JURISPRUDENCE

as a brief story

by

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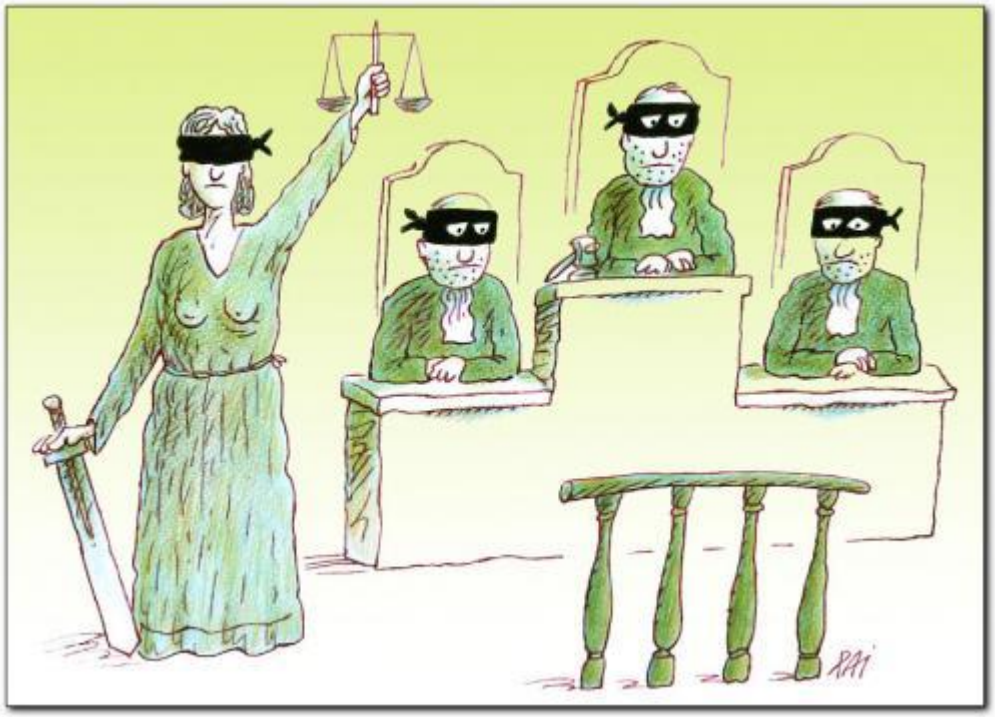
Košice 2015/2016

by JURISPRUDENCE



- The aim of these lessons is to provide the students of Jurisprudence by a basic and clear analysis of the major and most important theories in this field. The main theories are explained with discussion of their proper context. Contents include:
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- On Jurisprudence in General
- Classical Doctrine of Natural Law (Plato, Aristotle, Augustine, Aquinas, Hobbes, Locke, Rousseau)
- Classical Positivism (J. Bentham, J. Austin)
- Pure Theory of Law (H. Kelsen)
- Naturalist's Revival (L. L. Fuller, G. Radbruch)
- The Concept of Law and of the Legal System (H. L. A. Hart)
- Dworkin's Theory of Principles
- Justice Theory (J. Rawls)

- **BASICS AND SUGGESTED FURTHER READING**
-

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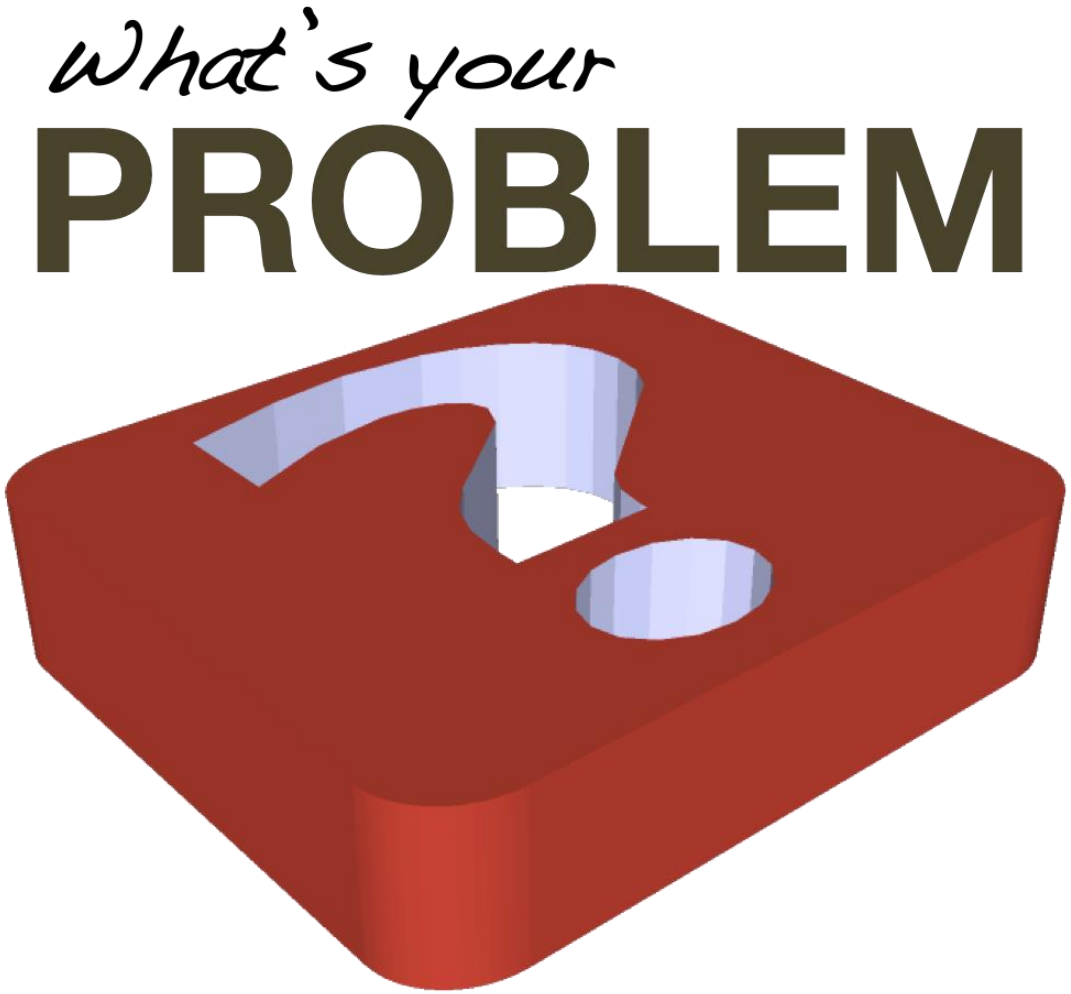


THE WORKS OF ARISTOTLE

- Προβλήματα
- Why is …?
- What is this?

I HAVE A PROBLEM: JURISPRUDENCE

PROBLEM

PROBLEM

PROBLEM

a) something put forward,

b) a question set for solution,

any thing, matter, person, etc.,

c) that is difficult to deal with

- PROBLEMS:

ΔΙΚΕ - JUSTITIA - JUSTICE

- **Proposed Topics for Essays**

- 1. What is Jurisprudence about?
- 2. On Natural Law
- 3. State of Nature according to Hobbes
- 4. On Legal Positivism
- 5. The Command Theory of Law (Bentham)
- 6. Classical Positivism and the Nazi State
- 7. Right to Disobey the Law/ Civil Disobedience
- 8. Law Distinguished from Morality
- 9. Separation of Powers
- 10. Freedom, Rights and Equality as Philosophical Principles of a Constitution

- 11. What is Justice?
- 12. Hart's concept of a legal system
- 13. Legal rules and legal principles according to Dworkin
- 14. Development of the concept of Human Rights
- 15. Free Speech
- 16. Freedom of Religion and Toleration
- 17. Privacy and The Big Brother
- 18. Abortion Rights
- 19. Should Euthanasia Be Legalized?
- 20. The Death Penalty (pro or contra)

- Questions (examples of a written test):

- What does justice mean for Plato?
- Which is the basic principle valid for all the contract theories?
- Primary and secondary rules according to Hart
- Who are the representatives of legal positivism?
- What is natural law by Aristotle?
- Define the sources of law within the natural law doctrine?
- Describe the Hobbesian state of nature.

DOMITIUS ULPIANUS

On Jurisprudence

- Jurisprudence (juris prudencia = the **knowledge, wisdom of law**) comes from Ancient Rome. Exclusive power of judgment on facts.

- Ulpian means *„Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia* (Digesta, 1,1,10,2)“, referring to the **ability to distinguish between what law is and what it is not**
- Jurisprudence is not simply to be equalised with legal science; it is the study/ the explanation of the nature of law and the manner of its working. Jurisprudence is aimed at a wise, pertinent and just solution of problems.

- The object and end of the science which is distinguished by the name Jurisprudence, is the **protection of rights** (James Mill, Jurisprudence 1825).

- According to the official syllabus the Jurisprudence course in Oxford *„affords an opportunity to reflect in a disciplined and critical way on the structure and functions of law and legal institutions and systems, on the nature of legal reasoning and discourse, and/or on the connections between law and morality and/or between law and other human relationships and characteristics. In some places it would be called theory of law or philosophy of law.“*
-
- John Austin stated in his work on the uses of Jurisprudence that *„the appropriate subject of Jurisprudence, in any of its different departments, is positive law: Meaning by positive law (or law emphatically so called) law established or ‚positum‘ in an independent community, by the express or tacit authority of its sovereign or supreme government*“ (p. 365)

- *The word Jurisprudence itself is not free from ambiguity; it has been used to denote*
- *The knowledge of Law as a* ***science****, combined with the* ***art*** *or* ***practical habit*** *or* ***skill*** *of applying it; or secondly*
- *Legislation; – the science of what ought to be done towards* ***making good laws****, combined with the* ***art of doing it****.*
-

- It is maybe helpful to think of Jurisprudence as a sort of jigsaw puzzle in which each piece fits with the others in order to construct a whole picture. The picture in this sense would be a complete model of law.
-
- The issues belonging to the content of jurisprudence are not *„puzzles for the cupboard, to be taken down on rainy days for fun“*, they *„nag at our attention, demanding an answer“*. (Dworkin, Taking Rights Seriously, p.14-15).

- The form of jurisprudence offered here focuses on finding the answer to such questions as „What is law?“, „What are the criteria for legal validity?“ „What is the relationship between law and morality?“ How do judges (properly) decide cases? There is a classic debate over the appropriate sources of law between *positivists* and *natural law schools* of thought.

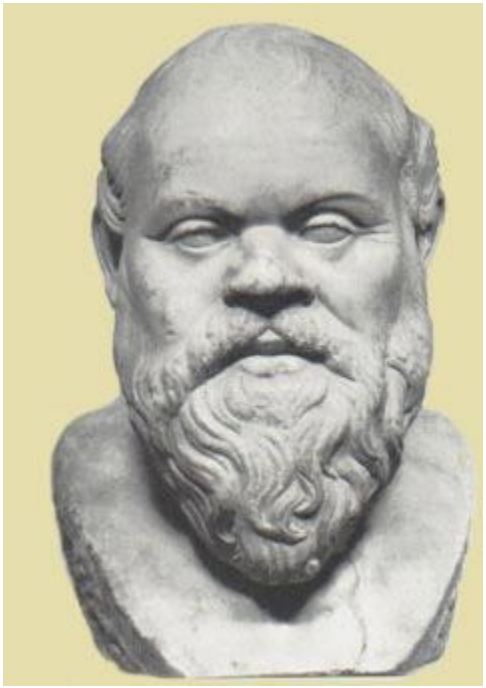
- **Positivists (to nomikon)** argue that *there is no connection between law and morality* and the only sources of law are ***rules*** that have been *enacted by a governmental entity* or by a *court of law*.

- **Naturalists (to fysikon)**, or proponents of natural law, insist that the rules enacted by the government are not the only sources of law. They argue that moral philosophy, religion, human reason and individual conscience are also integrate parts of the law.

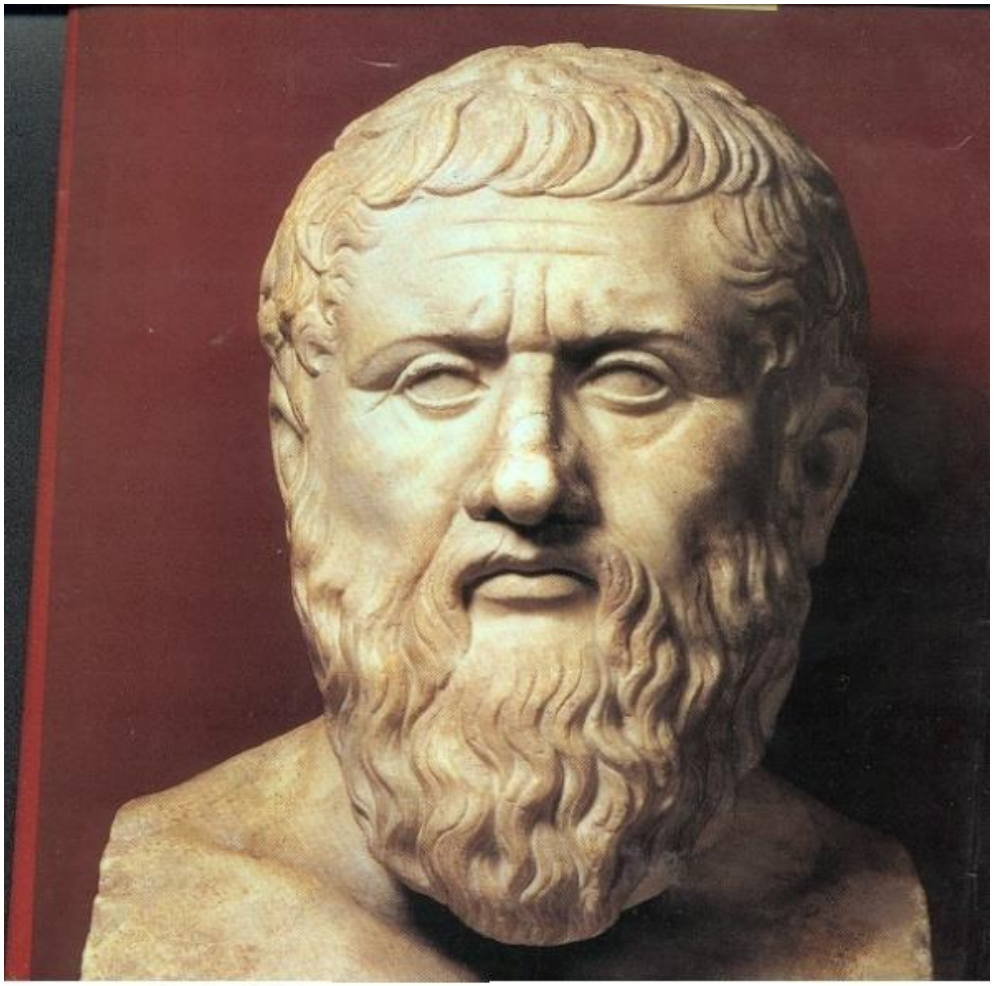
- Naturalists recognize the existence (and the need for) **man-made law** (positive law), but regard this as inferior to natural law.

LYSIPPOS: SOCRATES (370 B. C.)

„OTHER ARTISTS MAKE MEN AS THEY ARE. I MAKE THEM AS THEY APPEAR.“



PLATO (427 – 347 B. C.)



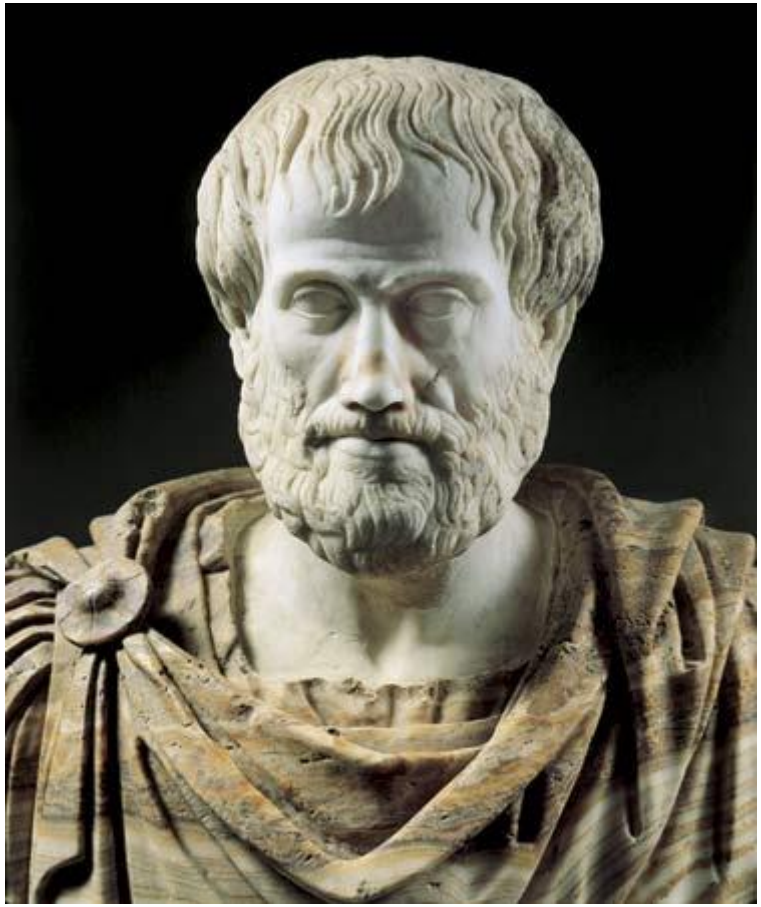
Bust of Plato

PLATO (c. 427 – 347 B. C.)

- Most important contributions to classical Greek legal philosophy were made by Plato (c. 427 - 347 B. C.) and Aristotle (384 – 322 B. C.). Plato was an idealist and in his ***Republic*** (πολίτεία) he set a model for the perfect society. The ***Laws*** (νόμοι) were a more practically oriented proposal to set out a legal code.
-
- If one reasons rightly, it works out that the just is the same thing everywhere, ***the advantage of the stronger*** (to tou kreittonos sympheron).

- **The genesis and essential nature of justice – a compromise between the best, which is to do wrong with impunity and the worst, which is to be wronged and be impotent to get one's revenge.**
-
- Justice is to tell the truth and return back what one has received.
-
- Justice is rendering each what befits him
-
- Justice is the advantage of the stronger

ARISTOTLE (384 – 322 B. C.)



Aristotle (384 – 322 B. C.)

- The word „natural“ in natural law refers to the following idea: Man is part of nature. Within nature man has a nature. His nature inclines him towards certain ends – to procreate children, to protect his family, to protect his survival. To seek such ends is natural to him. (JP, p.53).

- **Aristotle (384 – 322 B. C.)** is often said to be the father of natural law. The best evidence of Aristotle's having thought there was a natural law comes from the *Rhetoric*, where Aristotle notes that, *"there are two kinds of law, particular and general. By* ***particular laws*** *I mean those established by each people in reference to themselves (...); by* ***general laws*** *I mean those based upon nature.*

- *In fact there is a general idea of just and unjust in accordance with nature, as all men in a manner divine, even if there is neither communication nor agreement between them. This is what Antigone in Sophocles evidently means, when she declares that it is just, though forbidden, to bury Polynices, as being naturally just* (Rhetoric, 1373b 2-8, book 1.13.1).” Aside from the “particular” laws that each people have set up for themselves, there is a “common” law that is according to nature.

SOPHOCLES: ANTIGONE

- CREON: Now, tell me thou – not in many words, but briefly – knewest thou that an edict had forbidden this?
- ANTIGONE: I knew it: could I help it? It was public.
- CREON: And thou didst indeed dare to transgress that law?
- ANTIGONE: Yes, for it was not Zeus that had published me that edict; not such are the laws set among men by the justice who dwells with the gods below; nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven.

- In Chapter 5 of the Nicomachean Ethics, in which Aristotle discusses the nature of justice, he says:
- *"There are two sorts of political justice, one **natural** and the other **legal**. The natural is that which has the same validity everywhere and does not depend upon acceptance; the legal is that which in the first place can take one form or another indifferently, but which, once laid down, is decisive: e g that the ransom for a prisoner of the war shall be one mina, or that a goat shall be sacrificed and not two sheep… Some hold the view that all regulations are of this kind on the ground that whereas natural laws are immutable and have the same validity everywhere (as fire burns both here and in Persia), they can see that notions of justice are variable. But this contention is not true as stated, although it is true in a sense. Among the goods, indeed, justice presumably never changes at all; but in our world, although there is such a thing as natural law, everything is subject to change; but still some things are so by nature and some are not, and it is easy to see what sort of thing, among that admit of being otherwise, is so by nature and which is not, but is legal and conventional. …Rules of justice established by convention and of the ground of expediency may be compared to standard measures; because the measures used in the wine and corn trades are not everywhere equal: they are larger in the wholesale and smaller in the retail trade. Similarly laws that are not natural but man-made are not the same everywhere, because forms of government are not the same either; but everywhere there is only one natural form of government, namely that which is best."*

Two kinds of justice according to Aristotle:
Distributive justice

- Existence of a morality higher than that embodied in „good laws“. (Nicomachean Ethics).
- **Distributive justice (*δικαιογ διανεμετικον)*** concerns distribution of honours or of money or all of values that it is possible to distribute among citizens.
- Criterion - Personal value
- Democracy = freedom
- Oligarchy = wealth, riches
- Aristocracy = mental values
- Justice is something proportional (geometric prop.

Corrective justice

- This kind is that which *"supplies a corrective principle in private transactions. This corrective justice (δικαιογ διορτοτικον) again has two divisions, corresponding to the two classes of* ***private transactions****, those which are* ***voluntary*** *and those which are* ***involuntary****."*

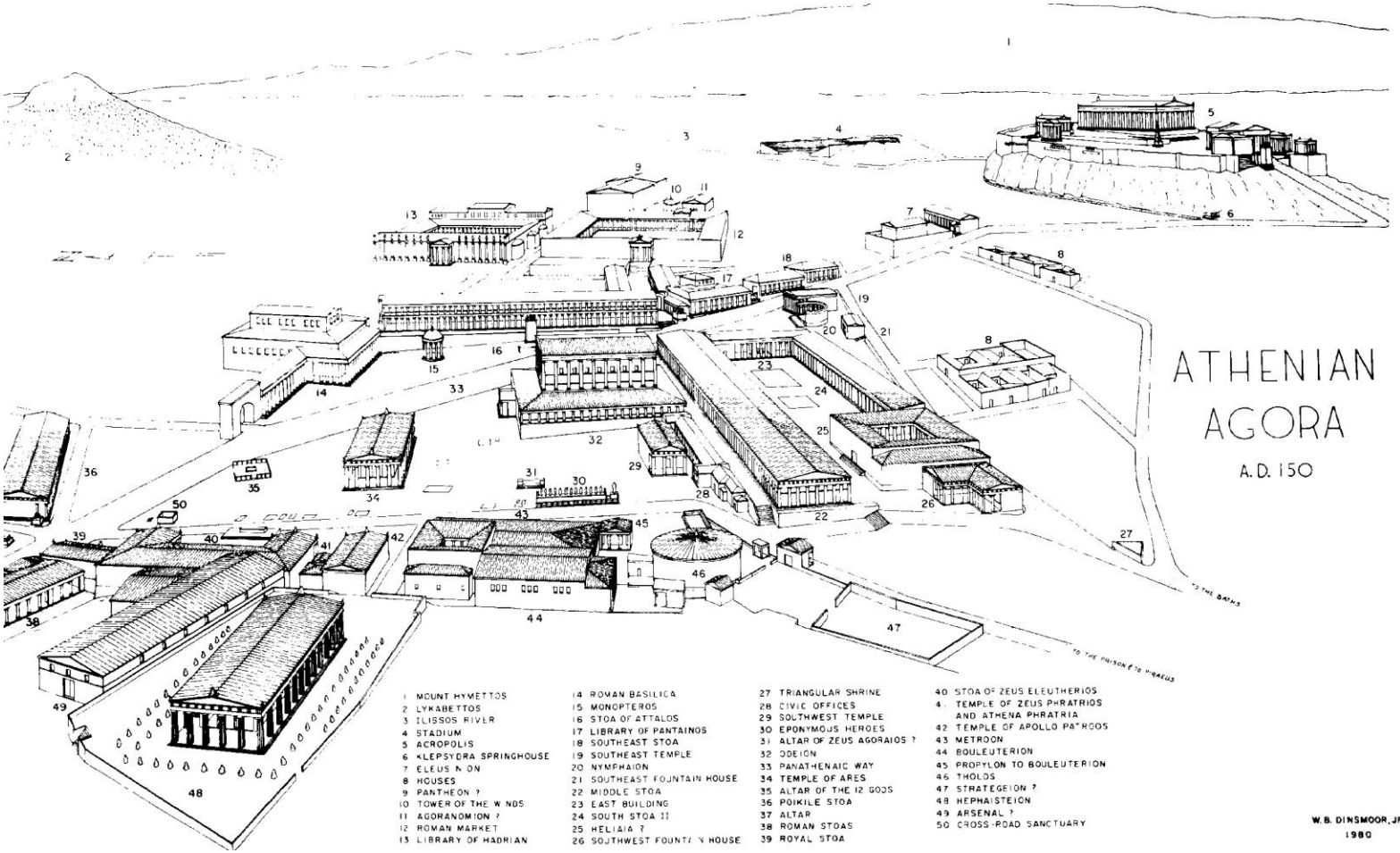
CORRECTIVE JUSTICE

- **Examples** *of voluntary transactions are:*
- *selling, buying, lending at interest, pledging,*

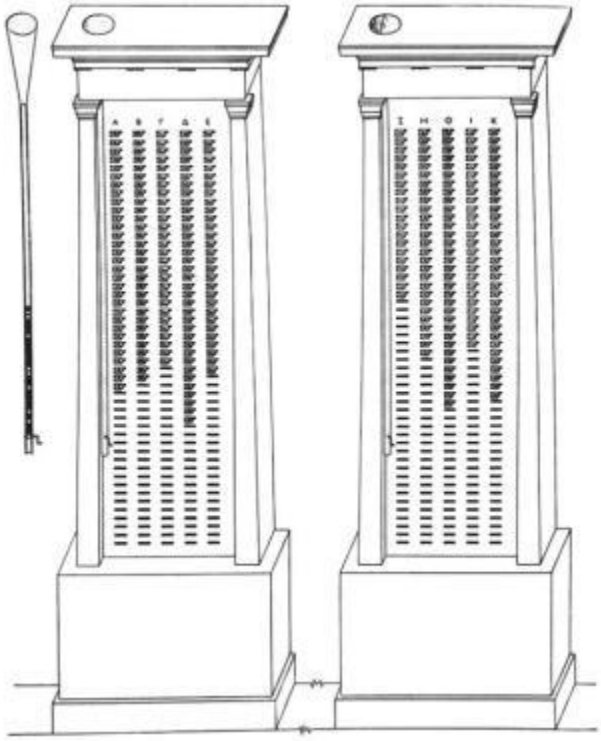
lending without interest, depositing, letting for hire; these transactions being termed voluntary because they are voluntarily entered upon.

- *Of involuntary transactions some are*
- ***furtive**, for instance, theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness; others are*
- ***violent**, for instance, assault, imprisonment, murder, robbery with violence, abusive language, contumelious treatment.".*

ATÉNSKA AGORA



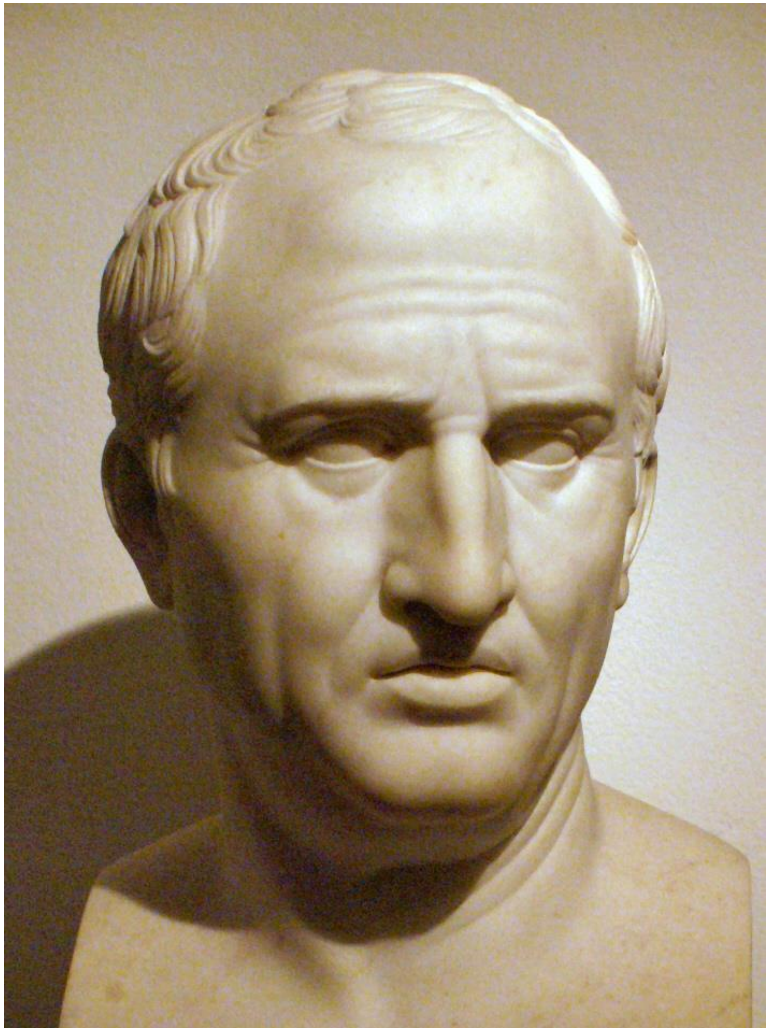
KLEROTERION



Marcus Tullius Cicero (106 – 43 B. C.)

- Cicero was strongly influenced by the works of the Greek stoic philosophers. Most of the themes of traditional natural law are already present in his thought: natural law is unchanging over time and every person has access to the standards of this higher law by use of reason. Cicero states in his Laws that "only just laws really deserve the name law" and "in the very definitions of the term 'law' there inhere the idea and principle of choosing what is just and true."

Marcus Tullius CICERO (106 – 43 B. C.)



In his work *On Duties* (De oficiis) he states:

"Indeed this idea that one must not injure anybody else for one's own profit / is not only natural law, but *an international valid principle: the same idea is also incorporated in the statutes which individual communities have framed for their national purposes. The whole point and intention of these statutes is that one citizen shall live safely with another.*

St Augustine (345 – 430) Christian Platonism

- St Augustine was well qualified to attempt to reconcile the Christian and Hellenistic thought. In his great work *The City of God* (De Civitate Dei).
- The will of God is seen as the highest law, the *lex aeterna* (eternal law), for all people, something in the sense of Stoic cosmic reason.
- Positive law, the *lex temporalis* …

- This opens the question of laws which are not 'good'. Certain statements of St Augustine out of context, have served to fuel the naturalists-positivists debate. The best known of all these statements is the dramatic assertion of that *'lex iniusta non est lex"*.(De Libero Arbitrio, 1. 5. 33)
- According to St Augustine nothing which is just is to be found in positive law (lex temporalis).

THOMAS AQUINAS (1225 –1274)

St Thomas Aquinas Christian Aristotelism

- It was in the work of St Thomas Aquinas (1225-1274), principally in the *Summa Theologica* that the final and most completed synthesis of the doctrine of natural law was achieved.
- **Summa Theologica (Prima Secundae Partis)**
- **Question 90 The essence of law**
- **1. Is law something pertaining to reason?**
- **2. The end of law**
- **3. Its cause**

SUMMA THEOLOGICA, QUESTION 90

- 1. Whether law is something pertaining to reason?
- 2. Whether the law is always something directed to the common good?
- 3. Whether the reason of any man is competent to make laws?
- 4. Whether promulgation is essential to a law?

THE ANSWER (1 – 4):

- **Law is nothing but a rational regulation for the good of the community, made by the persons having powers of government and promulgated.**
- For Aquinas natural law consists of participation by man in the eternal law.

Further reading in Summa Theologica:

- Question 91 Various kinds (of Law)
- Question 93 Eternal Law
- Question 94 Natural Law
- Question 95 Human Law

- Aquinas considers that a provision of positive law may be bad in two ways, it might contravene the *lex aeterna,* or it might be humanly ‘unfair.‘
- „*A tyrannical law made contrary to reason is not straightforwardly a law but rather a perversion of law.*“
- Aquinas argues that the moral obligation to obey the law fails in the case of a, humanly, bad law, unless greater ‚scandal‘ would result from disobedience. This point is spelt out by him also in his *Of the Government of Princes* (De Regimine Principium): here it is urged that some degree of unjust government should be tolerated.

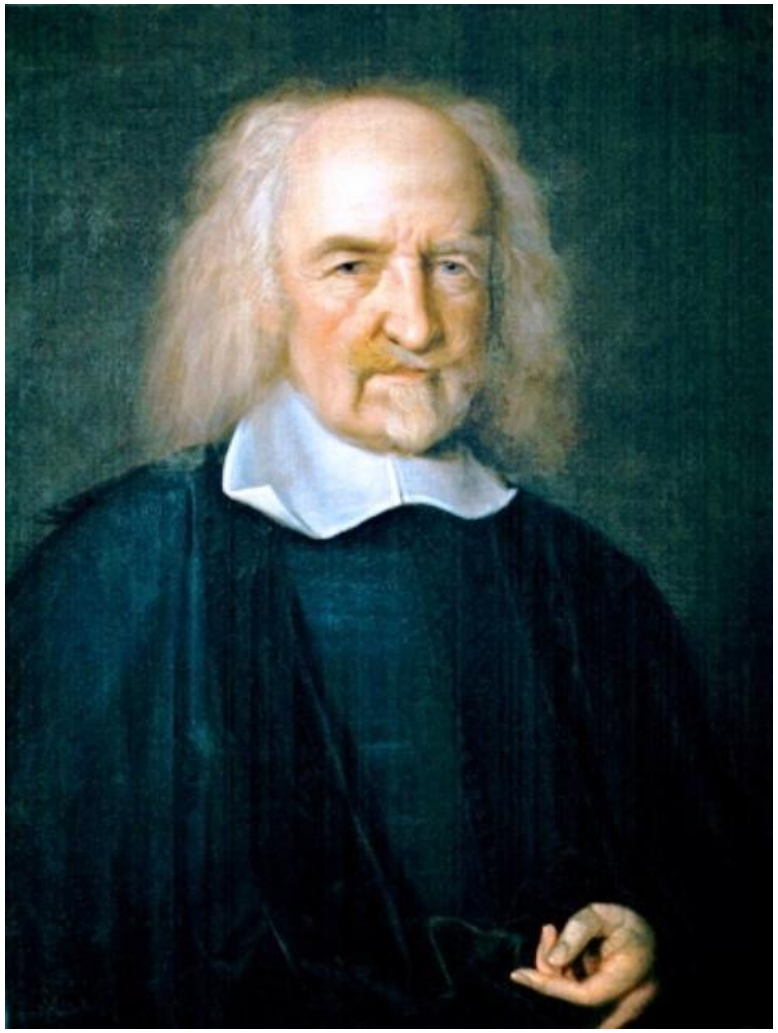
- The theories called „naturalist“ contend in a variety of ways, that law is to be identified by reference to moral or ethical, as well as formal, criteria of identification and in this are criticised for confusing the categories of „is“ and „ought to be“. The roots of this argument in Austin:
- *„The most pernicious laws... are continually enforced as laws by judicial tribunals. Suppose an act [that is] innocuous... be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object... that [this] is contrary to the law of God ..., the Court of Justice will demonstrate the inconclusiveness of mz reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.* (John Austin, The Province of Jurisprudence Determined, In: McCoubrey-White, JP, p. 55)

JEAN BODIN (1530 – 1596)

SOVEREIGNTY

- And before Hobbes, Jean Bodin (*Six Books of the Republic)* published in 1576 had written:
- *It is the distinguishing mark of the* ***sovereign*** *that he cannot in any way to be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law No one who is subject either to the law or to some other person can do this.*
- Sovereignty is the absolute and perpetual power of a Republic (Bodin). (Modern definition: sovereignty as a state of independence of the state power from any power inside and outside the state.)

THOMAS HOBBES (1588 – 1679)

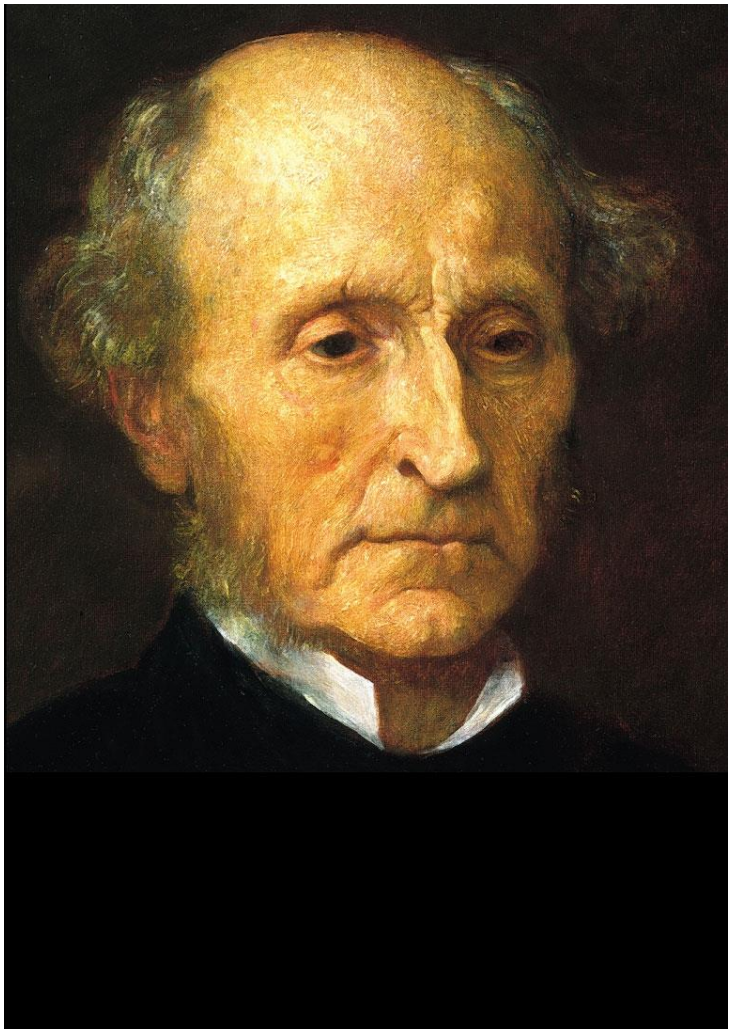


SIR WILLIAM BLACKSTONE (1723 - 1780)

ENGLISH JURIST, JUDGE

- Most noted for his **Commentaries on the Laws of England** (1765-1769 at Clarendon Press at Oxford), designed to provide a complete overview of English law (a four-volume treatise).
- Influence: John Marshall, The Federalists, Abraham Lincoln
- A Discourse on the Study of the Law (1758)

JOHN STUART MILL



THE COMMANDS THEORY OF LAW

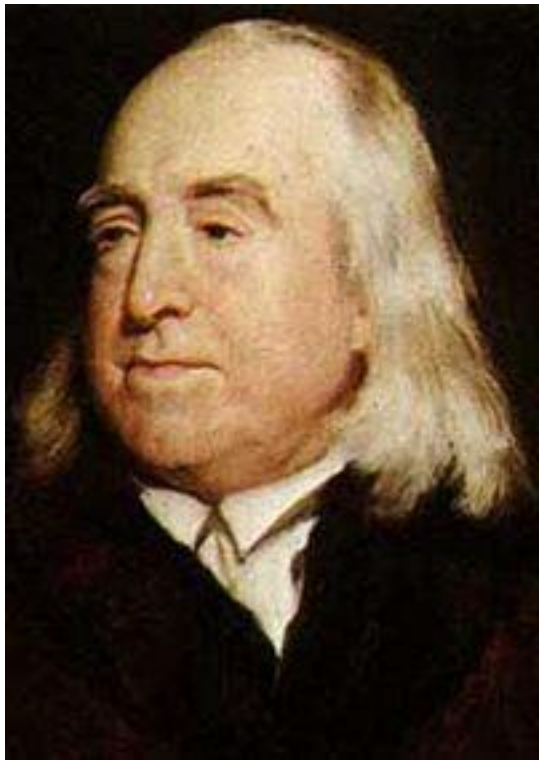
- The commands theory had antecedents earlier than Bentham. **Thomas Hobbes** in **Leviathan,** published in 1651 wrote:

- :"*Civill law [as opposed to international law] is to every Subject, those Rules, which the Common-wealth has Commanded him, by Word, Writing or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong. That is to say, of what is contrary and what is not contrary to the Rule.* ...

- *The Legislator in all Common-wealths, is only the Soveraign, be he one man as in a Monarchy, or one Assembly of men, as in a Democracy or Aristocracy. For the Legislator is he that maketh the Law. And the Common-wealth only praescribes, and commandeth the observation of those rules, which we call Law: Therefore the Common-wealth is the Legislator. But the Common-wealth is no Person, nor has capacity to doe any thing, but by the Representative. (that is the Soveraign;)and therefore the Sovereign is the sole Legislator...*

- *The Soveraign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Laws. For having power to make, and repeale Laws, he may when he pleaseth, free himselfe from that subjection, by repealing those Laws that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himselfe; because he that he can bind, can release; and therefore he that is bound to himselfe onely, is not bound…“*

JEREMY BENTHAM (1748 – 1832)



Jeremy Bentham

- Jeremy Bentham, English jurist, philosopher, legal and social reformer, was one of the most influential utilitarians, partially through his writings. At the beginning of his studies in Oxford he became disillusioned by the lectures of the leading authority, Sir William Blackstone (1723 – 1780). Instead practising law, Bentham decided to write about it. He was influenced by the philosophers of the Enlightenment (such as Beccaria, Helvetius, Diderot, D'Alembert and Voltaire) and also by Locke and Hume.

- *„Nature has placed mankind under the governance of two sovereign masters,* pain *and* pleasure. *It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other hand the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality it will remain, subject to it all the while. The* principle of utility *recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.“* (The Principles of Morals and Legislation, 1789).

- Bentham's definition of law is usually summarized as *'the command of a sovereign backed by a sanction'*. In fact it is a simplification of his view. Bentham defined 'a law' (singularity is important here) as*"an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed… by persons, who are or are supposed to be subject to his power, …"* (Of Laws in General), concerning conduct and supported by a sanction.

- We see here the elements of:

a) ‘command‘ – the will conceived by the sovereign is manifestly imperative,
b) ‚sovereignty‘ and
c) ‚sanction‘, in the attachment of motivations to compliance in the form of anticipated consequences.

Structural Theory of Law or Normologic Atomism

- Bentham tries to show that each legal institute (institution) each legal field, and legal order is composed of nothing else than smallest further not divisible imperatives, i. e. it is just an aggregate of such „imperative atoms“. These atoms Bentham calls LAWS, and LAWS are elements to construct STATUTES of positive law (OLG 12).

- According to Bentham there are 8 dimensions of a LAW which may be observed: its source, its addressees, the behaviour which is to be influenced, the distinction of command, prohibition, permission, non-command, in connection with the question whether LAW can enforce or let free certain behaviour, or motivating means as threatened sanctions.

JOHN AUSTIN (1790 – 1859)

- Bentham's views about law and jurisprudence were popularized by his student John Austin.
- Austin in 1819 married Sarah Taylor: the Austins became neighbours in London of Bentham and the Mills, and for twelve years they lived at the intellectual centre of the movement for reform. Austin was the first holder of the chair of jurisprudence since 1826, when the new University of London was founded. In preparation of his lectures he spent two years in Germany, mainly in Bonn.

- There he read the newly discovered Institutes of Gaius, the Pandects, the works of Hugo, Thibaut and Savigny. His opening lectures in jurisprudence in 1828 were attended by John Stuart Mill and many others of the Benthamites circle, but after the initial success he failed in attracting new students and in 1832 he resigned the chair. The first part of the lectures was published in autumn 1832, entitled *The Province of Jurisprudence Determined*. A second edition of this work was published by Sarah Austin in 1861. From her husband's notes she also reconstructed the main *Lectures on Jurisprudence or the Philosophy of Positive Law*, publishing them in 1863.

- Austin insisted that the science of „general Jurisprudence“ consists in the „clarification and arrangement of fundamental legal notions“.
- Basic building-stones of Austin’s theory of law are, that law is *“commands backed by threat of sanctions; from a sovereign, to whom the people have a habit of obedience* (The Province of Jurisprudence Determined, 1832).”
- Before giving a definition of law, Austin identifies what kind of law he is seeking to define. He says, that there are various kinds of law in the broadest sense; for example God’s laws, and the laws of science.

- At the head of the tree comes a signification of desire (a desire for example, that somebody should not travel faster than a certain speed). Two kinds / a request (admonition) and a command, in which a power exists to inflict evil or pain in the case the desire be disregarded.
- Commands of two kinds:
- Where a C obliges generally to acts or forbearances of a class, a command is a law, but where it obliges to a specific act or forbearance, a command is occasional or particular. Thus C are either general or particular. Law - order.
- Law's set by God to human creatures and law set by men to men. Human laws / 2. Not as political superiors. Parent / children.

- For Austin ‚law strictly so called' consists of a command given by a sovereign enforced by sanction.
- The aspects of his concept are:
- (1) The common superior must be **'determinate'**. A body of persons is ‚determinate' if ‚all the persons who compose it are determinated and assignable'. Determinate bodies are of **two kinds.** (a) In one kind the ‚body is composed of persons determined specifically or individually
- (2) The society must be in ‚the habit of obedience'. If obedience ‚be rare or transient' and not ‚habitual or permanent' the relationship of sovereignty and subjection is not created and no sovereign exists.

- (3) Habitual obedience must be rendered by the generality or bulk of the members of a society to … one and the same determinate body or persons‘.
- (4) In order that a given society may form a political society, the generality or bulk of its memebers must habitually obey a superior determinate as well as common.
- (5) The common determinate superior to whom the bulk of the society renders habitual obedience must not himself be habitually obedient to determine human superior.
- (6) The power of the sovereign is incapable of legal limitation. ‚Supreme power limited by positive law is a flat contradiction in terms‘.

- Law strictly so called into two.
- Law set by man to man in pursuance of legal rights. Civil law such as in the law of contract, or tort, and property. The sanction here took a form of an obligation in the shape of an order of the court, e.g . to pay damages or to restore property, coupled with the sanction of imprisonment if the obligation was disregarded.

- **Law is a command given by a determinate common superior to whom the bulk of the society is in the habit of obedience and who is not in the habit of obedience to a determinate human superior, enforced by sanction.**