually) universal artifacts of human practical reason devised to deal with (virtually) universal problems of social interaction. But his additional ‘technical’ analysis of *ius gentium* in terms of what is just leads to the distinction between the two senses of natural justice: that which is a matter of a commensurateness that involves the essential nature of something, and that which is a matter of a ‘commensurateness’ uniquely detectable by human reason in terms of
consequentialist considerations.

Whether this account of *ius gentium* is entirely consistent with the account given in the “Treatise on Law” is not obvious. There, it seems, *ius gentium* is that (virtually) universal part of human positive law that results from deductive inference from *lex naturalis*. The principal conceptual problem, it seems to me, is that this universal part of *lex humana* will not be limited to issues of justice—what is just or *ius*, according to Aquinas’ analysis of ‘ius’ in the *pars secunda secundae*. Indeed, in his endorsement of Isidore’s account of ‘positive law’, Aquinas follows that account in laying down three conditions to be satisfied: “that it be congruent with religion, inasmuch as it is proportional to *lex divina*; that it contribute to morality (*disciplinae*), inasmuch as it is proportionate to *lex naturale*; and that it further welfare (*saluti*), inasmuch as it is proportionate to human utility” (*ST I-II* q. 95, a. 3). In my opinion, Aquinas would have done well to distinguish a *lex gentium* (the–virtually actual or normatively–universal part of human law derivable from *lex naturalis*) from *ius gentium* (the sort of consequentialist conception of ‘natural’ justice outlined at *ST I-II*, q. 57) in a manner analogous to that in which he generally distinguishes *lex naturalis* and *ius naturale*. But it must be admitted that, in question 95 of the “Treatise on Law,” Aquinas is careless about maintaining the ‘*lex*/*ius*’ distinction, perhaps because of the influence of the usage of Isidore in this particular question. In fact, he goes so far as to speak in one place of the sort of *lex naturalis* that is “common to all animals” (*ST I-II* q. 95, a. 4, *ad 1*). This usage is certainly inconsistent with his usual use of ‘*lex naturalis*’, as well as his definition of it in the “Treatise on Law.” Were he to have used the phrase ‘*ius naturale*’, however, that use would have been entirely consistent with his doctrine at *ST I-II*, q. 57.

6. **Conclusion: Forward to the State of Nature**
James Bernard Murphy remarks that “to my knowledge, Aquinas is the first legal theorist in the Latin West explicitly to substitute *lex* for *ius* as the primary term for law—an innovation that will be adopted, as we shall see, by Hobbes and Bentham” (*The Philosophy of Positive Law*, 64). While I have suggested that Aquinas was anticipate in this respect by Cicero, at least in his *De legibus*, Aquinas is no doubt of central importance in this innovation. Since he shares with Cicero an essentially ‘statutory’ conception of *lex*, in the sense that *lex* must promulgated by an authoritative will in order to *be lex*, the strong association between law/lex and obligation, which characteristic of what I term the modern distinction between *lex* and *ius*, law and right, owes much to Aquinas’ adoption, as his primary conception of law, of the conception of *lex* that derives from the Ciceronian-philosophical tradition rather than the conception that derives from the Jurists. Thus, Hobbes can easily conclude that it is law/lex, rather than *ius*, that “determineth and bindeth” either to do or to forbear (*Lev*. 14.3).

What of *ius*? By restricting the use of term to what is *iustum*, what is a matter of justice, Aquinas encourages us to think of what is *ius*, according to the classical conception of justice, either as what one, in justice, *owes* or what, in justice, is owed to one, i.e., what is one’s just *due*. If we focus on the second disjunct, we have something very close to one modern sense of a ‘right’ (*ius*). Insofar as one’s just due depends on a *lex* that is rationally directed toward the good, such a *ius* involves Isaiah Berlin’s positive liberty.

But Hobbes’ claims that *ius* “consisteth in liberty to do or to forbear” and, more particularly, that *lex* and *ius* “differ as much as obligation and liberty” (*Lev*. 4.3), clearly invoke Berlin’s negative liberty. While more research concerning the four hundred years or so between the two Thomases—Aquinas and Hobbes—needs to be done, I conjecture that this idea of an
opposition between lex and ius is a Hobbesian innovation—but one that involves his conception of a state of nature. As I earlier suggested, the Jurists’ distinction between ius naturale and ius gentium underwrites a distinction, for human beings, between what instinct teaches us and the products of our participation in and use of reason:

Human reason as instantiated in ius gentium manifests itself in those cultural, political, and legal elements that are found to be virtually universally present in human societies. A consequence (to which I shall later return) of the ius naturale/ius gentium distinction so understood is that it underwrites a conceptual distinction between something like a ‘state of nature’, which prescinds from the distinctive products of human reason, and ‘civilized’ human life—that is, from life in human society in some generic sense of ‘society’ (this essay, ms. pp. 7-8).

If we consider the life of humans in such a state of nature, that life will not participate in reason and, hence, not in lex. (Note: the Hobbesian “laws of nature” are really only laws, according to Hobbes, insofar as they are commandments of God. But, even thus considered, they oblige in the state of nature not with respect to actual behavior [in foro externo] but only in ‘conscience’ [in foro interno].) With respect to ius, in the sense of what is one’s own or due, then, there appear to be two salient options. One can deny that human life in such a state participates in ius any more than it participates in lex. Or one can maintain that, as a result of the absence of any obligations imposed by lex in such a state, there is no legal or moral constraints on what one is permitted take to be one’s own or due. The latter, of course, is Hobbes’ choice: ius is complete moral and legal freedom to do or to forbear as one wishes without the rational constraint of lex.

Michael J. White

Sandra Day O’Connor College of Law

Arizona State University