

THOMAS AQUINAS AND MEDIEVAL CANON LAW:
TWO CASES OF GRATIAN'S INFLUENCE
IN THE *SUMMA THEOLOGIAE*

JUSTIN M. ANDERSON · JÖRGEN VIJGEN*

ABSTRACT · In this essay we argue that Thomas Aquinas's interaction with Gratian's *Decretum* constitutes a provocative yet relatively unexplored avenue of study. As a sample of this thesis, we analyze two passages where Aquinas explicitly refers to Gratian directly and the juridical tradition indirectly. The first passage pertains to Aquinas's interpretation of Gratian's definition of natural law in the *Prima Secundae* of the *Summa Theologiae*, but leads us to move to other places in Thomas's tract on the virtue of justice and his commentary on Peter Lombard's *Sententiae*. The second exemplification is found in Aquinas's tract of the sacrament of penance in the closing pages of the *Summa*. Both instances are quick glimpses of a vastly larger intellectual domain awaiting exploration.

KEYWORDS · Aquinas, Medieval Canon Law, Gratian, Natural Law, Penance.

RIASSUNTO · In questo contributo sosteniamo che l'interazione di Tommaso d'Aquino con il *Decretum* di Graziano costituisce una strada di studio provocatoria ma relativamente inesplorata. Come esempio di questa tesi, analizziamo due passaggi in cui Aquinas si riferisce esplicitamente e direttamente a Graziano e alla tradizione giuridica indirettamente. Il primo passaggio riguarda l'interpretazione di Tommaso della definizione di legge naturale di Graziano nella *Prima Secundae* della *Summa theologiae*. Questo passaggio ci porta inoltre ad altri posti nel trattato sulla virtù della giustizia e nel suo commento alle *Sententiae* di Pietro Lombardo. La seconda esemplificazione si trova nel tratto di Aquino del sacramento della penitenza nelle pagine finali della *Summa*. Entrambi i casi sono rapidi scorci di un campo intellettuale molto più vasto in attesa di esplorazione.

PAROLE CHIAVE · Aquino, Diritto canonico medievale, Graziano, Legge naturale, Penitenza.

* justin.anderson@shu.edu, Seton Hall University, USA; jvijgen@tiltenberg.org, Major Seminary of the Diocese of Haarlem-Amsterdam, Netherlands.

SUMMARY: Introduction. – 1. Aquinas’s Use of Gratian’s Definition of Natural Law. – 1.1 – 2. Aquinas’s Use of Gratian in *Summa Theologiae* III, q. 89, a. – 3. Conclusion.

INTRODUCTION

FOR nearly a century now, scholars involved in the study of Thomas Aquinas’s writings have sought to unearth the historical dimensions of his thought. This has included both studying the development of his arguments, but also his sources. As the decades have progressed, we have learned much of his indebtedness to his own contemporaries, but also to Scripture, to Augustine, to the neo-Platonic authors, and most recently to his Jewish and Muslim sources. However, one historical source that is largely, if not all together omitted, is Aquinas’s understanding and employment of the medieval canon law tradition, in particular both that of Gratian and the papal decretals. Recent findings, especially regarding his use of the decretal tradition on vows, scandal, and truth have revealed that in all likelihood, Aquinas – like others around him – was both aware of and sought to include the logic of certain papal decrees within his own writings.

Both Thomas’s works and the medieval ecclesial juridical tradition are enormous fonts of knowledge. Obviously, we do not seek to accomplish anything so ambitious herein. Instead, we only offer two samples of the sorts of vistas that remain undiscovered by scholars of both fields. Limiting ourselves to Aquinas’s direct and explicit use of Gratian in his *Summa theologiae*, we intend to signal the vastness of what awaits future scholarship, not its narrowness. The first instance concerns Aquinas’s use of Gratian’s definition of natural law as that which is contained in the law and the Gospel. Aquinas’s tract on law in which it appears is Gratian’s first explicit appearance in the *Summa theologiae*. It is certainly not his last. Not including implicit references or Thomas’s references to “the decretalists”, Gratian is used by Thomas more than 200 times before his last lines penned in late 1273. These are only the references Aquinas makes of Gratian in his great *Summa*.¹ Gratian is also explicitly referenced over 25 times in both the *de Malo* and *de Perfectione* and various other *Opuscula*. Our second case investigates Gratian’s deployment in Aquinas’s treatment of the sacrament of penance and in particular the question whether a person is restored to his former dignity through penance. A close analysis of the text and a comparison with both his contemporaries Albert and Bonaventure as well as Thomas’s own commentary on Peter Lombard’s *Sententiae* show the importance and extensive use of Gratian’s *Decretum*.

¹ In preparing for this article we have compiled a list of references to Gratian based on the 1962 edition of the *Summa Theologiae* (Rome, Editiones Paulinae, 1962). A complete identification of these references remains a *desideratum*.

1. AQUINAS'S USE OF GRATIAN'S DEFINITION OF NATURAL LAW

Gratian's opening words of his second recession of the *Decretum*, published around 1140, proffers what has been called his own definition of natural law. He writes:

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

Though certainly not without precedence, Michael Bertram Crowe indicates that this definition was properly Gratian's own creation.³ While this is properly Gratian's own definition, it is not his only one. Later, Gratian quotes Isidore who in turn was refurbishing a version of Ulpian's.⁴ Nevertheless, this first definition constitutes one of Gratian's own unique contributions to the natural law tradition. Nor were the incipit words of the *Decretum* the only place Gratian referred to this definition.⁵ Thus, even for Gratian the definition was "not simply a passing phrase".⁶ Its importance was accented by the confusion it engendered in the decretists. Gratian himself seems to have been aware of the potency for confusion by relating the

² "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 fieri, quod sibi nolit fieri. Unde Christus in euangelio: 'Omnia quaecumque uultis ut faciant uobis homines, et uos eadem facite illis. Haec est enim lex et prophetae.' [Matthew 7:12, cf. Luke 6:31]" GRATIANUS, *Decretum magistri Gratiani*, P. I, D. I, d.a.c. 1 (RF I, 1). RF = *Corpus iuris canonici*, ed. E. Richter, E. Friedberg, B. Tauchnitz, Leipzig, 1879-1881; Reprint Graz, Akademische Druck und Verlagsanstalt, 1959., Vol. I: *Decretum magistri Gratiani*. As translated by Kenneth Pennington, who advantageously keeps the key Latin terms. K. PENNINGTON, *Lex Naturalis and Ius Naturale*, «The Jurist» 68 (2008), pp. 569-591, esp. 570. For an alternative English translation of these passages see GRATIAN, A. THOMPSON, J. GORDLEY, K. CHRISTENSEN, *The Treatise on Laws: (decretum Dd. 1-20)*. Washington, D.C., Catholic University of America Press, 1993.

³ See M. B. CROWE, *The Changing Profile of the Natural Law*, The Hague, Nijhoff, 1977, pp. 79-81 and K. K. PENNINGTON, *Lex Naturalis*, cit., pp. 570-572.

⁴ That second definition reads, "Natural *ius* is common to all nations by that which is had by the instinct of nature, not by any constitution. [Ius naturale est commune omnium nationum eo quod ubique instinctu nature non constitutione aliqua habetur.]" (D. I, c. 7 = RF I, 1).

⁵ Rudolf Weigand points to several other places Gratian employs or hints at this definition, including: D. 9 c. 11 (RF I, 18); D. 5, p. I, § 2 (RF I, 7); D. 6 c. 3 (RF I, 11). It is implicit, thinks Weigand, at: D. 7, pf. (RF I, 12) See R. WEIGAND, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus*, München, Hueber, 1967, pp. 134-135 also as in B. CROWE, *The Changing Profile*, cit., p. 76, n. 12.

⁶ M. B. CROWE, *The Changing Profile*, cit., p. 76.

natural law with “the Law and the Gospel” and sought to clarify it some distinctions later.⁷

He wrote,

Natural *ius* is contained in the *lex* and the Gospel, but it can be shown that not everything contained in the Law and the Gospel pertains to natural *ius*. For certain things in the *lex* are moral precepts (such as ‘You shall not kill’, etc.), others are symbolic (such as the precepts concerning sacrifice, and other similar things). Moral commandments pertain to the natural *ius* and so they are seen to be unchangeable. Nevertheless, the symbolic precepts conjoined with the natural *ius*, in so far as they deal with observances, may be seen to be different from natural *ius* and, although their observances seem to undergo change, their moral significance does not change. Thus, as said above, natural *ius*, which began with the appearance of rational creatures, remains unchanged.⁸

Having suggested an association between the natural *ius* and what one reads in Sacred Scripture, Gratian’s definition forces the question of the natural law’s relationship to divinely revelation in general, and divinely revealed law in particular. Raising this question, however, entails at least two others regarding the essence of the natural law. The first entailed question regards natural law’s mutability in itself. For if the natural law “is contained” in the law of the Old Testament and if that law has been superseded by the New Testament (i.e., the law of Christ), then is it possible that the natural *ius* changes or can be superseded? The second entailed question regards the effects of sin on a person’s or society’s ability to properly discern the natural *ius*. Since the early Christian writers, even the divinely revealed old law was understood not only as a foreshadowing of the “law of grace” in Christ, but also as something needed given the blinding effects of sin on the ancient world’s ability to know good from evil.⁹ By relating the natural *ius* to divinely revealed law, Gratian set more than one question before the natural law tradition. We ought not to be overly surprised, therefore, to find among Aquinas’s six articles on the natural law in the *Prima Secundae*, composed between 1268-1272, answers not only to these questions, but also to Gratian’s definition itself.

1. 1. Aquinas’s Interpretation and Use of Gratian’s Definition

For Aquinas, like others before him, Gratian’s definition constitutes part of the context in which various issues must be resolved. I want to examine the

⁷ Atria A. Larson pointed out that reference to “the law and the Gospels” was a standard medieval indication not only of the Mosaic law and the four Gospels, but of the entire Old and New Testaments. See A. LARSON, *Gratian*, in *Law and the Christian Tradition in Italy: The Work of Great Christian Jurists*, ed. O. Condorelli, R. Domingo, London-New York, Routledge, 2020, pp. 41-55.

⁸ GRATIANUS, *Decretum*, cit., D. 1, c. 3 (RF I, 1).

⁹ M. B. CROWE, *The Changing Profile*, cit., p. 76.

two places Thomas explicitly cites Gratian's definition and the difference it makes in his analysis. I begin with the more popular, though later text of the *Prima Secundae*.¹⁰

Aquinas's context is whether the natural law is the same in all men, a dictum that comes from the other definition of natural law known through Isidore. In sum, Aquinas argues that the general principles of natural law are the same for all according to its rectitude and knowledge. However, while the majority of people have both the rectitude and knowledge regarding conclusions from natural law's general principles, a few cases fail. Thus, Gratian's definition is not the principal focus of the article, but Aquinas is forced to interpret it since it has been volleyed as the first objection against his explanation of how the natural law is and is not the same in all. Thomas does so in much the same way Gratian did:

The meaning of the sentence quoted is not that whatever is contained in the Law and the Gospel belongs to the natural law [*lege naturae*], since they contain many things that are above nature; but that whatever belongs to the natural law [*lege naturae*] is fully contained in them.¹¹

On the face of it, Aquinas's response seems to have relatively little content. Nevertheless, the idea of natural law being contained in the Old Law embroils Aquinas, like Gratian, in the task of sifting through the entailed questions. This is why we hear echoes of Gratian's definition in Aquinas's treatment on the Old Law (q. 98), on the precepts of the Old Law (q. 99), and on the moral precepts of the Old Law (q. 100). Using Gratian's definition, Thomas argues that parts of the Old Law were binding on all people "not because they belonged to the Old Law, but because they belonged to the natural law".¹² Nevertheless, Gentiles could obtain "salvation more perfectly and more securely" by the Old Law than by the natural law.¹³ Part of the

¹⁰ ST IaIIae q. 94, a. 4, ad. 3. The objection and the reply are a later version of what already appeared at *Super Sententiae*.

¹¹ THOMAE AQUINATIS, *Summa theologiae* IaIIae 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*". Unless otherwise noted, all Latin is from: *Opera omnia iussu impensaue Leonis XIII P. M. edita, t. 4-12*, Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1888-1906. All English translations are taken from *The Summa Theologiae of St. Thomas Aquinas*, Literally translated by Fathers of the English Dominican Province, 2nd and rev. ed., New York, Benziger, 1948.

¹² ST IaIIae q. 98, a. 5, c; "Quantum igitur ad illa quae lex vetus continebat de lege naturae, omnes tenebantur ad observantiam veteris legis, non quia erant de veteri lege, sed quia erant de lege naturae".

¹³ ST IaIIae q. 98, a. 5, ad. 3: "Ad tertium dicendum quod gentiles perfectius et securius

reason for this is that even for good people the natural law had begun “to be obscured on account of the exuberance of sin”.¹⁴ Certainly, these propositions Aquinas embraces were not unique to him or Gratian. In each of these places, however, Aquinas works through, if sometimes implicitly, the idea that the natural law is contained in the law of the Old Testament.¹⁵

By engaging Gratian’s definition in his treatment of natural law, Aquinas opened the door to engage further questions that would shape his tract on law. Most especially he considered the idea that natural law existed prior to the Law of Moses, and therefore, was in some ways more imperfect and inferior to that law.¹⁶ A parallel reasoning is even found in his treatment of human law, for in that too we find the natural law “contained in” another law.¹⁷

salutem consequerentur sub observantiis legis quam sub sola lege naturali, et ideo ad eas admittebantur. Sicut etiam nunc laici transeunt ad clericatum, et saeculares ad religionem, quamvis absque hoc possint salvari”.

¹⁴ ST IaIIae q. 98, a. 6, c: “...quando lex naturalis obscurari incipiebat propter exuberantiam peccatorum”.

¹⁵ Aquinas would continue to work out this relationship between the natural law and the Old Law. See esp., ST IaIIae q. 99, a. 2, ad. 1 and 2; a. 3, ad. 2; q. 100, a. 1. This last is particularly poignant where Thomas asks, “Whether all the moral precepts of the Old Law belong to the natural law”.

¹⁶ Aquinas employs the language of imperfect [*imperfectum*] and perfect [*perfectum*] to refer to the natural law, old law, and new law relation among themselves. In one place he recites John Chryostom’s commentary on Mk. 4:28: “Unde Chrysostomus exponens illud quod habetur Marc. IV, *ultra terra fructificat primum herbam, deinde spicam, deinde plenum frumentum in spica*, sic dicit, *primo herbam fructificat in lege naturae; postmodum spicas in lege Moysi; postea plenum frumentum, in Evangelio*. Sic igitur est lex nova in veteri sicut fructus in spica” (ST IaIIae q. 107, a. 3, c.). In that same article, Aquinas speaks of how a law may be “contained” in another law. It can be contained in another either actually or virtually. “Uno modo, in actu, sicut locatum in loco. Alio modo, virtute, sicut effectus in causa, vel complementum in incompleto, sicut genus continet species potestate, et sicut tota arbor continetur in semine” (*ibid.*).

Thomas has multiple other passages where he considers natural law as something more imperfect than nearly every other kind of law. For example, he argues that the old law showed forth [*manifestabat*] the natural law and added to it (ST IaIIae q. 98, a. 5, c.), that gentiles could obtain salvation more perfectly and more securely [*perfectius et securius*] by the old law than the natural law (*Ibid.*, ad. 3), that just as grace presupposes nature, “ita oportet quod lex divina praesupponat legem naturalem” (ST IaIIae q. 99, a. 2, ad. 1), that the old law was given because the natural law had begun to be obscured on account of sin (ST IaIIae q. 98, a. 6), even to the point of the natural law becoming obscured in its practical precepts “ita ut quaedam quae secundum se sunt mala, ratio multorum licita iudicaret” (ST IaIIae q. 99, a. 2, ad. 2). This last point is a commonality between Gratian and Aquinas simply because both are following the patristic authors and various medievals, not least of all Anselm of Laon and Hugh of St. Victor. See M. B. CROWE, *The Changing Profile*, cit., p. 80-81. This line of reasoning not only finds a parallel in natural law’s relation to human law but sets the stage for Aquinas’s discussion of the moral precepts of the old law.

¹⁷ For example, ST IaIIae q. 95, a. 2, c.

1. 2. *Aquinas's Use of Ius and Lex*

This last consideration leads us to the brink of a second topic pertaining to Aquinas's explicit engagement with Gratian's definition. However, this issue does not arise from how Aquinas employed Gratian's definition, but how he apparently failed to employ it. Kenneth Pennington has made the case that Aquinas seems to have been unaware of the rather important distinction in the legal tradition between *ius* and *lex*, at least in his tract on law. This distinction, embodied in his definition of natural law, was first examined in detail by Gratian.¹⁸ Jurists writing between Gratian and Aquinas developed this distinction.

Pennington writes,

It is important to notice that the jurists never attributed the rich penumbras of meanings to *lex* that they did to *ius*. *Lex* was a plebian hod carrier of the law; *ius* was a term rich in resonances. *Ius* reminded the jurists constantly of the transcendental significance of a legal system.¹⁹

Aquinas's operational weakness, for Pennington, demonstrates "the slow penetration of the term *ius naturale* into theological thought" in the 13th Century.²⁰ Pennington points to how Aquinas only used the term *lex naturalis* in his *Super Sententiae*, composed between 1252-1256, (while Lombard only used *ius naturale*), but the two terms appear to be used interchangeably in his tract on law in the *Prima Secundae* of 1268-1272. Pennington concludes that "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 as well as a set of rules or laws".²¹ Given that later canonists would cease to comment on the *Decretum Gratiani* and embrace Aquinas as their source, Pennington argues that Aquinas's failure to engage in the rich distinction between *ius* and *lex*, especially in natural law discussions, would have perduring negative effects on the Western theological tradition.²² Because Aquinas's "language shaped his thought",²³ Pennington concludes that "the shift in terminology that we have traced has impoverished natural law thought".²⁴ In so doing, we have missed "what every jurist, even the pagan Roman jurists, had understood for centuries: *ius* embodies justice; and *ius naturale* in its purest form contains equity, justice, and reason in its DNA".²⁵

Much of what Pennington points out regarding Aquinas's treatment of *ius naturale* and *lex naturalis* in his tract on law in the *Prima Secundae* (qq.

¹⁸ K. PENNINGTON, *Lex Naturalis*, 569.

²¹ *Ibid.*, 579.

²⁵ *Ibid.*

¹⁹ *Ibid.*, 573.

²³ *Ibid.* 579.

²⁰ *Ibid.*, 578.

²⁴ *Ibid.*, 591.

²² *Ibid.*, 585-591.

90-108) seems true. Aquinas does seem to use the phrases interchangeably in his tract on law, a fact that one perhaps justifiably finds confusing in light of its importance. Pennington is right here. However, closer examination of Aquinas's use of *ius* and *lex*, both in his *Super Sententiae* and in the *Secunda Secundae*, challenge Pennington's wider conclusions.²⁶ We will confine ourselves to two places.

The first concerns the idea that Aquinas only gradually came to grapple with the profound meaning *ius*, which the jurists knew. In fact, as early as his *Super Sententiae* (1252-1256) Aquinas had worked out four different senses of *ius naturale* while discussing natural law's prohibition on having more than one wife.²⁷ He states that a *ius* is said to be natural by its very principle, namely because it is instilled in nature [*ex principio, quia a natura est inditum*]. To this meaning he assigns the testimony of Cicero that "*ius naturale* is not

²⁶ There is a good deal of literature on Aquinas's treatment of these terms in part because much depends on how one interprets Aquinas's usage of them. For example: P. M. VAN OVERBEKE, *La loi naturelle et le droit naturel selon saint Thomas*, «Revue thomiste» 57 (1957), pp. 53-78; 450-495; and *Droit et Morale: Essai de synthèse thomiste*, «Revue thomiste» 58 (1958), pp. 285-336; 674-694; E. T. GELINAS, *Ius and Lex in Thomas Aquinas*, «American Journal of Jurisprudence» 15 (1970), pp. 154-170; M. VILLEY, *Si la théorie générale du droit, pour Saint Thomas, est une théorie de la loi*, «Archives de philosophie du droit» 17 (1972), pp. 427-431; G. KALINOWSKI, *Le fondement objectif du droit d'après la Somme théologique de Saint Thomas d'Aquin*, «Archives de philosophie du droit» 18 (1973), pp. 59-75; and *Sur l'emploi métonymique du terme ius par Thomas d'Aquin*, «Archives de philosophie du droit» 18 (1973), pp. 331-339; V. J. BOURKE, *Is Thomas Aquinas a Natural Law Ethicist?*, «The Monist» 58 (1974), pp. 52-66; O. J. BROWN, *Appendix 1: Ius and Lex in Aquinas*, in ID., *Natural Rectitude and Divine Law in Aquinas: An Approach to an Integral Interpretation of the Thomistic Doctrine of Law*, Toronto, PIMS, 1981, pp. 165-174; W. METZ, *Lex und ius bei Thomas von Aquin*, in *Transformation des Gesetzesbegriffs im Übergang zur Moderne?*, ed. M. Walther, N. Brieskorn, K. Waechter, Stuttgart, Steiner, 2008, pp. 17-36; A. PADOVANI, *Ius e lex a Cicerone a san Tommaso d'Aquino e oltre*, «Rivista internazionale di diritto commune» 29 (2018), pp. 189-262.

²⁷ *Super Sent.* IV, d. 33, q. 1, a. 1, ad. 4, ed. P. Fiaccadori, Parma, 1858, vol. 7.2, p. 968: "Ad quartum dicendum, quod jus naturale multipliciter accipitur. Primo enim jus aliquod dicitur naturale ex principio, quia a natura est inditum; et sic definit Tullius in 2 *Rhetoricorum*, dicens: *jus naturae est quod non opinio genuit, sed quaedam innata vis inseruit*. Et quia etiam in rebus naturalibus dicuntur aliqui motus naturales, non quia sint ex principio intrinseco, sed quia sunt a principio superiori movente, sicut motus qui sunt in elementis ex impressione corporum caelestium, naturales dicuntur, ut Commentator dicit in 3 *Caeli et mundi*; ideo ea quae sunt de jure divino, dicuntur esse de jure naturali, cum sint ex impressione et infusione superioris principii, scilicet Dei; et sic accipitur a Gratiano, qui dicit, quod *jus naturale est quod in lege et in Evangelio continetur*. Tertio dicitur jus naturale non solum a principio, sed a natura, quia de naturalibus est. Et quia natura contra rationem dividitur, a qua homo est homo; ideo strictissimo modo accipiendum jus naturale, illa quae ad homines tantum pertinent, etsi sint de dictamine rationis naturalis, non dicuntur esse de jure naturali: sed illa tantum quae naturalis ratio dictat de his quae sunt homini aliisque communia; et sic datur dicta definitio, scilicet: *jus naturale est quod natura omnia animalia docuit*. This same article is reduplicated in the Supplement to the *Summa theologiae* since Aquinas died before reaching the sacrament of marriage". See *Suppl.* IIIa q. 65, a. 1, ad. 4.

the result of opinion but the product of an innate force".²⁸ A second way *ius* may be called natural is by being moved by some higher principle [*a principio superiori movente*]. As an example of this, Aquinas points to Ibn Rushd's commentary on Aristotle's *On the Heavens and the Earth*, where it is argued that some "natural movements" of elements are caused by the impression of heavenly bodies. In parallel fashion, those things moved by *ius divinum* are said to have a *ius naturale* by God's impression on them.²⁹ To substantiate this reference to the divine movement Aquinas gives his earliest citation of Gratian's definition. Wrongly attributing the definition to Isidore, Aquinas writes, "Isidore takes it in this sense, when he says that '*ius naturale* is that which is contained in the Law and the Gospel'".³⁰ Aquinas's third sense speaks of those *iura naturalia* that are not only from a principle of nature (1st sense), but also concern natural things. (In this sense alone will Aquinas conclude that a plurality of wives is not against *ius naturale*, though it is in the first and second senses.) The fourth sense and "strictest sense" [*strictissimo modo*] of *ius naturale* is where *naturale* is contradistinguished from reason. Thus, only those things which are both dictated by natural reason and "are common to man and other animals" are said to be *ius naturale*. (In this sense, those things merely dictated by reason and pertain to the human person alone are not called *ius naturale*). To this last sense, Aquinas attaches Isidore's definition of natural law: *ius naturale est quod natura omnia animalia docuit*.

Based on this passage of the *Super Sententiae* it is not completely accurate to conclude that Aquinas's understanding of the profundity of that tradition's *ius naturale* was lacking. Even from Thomas's earliest writings he attended to how *ius naturale* is a rich, polyvalent phrase. In the course of doing so, Aquinas provides both definitions cited at the beginning of the *Decretum Gratiani*.

Yet, what of the idea that Aquinas's confused use of *ius* and *lex* served as a turning point in the obsolescence of the legal tradition's rich insight, especially regarding *ius*'s relation to *iustitia*? We might easily conclude such if we focus solely on the *Prima Secundae*'s treatment of the natural law. However, if we broaden our scope, we find Aquinas subsequently dedicating an entire question to *ius* (IIaIIae q. 57) at the opening of his lengthy treatment of the cardinal virtue of *iustitia* in his *Summa theologiae* (IIaIIae q. 57-122). Thomas

²⁸ M. CICERO, *De Inventione* II, 53.

²⁹ It cannot be passed over in silence that Aquinas will employ this same language of God's impressing when he speaks of the natural law being a certain impress of the eternal law, when he gives his own famous definition of natural law as "nihil aliud sit quam impressio divini luminis in nobis" ST IaIIae q. 90, a. 2, c.

³⁰ *Super Sent.* IV, d. 33, q. 1, a. 1, ad. 4.

sees clearly that *ius* must be prior to *iustitia*.³¹ In fact, *ius* is the object of *iustitia* because *ius* means the same as *iustum*, the just.³² One's work "is said to be *iustum* when it is related to another by way of a certain kind of equity".³³ After explaining this, Thomas treats an objection which made *ius* identical, not to the just, but to *lex*. Here, and not in the *Prima Secundae*, are we treated to his clearest statements on the difference between *ius* and *lex*. Thomas writes that, just as a craftsman has in mind an expression of things he will make externally, so too does one have in mind an expression of a particular just work. If this expression be actually expressed in writing, then it is called *lex*. Aquinas concludes: "And so, *lex* is not itself *ius*, properly speaking, but a certain *ratio iuris* [*sed aliqualis ratio iuris*]"³⁴ Interestingly, he describes this as Isidore's idea of *lex*, since the latter states *lex* is a written decree.³⁵

1. 3. *Three Things IIaIIae Q. 57 Teaches Us regarding Ius and Lex*

This passage shows us three things. First, as to the meaning he gives to *ius* Thomas clearly identifies it with the *iustum*, and the *iustum* with a certain equity. As a result, "equity and justice belong in the realm of *ius*" is

³¹ Even no later than 1265, he had written in his *Summa contra gentiles*, "Cum iustitiae actus sit reddere unicuique quod suum est, actum iustitiae praecedit actus quo aliquid alicuius suum efficitur." (SCG II, cap. 28, n. 1048) THOMAE AQUINATIS, *Liber de veritate catholicae Fidei contra errores infidelium seu Summa contra Gentiles*, t. 2-3. ed. P. Marc, C. Pera, P. Caramello, Taurini-Romae, Marietti, 1961, p. 139.

³² ST IIaIIae q. 57, a. 1: "Respondeo dicendum quod iustitiae proprium est inter alias virtutes ut ordinet hominem in his quae sunt ad alterum. Importat enim aequalitatem quandam, ut ipsum nomen demonstrat, dicuntur enim vulgariter ea quae adaequantur iustari. Aequalitas autem ad alterum est. Aliae autem virtutes perficiunt hominem solum in his quae ei conveniunt secundum seipsum. Sic igitur illud quod est rectum in operibus aliarum virtutum, ad quod tendit intentio virtutis quasi in proprium obiectum, non accipitur nisi per comparisonem ad agentem. Rectum vero quod est in opere iustitiae, etiam praeter comparisonem ad agentem, constituitur per comparisonem ad alium, illud enim in opere nostro dicitur esse iustum quod respondet secundum aliquam aequalitatem alteri, puta recompensatio mercedis debita pro servitio impenso. Sic igitur iustum dicitur aliquid, quasi habens rectitudinem iustitiae, ad quod terminatur actio iustitiae, etiam non considerato qualiter ab agente fiat. Sed in aliis virtutibus non determinatur aliquid rectum nisi secundum quod aliquo modo fit ab agente. Et propter hoc specialiter iustitiae prae aliis virtutibus determinatur secundum se obiectum, quod vocatur iustum. Et hoc quidem est *ius*. Unde manifestum est quod *ius* est obiectum iustitiae".³³ *Ibid.*

³⁴ ST IIaIIae q. 57, a. 1, ad. 2: "Ad secundum dicendum quod sicut eorum quae per artem exterius fiunt quaedam ratio in mente artificis praeexistit, quae dicitur regula artis; ita etiam illius operis iusti quod ratio determinat quaedam ratio praeexistit in mente, quasi quaedam prudentiae regula. Et hoc si in scriptum redigatur, vocatur *lex*, est enim *lex*, secundum Isidorum, constitutio scripta. Et ideo *lex* non est ipsum *ius*, proprie loquendo, sed aliqualis ratio iuris".

³⁵ ISIDORI, *Etymologiarum sive Originum libri xx*, ed. W. M. Lindsay, Oxford, Clarendon Press, 1911, lib. IIa, 10; [PL 82, 198].

a description fittingly applied to Aquinas's account as well as that of the jurists.³⁶

Secondly and most obviously, q. 57 demonstrates that Aquinas, at least in some places, attended very carefully to the difference between *ius* and *lex*. He identified a difference between them. *Lex* is a particular expression or reckoning of *ius*. As such, "*lex* is a species of *ius*".³⁷ This last and pivotal phrase is important. That law is a *ratio iuris* can be translated various ways. For just as *ius* is a polyvalent term, so too is *ratio*. Perhaps it is best here to think of *ratio* as "a rational reckoning" of *ius*. One that, when done by human reason can possibly miss the *ius* of certain particular situations. For good reason, then, do Thomistic commentators point us from this passage in q. 57 to another in q. 60 where Thomas addresses the question of whether judgment should always be given according to the written law.

Turning briefly to the *Secunda Secundae* q. 60 we find one of the places where Aquinas explicitly addresses how *ius* and *lex* can come apart. In asking whether one should always judge according to the written law, Thomas indicates that judgment is a determination based on the *iustum*. Something can be *iustum* in two ways, and here he appeals to *ius naturale* and *ius positivum*. *Lex* is written to manifest both, though in diverse ways. In responding to the first objection, Thomas speaks strongly of the power of *ius naturale* over *lex*.

He writes,

Just as the written *lex* does not give force to the *ius naturale*, so neither can it diminish or annul its force [...] Hence, if the written *lex* contains anything contrary to the *ius naturale*, it is unjust [*iniusta*] and has no binding force. [...] Wherefore such writings are to be called, not *lex*, but rather corruptions of *lex*, as stated above.³⁸

With that last phrase the editors refer us back to the earlier *Prima Secundae*'s tract on law (q. 95, a. 2).

Just as q. 60 indicates how one ought to judge when *ius* and *lex* come apart, some 60 questions later we find Aquinas making the ability to discern such times a virtue, *epieikeia*. By this point we find ourselves deep in the *Se-*

³⁶ K. PENNINGTON, *Lex Naturalis*, p. 574.

³⁷ ISIDORI, *Etymologiarum*, lib. v, 3; [PL 82, 199]. The title of this section in Isidore is: *Quid differunt inter se ius, leges et mores*.

³⁸ ST IIaIIae q. 60, a. 5, ad 1: "Ad primum ergo dicendum quod *lex scripta*, sicut non dat robur iuri naturali, ita nec potest eius robur minuere vel auferre, quia nec voluntas hominis potest immutare naturam. Et ideo si Scriptura legis contineat aliquid contra *ius naturale*, iniusta est, nec habet vim obligandi, ibi enim *ius positivum* locum habet ubi quantum ad *ius naturale* nihil differt utrum sic vel aliter fiat, sicut supra habitum est. Et ideo nec tales Scripturae leges dicuntur, sed potius legis corruptiones, ut supra dictum est. Et ideo secundum eas non est iudicandum".

cunda Secundae (q. 120).³⁹ To argue that such a disposition is a virtue, Thomas calls back to service a case previously addressed in *Prima Secundae* (q. 94, a. 4, c.), that of returning a deposited sword to an irate owner. Here, Thomas states more clearly than he did in the *Prima Secundae* that “in this and similar cases, it would be evil to follow the posited law [*legem positam*], however it is good to set aside the letter of the law [*verbis legis*], and follow that which the nature of justice and the common good demands”.⁴⁰ This passage could be thought an innovation only appearing after the *Prima Secundae* if it were not for a very similar rationale appearing in the *Super Sententiae* of the 1250s.⁴¹

As indicated the literature on *ius* and *lex* in Aquinas is quite large. And until we have a more thorough treatment of it, many questions will remain unanswered. Whatever the case may be, it seems to us, sorting through the myriad of difficulties will demand both a thorough knowledge of Aquinas and the juridical tradition’s influence on mid-13th Century theologians like Thomas. However, we cannot conclude that Aquinas was uninterested or failed to notice Gratian’s significant contribution to the Western jurisprudence tradition.

The third lesson q. 57 of the *Secunda Secundae* teaches us, is that Thomas’s account of *lex* ties in well with his idea that it must always be promulgated, or more simply written.⁴² *Lex* by its nature is expressed.⁴³ This idea is not to be passed over too quickly. Clifford Kossel identifies the issue of promulgation as the critical link between eternal law and natural law for Aquinas. Species have certain natural instincts or natural inclinations because this is how the eternal law has been promulgated in God’s wisdom.⁴⁴ Perhaps this is one reason why for Aquinas it is logical to speak of *lex naturalis* rather than *ius naturale*. It is a *lex* since natural law is the expression of the eternal law. Though this is only one possible answer to why he uses *lex* and *ius* so interchangeably in *IaIIae* q. 94, there are others. Oscar Brown, for example, argues that Thomas only drew “a technical distinction in principle between *ius* and *lex* that he almost entirely ignored in actual practice, i.e., in his own use of the two terms”.⁴⁵ Still a third may come from how we consider Aquinas’s *Summa theologiae*. Many consider it a systematic treatment. It is that,

³⁹ ST *IaIIae* q. 120, a. 1.

⁴⁰ ST *Ia-IIae*, q. 120 a. 1 co. “...In his ergo et similibus casibus malum esset sequi legem positam, bonum autem est, praetermissis verbis legis, sequi id quod poscit iustitiae ratio et communis utilitas”.

⁴¹ *Super Sent.* III, d. 37, q. 1, a. 3, ed. M. F. Moos, Paris, Lethielleux, 1933, pp. 1243-1245.

⁴² ST *IaIIae* q. 90, a. 4, c.

⁴³ This too Gratian exhibits as is seen in his opening distinctions of the *Decretum*.

⁴⁴ C. G. KOSSEL, *Natural Law and Human Law (IaIIae, qq. 90-97)*, in *The Ethics of Aquinas*, ed. S. J. Pope, Washington, D.C., Georgetown University Press, 2002, p. 172.

⁴⁵ J. BROWN, *Appendix 1, cit.*, p. 174.

but it is also one crafted for beginners in the theology of Aquinas's own religious community. Bonnie Kent has argued that this should affect how we read it. Kent suggests that "the *Summa* can be better understood as a conversation continuing over the course of many evenings than as the straightforward textbook discussion modern readers might expect".⁴⁶ If we read the *Summa theologiae* in such a light, and it is a tenable perspective based on multiple conversations, then the problem of his imprecise language in an earlier tract may evaporate.⁴⁷ These are a couple possible ways to realistically address why Thomas's language in *Prima Secundae* q. 94 is seemingly so imprecise. There are certainly others. Thus, Pennington is correct to point out how indiscriminate Aquinas's language is in his tract on law. He has been one of the first contemporary scholars to explore the intersection between the juridical tradition and Aquinas and should be praised accordingly. However, taking into account Aquinas's attention to *ius* in *Super Sententiae* we are forced to dissent from the idea that Thomas became aware of the profundity of the meaning of *ius* and its relationship to *lex* only after writing his *Prima Secundae* tract on law. It is even more difficult to conclude that Gratian's insight of *ius* and *lex* was lost on Aquinas. The problem may not lie with Aquinas's paltry understanding of *ius* so much as his equally rich senses of *naturalis* and *lex*.

Ironically, as Crowe points out, Gratian's definition that places *ius naturale* contained in the Law and the Gospel is not entirely a medieval problem. In our own day questions abound regarding the natural law's knowability and permanence. Some resigned it to religious thought. Others have called it a blunt instrument for effective dialog among pluralistic cultures today.⁴⁸ Still others, argue that the religious teaching authority of the Catholic Church is the authentic interpreter of the natural law. Each of these questions in their own way touch upon that which Gratian spoke about so long ago: the *ius naturale*'s relationship to religious faith, revelation, and laws of the land.

⁴⁶ B. KENT, *Habits and Virtues (IaIIae, qq. 49-70)*, in *The Ethics of Aquinas*, cit., p. 123.

⁴⁷ One example of this reading may be found in how Aquinas unfolded his tracts, such as virtue, or individual phrases, such as *lex eterna*. The former, especially in terms of perfect and imperfect virtue, displays how Aquinas slowly gives greater and greater specification to the idea of virtue as one proceeds through the work. See T. M. OSBORNE JR., *Perfect and Imperfect Virtues in Aquinas*, «The Thomist» 71 (2007), pp. 39-64. The latter concerns Aquinas's use of "divine law" earlier in the *Summa* (e.g., ST IaIIae q. 63, a. 2, c.), while it becomes more specifically defined at a later passage (ST IaIIae q. 91, a. 4). Understandably, one still would need to follow usage subsequent to ST IaIIae q. 57 for consistency.

⁴⁸ J. CARD. RATZINGER, J. HABERMAS, *Dialectics of Secularization: On Reason and Religion*, trans. by B. McNeil, San Francisco, Ignatius, 2005; on Ratzinger/Benedict's thoughts on natural law see also M. RHONHEIMER, *Benedikt XVI über Rechtsstaat, Demokratie und Naturrecht. Die Reden in Berlin und London*, in *Der Theologenpapst. Eine kritische Würdigung Benedikts XVI*, ed. J. Tück, Freiburg i. Br., Herder, 2013, pp. 135-157.

2. AQUINAS'S USE OF GRATIAN IN *SUMMA THEOLOGIAE* III, Q. 89, A. 3

As is well known, Thomas breaks off his discussion of the various sacraments in the *Tertia Pars* of the *Summa theologiae* in the middle of his treatise on the sacrament of penance. As such the work for which he is most renowned is left unfinished, although probably under the direction of his secretary Reginald of Piperno an attempt was made to finish it. That part, which collects earlier material from Thomas's *Super Sententiae*, is now known as the *Supplementum*.⁴⁹ In the penultimate question of the unfinished treatise on the sacrament of penance Thomas asks whether by penance man is restored to his former dignity.⁵⁰ The remote origins of this question lie in the fact that both Peter Lombard and Gratian cite the following text from John Chrysostom's *De reparatione lapsi*:

Such, believe me, such is God's pity toward men that he never rejects penance, if it is offered to him sincerely and simply. Even if one should have reached the heights of evils, so long as he wants to return from there to the way of virtue, God receives him freely, embraces him, and does everything to restore him to his former state [*ad priorem revocet statum*]. What is even more extraordinary and excellent, even if one should be unable to fulfill all the requirements of satisfaction, however brief and for however short a time the penance done, he still accepts it, nor does he allow that the reward of even the smallest conversion should be lost.⁵¹

⁴⁹ The seven questions in the unfinished treatise (qq. 84-90) deal with the following topics: penance as a sacrament, penance as a virtue, the effect of penance in particular regarding mortal sins, the forgiveness of venial sins, the return of sins, the recovery of virtue and the parts of penance in general. The questions in the *Supplementum* (qq. 1-28) deal with contrition (qq. 1-5), confession (it's necessity, nature, minister, effect and seal qq. 6-11), satisfaction (qq. 12-15), recipient (q. 16), power, effect and minister of the keys (qq. 17-20), excommunication (qq. 21-25), indulgences (qq. 25-27) and finally the rite of penance (q. 28).

⁵⁰ ST III, q. 89, a. 3.

⁵¹ PETRUS LOMBARDUS, *IV Sent.*, d. 14, c. 5, ed. Grottaferrata, Collegio S. Bonaventurae ad Claras Aquas, 1971, p. 323, ll. 21-30: "Item iohannes chrysostomus, de reparatione lapsi: Talis, mihi crede, talis est erga homines pietas dei: Nunquam spernit poenitentiam, si ei sincere et simpliciter offeratur. Etiam si ad summum quis perueniat malorum, et inde tamen uelit reuerti ad uirtutis uiam, suscipit libenter, amplectitur, facit omnia quatenus ad priorem reuocet statum. Quodque est adhuc praestantius et eminentius, etiam si non potuerit quis explorare omnem satisfaciendi ordinem, quantulumcumque tamen et quamlibet breui tempore gestam non respuit poenitentiam; suscipit etiam ipsam, nec patitur quamuis exiguae conuersionis perdere mercedem" GRATIANUS, *De poenitentia* D.3 c. 28. (RF I, 1217/1218; L 180). L = Gratian's «*Tractatus de poenitentia*». A New Latin Edition with English Translation, ed. A. A. Larson, Washington, D.C., The Catholic University of America Press, 2016 («*Studies in Medieval and Early Modern Canon Law*», 14). See also PETRUS CANTOR, *Summa quae dicitur Verbum abbreviatum (textus conflatus)* II, c. 45, p. 773 («*CCCM*» 196); PETRUS COMESTOR, *Sententiae de sacramentis*, Par. 25, ed. R. M. Martin, Louvain 1937, p. 74. Chrysostom's Latin text cannot as such be found in PG 47, 284 but is a faithful rendition of texts found in other

It is worthwhile to compare Thomas's treatment with that of his contemporaries Albert the Great and Bonaventure. Albert, who completed his commentary on Lombard's *Sententiae* in 1249, literally devotes only a few words to the question: he explicitly links the question to Chrysostom's text as quoted by Peter Lombard, gives two brief objections and then affirms that the forgiven penitent returns to his or her former state [*in pristinum statum*] because otherwise the doing of satisfaction as the third part of penance, together with contrition and confession, would not be possible. He ends rather abruptly by "*et sic cessat totum quod objectum est*".⁵² One notes the complete absence of any authority, whether from Scripture, the Fathers, canon law or philosophy.

Bonaventure, who completed his commentary on Lombard's *Sententiae* in 1253, deals much more extensively with the question "whether perfect penance restores to the former grade".⁵³ He gives four affirmative arguments and four objections. All of them except one from the Pseudo-Augustinian treatise *Hypognosticon*⁵⁴ are speculative arguments. Central to Bonaventure's response is the distinction between a restoration "*quantum ad substantiam habituum gratiae et habitatum naturalium*" and "*quantum ad aliquem statum sive integritatem vel decorem accidentalem*". In the former case a perfect restoration is indeed possible while in the second case it is not. As his response to the second and third objection makes clear, Bonaventure has in mind the case of the loss of virginity or the glory of innocence which cannot

manuscripts containing Chrysostom's works. See the critical apparatus in the Grottaferrata edition of Peter Lombard's text. The text in PG has "in pristinum statum restituat". The text in Sources Chrétiennes, vol. 117 (*À Théodore*, ed. J. Dumortier, Paris, Cerf, 1966), p. 269 has "ad priorem revocet statum".

⁵² ALBERTUS MAGNUS, *In IV Sent.* d. 14, a. 33, ed. A. Borgnet, Paris, Vivès, 1894, vol. 29, pp. 465-466. Here is the complete text of the article: "Deinde quaeritur de hoc quod dicit, ibi, D, § 1, sub finem: 'Facit omnia quatenus ad priorem revocet statum, etc.' Hoc non videtur verum: quia 1. Prior status est innocentiae: et ad illum non est regressus per poenitentiam. Si dicatur, quod revocat ad priorem statum quantum ad immunitatem culpae, sed non quantum ad dignitatem. Contra: Videmus, quod cum poenitens resurgit, adhuc remanet in illo difficultas bene agendi: et hoc est ex reliquiis peccati, quas ante non habuit: ergo per poenitentiam, priorem statum non omnino recipit. 2. Item, Prior status est, quod sit expeditus ab bene operandum secundum omne opus virtutis: et hoc non potest esse nisi ex habitu perfecto cujuslibet virtutis: ergo hoc non est solius poenitentiae, ut videtur Magister supponere in Littera. Solutio. Dicendum ad hoc, quod poenitentia in partibus suis habet restituere in pristinum statum, scilicet in contritione, confessione, et satisfactione: et praecipue quoad illam partem, quae est satisfactio: quia illa supponit exercitium operis secundum quamlibet virtutem imperatam a poenitentia: et sic cessat totum quod objectum est".

⁵³ BONAVENTURE, *In IV Sent.* d. 14, p. II, art II, q. II, ed. Quaracchi, Ex Typographia Collegii S. Bonaventurae, 1889, vol. 4, pp. 337-338.

⁵⁴ *Hypognosticon*, Bk. 3, ch. 9, n. 17 (PL 45:1631).

be restored as such, that is to say erased, but the substance of it can be restored in terms of merit.⁵⁵

In his own commentary on Lombard's *Sententiae*, of which book IV is completed in 1256, Thomas deals with our topic in the question whether penance should be made public or solemnized.⁵⁶ In one of the arguments to the contrary he quotes the same text from the *Hypognosticon* as did Bonaventure, that is to say, "poenitentia omnes defectus revocat ad perfectum" which would imply no need for solemn penance. In his response to this objection Thomas distinguishes between a restoration "in pristinam gratiam" and "in pristinam dignitatem" in order to argue that a restoration into the former is possible whereas a restoration into one's former dignity is not. He illustrates this distinction with the example of the virgin, who after having done penance for fornication, does not regain the dignity of virginity and hence is not allowed to wear a veil. Another example he gives concerns someone who has committed a grave sin for which he has done public penance. Such a person, while freed from guilt, cannot be allowed by a bishop, so Thomas argues, to receive priestly orders and this for various reasons.⁵⁷ But the most fundamental reason is the fact that, while the restoration of one's former state of grace does indeed occur when one is freed from guilt through penance, this does not necessarily imply that one is freed from all penalties, that is to say, that one has been restored to one's original dignity.⁵⁸ As with Bonaventure, Thomas's entire argument, apart from the identical reference to the *Hypognosticon*, is marked by the absence of any authoritative sources.

⁵⁵ BONAVENTURE, *In IV Sent.* d. 14, p. II, art II, q. II, ed. Quaracchi, Ex Typographia Collegii S. Bonaventurae, 1889, vol. 4, p. 338: "2. 3. Ad illud quod obiicitur de virginitate et gloria illa de innocentia; dicendum, quod quantum ad hoc non restituit, sed quantum ad omne quod fuit substantiale circa meritum".

⁵⁶ *Super Sent.* d. 14 q. 1 a. 5 qc. 1 obj. 3 and ad 3, ed. M. F. Moos, Paris, Lethielleux, 1947, pp. 613-614.

⁵⁷ *Super Sent.* d. 14 q. 1 a. 5 qc. 1 ad 3: "Primo propter dignitatem ordinum istorum. Secundo propter timorem recidivi. Tertio propter scandalum vitandum, quod posset in populo oriri ex memoria praecedentium peccatorum. Quarto, quia non haberet frontem alios corrigendi, cum peccatum ejus fuerit publicum".

⁵⁸ See also *Super Sent.* d. 19, q. 1, a. 3, qca. 2, ad 2, ed. M. F. Moos, Paris, Lethielleux, 1947, p. 985: Ad secundum dicendum, quod poenitentia ab omnibus defectibus culpae liberat, non autem ab omnibus defectibus poenae: quia adhuc post peractam poenitentiam de homicidio aliquis remanet irregularis. Unde sacerdos potest de crimine absolvere, et pro poena amovenda ad superiore remittere, nisi in excommunicatione, quia absolutio ab ipsa debet praecedere absolutionem a peccato: quia quamdiu aliquis est excommunicatus, non potest recipere aliquod Ecclesiae sacramentum. And *Super Sent.* d. 37, q. 2, a. 2, ad 4, ed. P. Fiaccadori, Parma, 1858, vol. 7.2, p. 1001: "Ad quartum dicendum, quod non est necessarium quod deleta culpa deleatur omnis poena, sicut de irregularitate patet: non enim poenitentia restituit in pristinam dignitatem, quamvis possit restituere in pristinum statum gratiae, ut supra, dist. 14, dictum est".

This situation changes drastically sixteen years later when Thomas starts working on the *Tertia Pars* of his *Summa theologiae* which he leaves unfinished in the middle of his treatise on penance. In our text under consideration ST III, q. 89, a. 3 there is a plethora of authorities explicitly cited in every part of the *quaestio* (objections, *sed contra*, *responsio*, etc.). Article 3 has in fact nineteen explicit references and quotations: five from Scripture, six from the Church Fathers (Jerome, Gregory, Isidore, Augustine and Chrysostom), seven from Gratian's *Decretum* and one from the *Liber extra*. A further analysis also reveals that the quotations from Augustine, Jerome, Isidore and one from Gregory stem directly from the *Decretum*.⁵⁹ Moreover, the vast majority of these quotations and references to the Church Fathers and the *Decretum* do not occur in the *Super Sententiae* or in any other of his works but occur here for the first time in the entirety of Thomas's vast set of writings.⁶⁰ One can safely conclude from these numbers that, compared to the *Super Sententiae* and to his contemporaries Albert and Bonaventure, Thomas went to great lengths to offer an authoritative foundation to every part of the argument.

Let us now take a closer look at the arguments themselves. The texts quoted in the objections point to authoritative texts which say that either for penitent sinners "it is a difficult thing to return to their former degree" or that they should not "receive further promotion" or that they are even "excluded from the lowest orders of clerics". The *sed contra*, quoting from the *Decretum* D.50, c.21 *Contumaces*, offers a text which defends the opposite view: when penance has reformed those sinners "gradum suum dignitatemque recipiet". Thomas was surely not the first to meet this conundrum. In fact, Gratian himself admits that there exists a "dissonantia auctoritatum" and aims to bring them into harmony [*ad concordiam reuocari ualeat*]. As he explains in D. L, d.p.c. 24 and 28, the stricter decrees are applicable, not to those who hate the crime they have committed, but to those who do penance merely out of fear for their reputation or out of ambition. The more lenient decrees refer to those who worthily offer penance to God and can indeed be received back into their former dignity.⁶¹

⁵⁹ The references to the *Decretum* are as follows: in the *objectiones* he refers to *prima pars* D.50, c.30 *Quicumque dignitatem* (RF I, 191), d. 50, can. 60 *Canones* (RF I, 200), D.50, c.52 *Hi qui altario* (RF I, 197). The *sed contra* refers to, D. 50, can. 16 *Tua sanctitas* (RF I 184) and D. 50, can. 21 *Contumaces* (RF I, 186). The *responsio* refers to D. 50, can. 28 *Domino* (RF I, 188), D. 50, can. 29 *Si quis diaconus* (RF I, 190), D. 50, can. 8 *Si quis viduam* (RF I, 179) and P. I, d. L, can. 34 *De his vero* (RF I, 193).

⁶⁰ For more details see J. VIJGEN, *The Patristic Sources of Thomas' Treatise on Penance in Reading the Church Fathers with Thomas Aquinas*, ed. J. Vijgen, P. Roszak, Turnhout, Brepols, 2021, pp. 409-440.

⁶¹ D. 50, d.p.c. 24 (RF I, 187): "Quomodo igitur huiusmodi auctoritatum dissonantia ad

In his response Thomas distinguishes between a dignity *ad Deum* and a dignity *ad Ecclesiam* which can both be lost by sin. The dignity with respect to God is again twofold: a principal dignity and a secondary dignity. The principal dignity of being counted among the children of God is restored by penance, whereas the secondary dignity of innocence can never be recovered, that is to say, what is lost cannot be restored in the sense of being undone. However, such a person can sometimes gain even more “because as Gregory says, ‘those who acknowledge themselves to have strayed away from God, make up for their past losses, by subsequent gains: so that there is more joy in heaven on their account, even as in battle, the commanding officer thinks more of the soldier who, after running away, returns and bravely attacks the foe, than of one who has never turned his back, but has done nothing brave’”.⁶² Not surprisingly, Thomas develops this distinction against the background of the parable of the prodigal son in Luke 15; the prodigal son regained his former principal dignity, whereas the elder son never lost his secondary dignity (Luke 15: 29: “I have never transgressed thy commandments”). St. Thomas must have found this passage in Gregory’s *Homilies on the Gospels* while composing his *Catena* on Luke for only there can one find this text,⁶³ which is absent from his *Super Sententiae* as well as from Lombard’s *Sententiae* and Gratian’s *Decretum*. Here we have a clear indication, or so it seems to be, that the direct contact with the Church Fathers for which Thomas is renowned enables him to go further than the distinction between guilt and penalty which we encountered in the *Super Sententiae*.

In the second part of the response he deals with the dignity *ad Ecclesiam* or ecclesiastical dignity, that is to say, the ability to perform an ecclesiastical office or the lack thereof. One immediately notices the extensive use of the

concordiam reuocari ualeat, breuiter inspiciamus. Sunt quidam, quos non odium criminis, sed timor uilitatis, amissio proprii gradus et ambitio celsioris ad penitentiam cogit. Hos sacri canones irrecuperabiliter deiciunt, quia qui simulatione penitenciae uel affectione honoris adeo non consequitur ueniam, nec ab ecclesia meretur reparationem. Unde Augustinus scribit ad Bonifacium: [epist. L.] D. 50, d.p.c. 28 (RF I, 190): “Quicumque igitur pro criminibus suis digne Deo penitentiam obtulerint, auctoritate Gregorii et Ieronimi et Augustini et Ysidori gradum pristinae dignitatis recipere possunt. Qui autem non odio criminis, sed timore uilitatis uel ambitione honoris falsas Deo penitencias offerunt, in pristini honoris gradum reparari minime poterunt”. For more on this theme in Gratian see A. LARSON, *Master of Penance. Gratian and the Development of Penitential Thought and Law in the Twelfth Century*, Washington, D.C., The Catholic University Press of America, 2014, pp. 238-244.

⁶² ST III, q. 89, a. 3 c.: “Recuperat tamen quandoque aliquid maius. Quia, ut Gregorius dicit, in homilia de centum ovibus, qui errasse a Deo se considerant, damna praecedentia lucris sequentibus recompensant. Maius ergo gaudium de eis fit in caelo, quia et dux in praelio plus eum militem diligit qui post fugam reuersus hostem fortiter premit, quam illum qui nunquam terga praebuit et nunquam aliquid fortiter fecit”. See GREGORY, *In Evang.* II, hom. 34 (PL 76, 1248; SC 522, 382).

⁶³ *Catena in Lc.*, cap. 15, l. 1, no. 2488.

Decretum in all four of the cases described by Thomas. The restoration to a former dignity depends first on a preceding atonement through repentance or through confession. The authority quoted is Isidore as mentioned in D.50 c.28 *Domino*. Secondly, it depends on a sincere repentance, involving compunction, prayer, fasting, etc. as mentioned in d. 1, can. 29 *Si quis diaconus*. Thirdly, an irregularity can, following D. 50, can. 8 *Si quis viduam*, either lead to being prohibited to enter the clerical state or to being “cast out” (*dejiciatur*) of it. Finally, Thomas mentions the issue of scandal, quoting Rabanus from D. 50, can. 34 *De his vero*. The public nature of a scandal, involving perjury, theft, fornication and the like must lead to a deposition from one’s former rank because of the scandal it causes. Private sins (*absconse*), confession and penitential acts may lead to retaining one’s rank.

In his rationale for rejecting the objections Thomas again relies heavily on Gratian’s own reading of Augustine in D.50 c.28 in his commentary in d.p.c. 28. Canonical laws prohibiting a repentant sinner to enter, return to, or remain in the clerical state do not reflect the Church’s despair in God’s mercy for otherwise neither King David nor Peter would have remained a king or an apostle, respectively. These laws, rather, intend to preserve the Church’s authority or take into account the reality of insincere contrition and worldly ambition.⁶⁴ It is noteworthy that this is the first and only time Thomas, via Gratian, uses this text from Augustine throughout his entire set of writings. A text by Chrysostom, in which, commenting on John 21, 17 (“Feed my sheep”), Chrysostom emphasizes the greater confidence of Peter in Jesus even after Peter’s denial and repentance, is used to imply that Peter’s penance was a private one so that it is allowed for a private sinner like Peter to advance to a higher grade, i.e. as *pastor ovium Christi*. As with the reference to Gregory earlier in the *corpus*, Thomas draws on his *Catena* on John, chapter 21 for additional corroboration that restoration to one’s former dignity is indeed possible.

By 1273 Thomas offered his readers a more nuanced and richer treatment of our question under consideration than Albert and Bonaventure did. The nuance is provided by the passage from Gregory in which the bravery of a soldier, returning to the battlefield, is compared to the penitent sinner. The richness comes from a variety of authoritative sources (Scripture, Church Fathers, Gratian), many of whom Thomas employs here for the first time in his writings and whom he has encountered through the mediation of Gratian.

3. CONCLUSION

Above we have indicated two relatively small passages of Aquinas’s *Summa theologiae* to demonstrate that his study and use of Gratian is far more interesting than it may first appear. We did this with the first explicit places Gra-

⁶⁴ Gratian and Thomas are quoting from Augustine, *Epistulae* 185, c. 10 (PL 33, 812).

tian appears in the *Summa*, in Aquinas's treatment of law and later the virtue of justice, and one of the last pages Aquinas composed, in his treatment of penance. Yet, these instances merely constitute Aquinas's most explicit use of Gratian. What of the implicit legal language that Aquinas in some places seems to intentionally call upon?⁶⁵ What of the influence of the *Liber Extra* compiled by none other than Raymond of Peñafort, Aquinas's Dominican confrere and associate, or his highly influential *Summa de casibus*? If we can ask this question of Aquinas, certainly we can ask it of multiple other medieval theologians: Bonaventure, Albert the Great, etc. Moreover, we can and should ask the inverse question: how have the theologians shaped medieval ecclesiastical law subsequent to them?

Both Thomas's oeuvre and the medieval canon law tradition represent massive sources of knowledge in their own right. Tracing connections will likely require a familiarity with both. For these and similar expeditions, we hope to invigorate fellow medieval scholars both on the theological and juridical side, fully acknowledging that such ventures push the fine line between hubris and magnanimity.⁶⁶

Moreover, such a project is timely. Despite the danger, there is now a surging interest in the relationship between 12th Century "canonists" and "theologians" – though these designations are somewhat post-fabrications – at a point in history when these respective fields had not been completely divided by intellectual drift. Certainly, the collision of these two intellectual oceans makes for no safe sailing. The demands of such a study can make the task appear overwhelming, certainly for any one individual alone. Yet, it is precisely because both fields of learning are so important that the work will prove both fruitful and intriguing. Perhaps now is the time to begin mapping the interaction and influence that existed between the ocean of medieval canon law and Thomas Aquinas, this *oceanum incognitum*.

BIBLIOGRAPHY

ALBERTUS MAGNUS, *In IV Sententiarum*, ed. A. Borgnet, Paris, Vivès, 1894.

BONAVENTURA, *In IV Sententiarum*, ed. Quaracchi, Ex Typographia Collegii S. Bonaventurae, 1889.

ANDERSON J. M., *Is It Better to Die Excommunicated than Act against One's Conscience? What Aquinas Famously (Never) Said on Conscience and Church Authority*, «Ephemerides Theologicae Lovanienses» 95 (2019), pp. 567-593.

⁶⁵ J. M. ANDERSON, *Is It Better to Die Excommunicated than Act against One's Conscience? What Aquinas Famously (Never) Said on Conscience and Church Authority*, «Ephemerides Theologicae Lovanienses» 95 (2019), pp. 567-593, esp. p. 577, n. 28.

⁶⁶ For this purpose, we have established an international working group called Thomas Aquinas and Canon Law. See <https://thomasaquinasandcanonlaw.wordpress.com>.

- BOURKE V. J., *Is Thomas Aquinas a Natural Law Ethicist?*, «The Monist» 58 (1974), pp. 52-66.
- BROWN O. J., *Appendix 1: Ius and Lex in Aquinas*, in IDEM, *Natural Rectitude and Divine Law in Aquinas: An Approach to an Integral Interpretation of the Thomistic Doctrine of Law*, Toronto, PIMS, 1981, pp. 165-174.
- CROWE M. B., *The Changing Profile of the Natural Law*, The Hague, Nijhoff, 1977.
- GELINAS E. T., *Ius and Lex in Thomas Aquinas*, «American Journal of Jurisprudence» 15 (1970), pp. 154-170.
- GRATIANUS, *The Treatise on Laws: (Decretum DD. 1-20)*, transl. by A. Thomson, J. Gordley, K. Christensen, Washington, D.C., Catholic University of America Press, 1993.
- GRATIANUS, *Decretum magistri Gratiani*, ed. E. Richter, E. Friedberg, Leipzig, B. Tauchnitz, 1879-1881; Reprint Graz: Akademische Druck und Verlagsanstalt, 1959 («Corpus iuris canonici»).
- GRATIANUS, *Gratian's «Tractatus de penitentia». A New Latin Edition with English Translation*, ed. A. A. Larson, Washington, D.C., The Catholic University of America Press, 2016.
- ISIDORUS, *Etymologiarum sive Originum libri xx*, ed. W. M. Lindsay, Oxford, Clarendon Press, 1911.
- JEAN CHRYSOSTOME, *À Théodore*, ed. J. Dumortier, Paris, Cerf, 1966 (SC 117).
- KALINOWSKI G., *Le fondement objectif du droit d'après la Somme théologique de Saint Thomas d'Aquin*, «Archives de philosophie du droit» 18 (1973), pp. 59-75.
- KALINOWSKI G., *Sur l'emploi métonymique du terme ius par Thomas d'Aquin*, «Archives de philosophie du droit» 18 (1973), pp. 331-339.
- KOSSEL C. G., *Natural Law and Human Law (IaIIae, qq. 90-97)*, in *The Ethics of Aquinas*, ed. S. J. Pope, Washington, D.C., Georgetown University Press, 2002, pp. 169-193.
- KENT B., *Habits and Virtues (IaIIae, qq. 49-70)*, in *The Ethics of Aquinas*, ed. S. J. Pope, Washington, D.C., Georgetown University Press, 2002, pp. 116-130.
- LARSON A., *Master of Penance. Gratian and the Development of Penitential Thought and Law in the Twelfth Century*, Washington, D.C., The Catholic University Press of America, 2014.
- LARSON A., *Gratian*, in *Law and the Christian Tradition in Italy: The Work of Great Christian Jurists*, ed. O. Condorelli, R. Domingo, London-New York, Routledge, 2020, pp. 41-55.
- METZ W., *Lex und ius bei Thomas von Aquin in Transformation des Gesetzesbegriffs im Übergang zur Moderne?*, ed. M. Walther, N. Brieskorn, K. Waechter, Stuttgart, Steiner, 2008, pp. 17-36.
- OSBORNE JR. T. M., *Perfect and Imperfect Virtues in Aquinas*, «The Thomist» 71 (2007), pp. 39-64.
- PADOVANI A., *Ius e lex a Cicerone a san Tommaso d'Aquino e oltre*, «Rivista internazionale di diritto comune» 29 (2018), pp. 189-262.
- PENNINGTON K., *Lex Naturalis and Ius Naturale*, «The Jurist» 68 (2008), pp. 569-591.
- PETRUS CANTOR, *Summa quae dicitur Verbum abbreviatum (textus conflatus)*, ed. M. Boutry, Turnhout, Brepols, 2004 («CCCM» 196).

- PETRUS COMESTOR, *Sententiae de sacramentis*, ed. R. M. Martin, Louvain, 1937.
- PETRUS LOMBARDUS, *Sententiae in IV libris distinctae*, ed. Grottaferrata, Collegio S. Bonaventurae ad Claras Aquas, 1971-1981.
- RATZINGER J., HABERMAS J., *Dialectics of Secularization: On Reason and Religion*, trans. by B. McNeil, San Francisco, Ignatius, 2005.
- RHONHEIMER M., *Benedikt XVI über Rechtsstaat, Demokratie und Naturrecht. Die Reden in Berlin und London*, in *Der Theologenpapst. Eine kritische Würdigung Benedikts XVI*, ed. J. Tück, Freiburg i. Br., Herder, 2013, pp. 135-157.
- THOMAS DE AQUINO, *Opera omnia iussu impensaue Leonis XIII P. M. edita, t. 4-12*, Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1888-1906.
- THOMAS DE AQUINO, *The Summa Theologiae of St. Thomas Aquinas*, Literally trans. by Fathers of the English Dominican Province, 2nd and rev. ed., New York, Benziger, 1948.
- THOMAS DE AQUINO, *Liber de veritate catholicae Fidei contra errores infidelium seu Summa contra Gentiles*, t. 2-3. ed. P. Marc, C. Pera, P. Caramello, Taurini-Romae, Marietti, 1961.
- VAN OVERBEKE P. M., *La loi naturelle et le droit naturel selon saint Thomas*, «Revue thomiste» 57 (1957), pp. 53-78; 450-495.
- VAN OVERBEKE P. M., *Droit et Morale: Essai de synthèse thomiste*, «Revue thomiste» 58 (1958), pp. 285-336; 674-694.
- VIJGEN J., *The Patristic Sources of Thomas' Treatise on Penance in Reading the Church Fathers with Thomas Aquinas*, ed. J. Vijgen, P. Roszak, Turnhout, Brepols, 2021, pp. 409-440.
- VILLEY M., *Si la théorie générale du droit, pour Saint Thomas, est une théorie de la loi*, «Archives de philosophie du droit» 17 (1972), pp. 427-431.
- WEIGAND R., *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus*, München, Hueber, 1967.