LEX NATURALIS AND IUS NATURALE

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

¹ Since my home is two blocks away from the steam plant I have mixed feelings about efforts to guarantee its continued existence.
To answer that question we have to go back to the Renaissance of law in the twelfth century. *Ius* and *lex* were terms of Roman law. The first jurist to examine *lex* and *ius* in detail was named Gratian who taught canon law in Bologna. In the first half of the twelfth century he compiled a *Tractatus de legibus* with which he introduced his students to law. He explored the different meanings of *ius* and *lex* for the first time in European jurisprudence. Gratian began his *Tractatus* with a statement that would remain a standard statement for centuries:

The Human Race is ruled by two things: namely, natural *ius* and *mos*. The *ius* of nature is what is contained in the *lex* and the Gospel. By it, each person is commanded to do to others what he wants done to himself and is prohibited from inflicting on others what he does not want done to himself. This indeed is the *lex* and the prophets.2

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

Gratian patterned his thought and borrowed his terminology from texts that he found in Justinian’s *Digest*. There he found a statement by the ancient jurist Gaius who also defined the law that governed human society:

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

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