Abstract: Philosophers and lawyers have long argued about the relation of law to politics: “does the king make law” or “does law make the king”? This persistent debate stems from two different perspectives on the nature of law. Professors of law have long noted that laypersons tend to speak of “a law” and the “laws” while lawyers tend to speak more holistically of “the law.” After discussing how rival perspectives in legal theory can be compared and evaluated, several dimensions of this contrast between the lay and the lawyerly conceptions of law: the individuation of laws, the sources of law, the ethical and imperative aspects of law, and the nature of the rule of law are analyzed. The distinction between a lawyerly and a lay perspective on law is reflected in the traditional linguistic and conceptual distinction between ius and lex. Many of the classic philosophers of law, from Plato to Hobbes, are rank laymen when it comes to their descriptions of law since the lawyerly understanding of law has only very recently achieved philosophical articulation.

Preface: Persistent Questions

Ever since Plato distinguished the rule of law from the rule of men (Statesman 300A–303B), jurists and political theorists have continued to argue about how to characterize the relation of law to politics. Plato sharply contrasts the administration of justice according to law with the administration of justice according to the unfettered wisdom of the rulers. The ideally best regime, he argues, is the rule of the unfettered judgment of the fully virtuous while the worst regime is the rule of the unfettered judgment of the vicious. Yet because tyrants are so much more common than wise and virtuous rulers, Plato emphasizes the importance of the rule of law as a “second-best” regime: not as good as the rule of unfettered wisdom but better than the rule of sheer caprice. After Plato, the debate is not about justice according to law and justice without law, but rather the question of the relation of political power to law: assuming a government both of laws and of men, where does supreme authority lie? As the medieval
scholastics framed the question, “does the king make the law or does law make the king?” Champions of the rule of law emphasize the constraints that the rule of law (especially constitutional norms and an independent judiciary) place upon the exercise of political power while champions of political sovereignty emphasize the impotence of mere “parchment barriers” and the use of law as an instrument of political power.

Arguments about law and politics have a chicken and egg quality: each seems plausibly prior to the other. The legal conception of politics insists that the government itself and its law-making powers are themselves the product of law and are constrained by principles of both constitutional and private law. The political conception of law, however, insists that all laws are the creatures of particular men and particular regimes, that law has no efficacy apart from being interpreted and applied by men, and that law is best understood as but one among several main instruments of political power and policy. Is law primarily a system of hedges and channels that constrain political power or a resource or tool for transmitting and facilitating the exercise of power? We want to resist saying either simply that “law makes the king” or “the king makes the law”: each formula seems plausible, yet one-sided. But how can they both be true? No wonder our jurists and political theorists continue to argue about how to characterize the relation between political authority and law.

These debates about the relation of law to politics are at the center of both jurisprudence and political philosophy. A legal conception of politics focuses our attention upon the formal institutions of government and the norms and conventions that define the location and the scope of political power. Here the actions of public officials are evaluated in relation to the legal norms that are said to define their duties. By contrast a political conception of law focuses our attention, not upon the formal institutions of government, but the allegedly deeper sources of political power and influence within the society. Here the actions of public officials are evaluated in relation to the field of political forces, the pressures of party, lobbyists, financiers, and public opinion. To what extent does law have an independent causal role in shaping politics? Or is law merely deployed strategically or ignored in the play of powerful interests? Are our fundamental rights and liberties ensured by enduring law or merely by transient balances of power?

Joseph Raz discusses some of the puzzles about the relation of law to politics and usefully suggests a way to make sense of them: “The solution to this riddle is in the difference between the professional and the lay sense of ‘law.’”¹ I will pursue this suggestion that the legal interpretation of politics and the political interpretation of law rest upon two rival perspectives on the nature of law. Once we distinguish these two perspectives on law we

see why it is plausible to assert both that “law makes the king” and that “the
king makes law”. I will not adopt Raz’s particular interpretation of the dis-
tinction between the professional and the lay meaning of law, but I think my
interpretation is consistent with his. Distinguishing these two senses of law
will illuminate not only our understanding of the rule of law but also of the
nature of law.

**Are Rival Perspectives Commensurable?**

It is often observed that where you stand depends on where you sit. How we
understand and how we evaluate the rule of law will often reflect, implicitly
or explicitly, a particular point of view. Although Edward Coke argued that
law could be understood only from the perspective of the artificial reason of
a lawyer, Oliver Wendell Holmes, Jr., famously invited us to consider the law
from the point of view of a bad man seeking to avoid legal penalties. John
Austin treated law from the point of view of a sovereign legislator, while
Ronald Dworkin assumes the perspective of an appellate judge. I will
attempt to show that laymen, including many classic philosophers of law,
talk and think about law in ways distinctively different from that of pro-
fessional lawyers. In all this implicit and explicit perspective-taking, little
attention is devoted to the question of whether some perspectives might
be superior to others, in the sense of more comprehensive. Who is in a pos-
tion to compare alternative perspectives?

Where there is a clash between perspectives on the value of some good, we
naturally seek the perspective of someone who has occupied, and can under-
stand from within, both rival perspectives. In the war between the sexes, we
 sorely lack the perspective of someone who has been both; in clashes
between nations we often seek the counsel of immigrants and émigrés; in
the midst of partisan wrangling it is helpful to hear from political turncoats;
in the throes of religious strife we enjoy the perspective of converts. We think
that a person who has occupied both of the relevant perspectives might be
best positioned to compare and to rank them. Plato argues that a philoso-
pher, of necessity, has experienced from childhood, and can understand,
the love of profit and the love of honor, but that the lovers of profit and of
honor have not necessarily experienced, nor can they understand the love
of wisdom. So only a philosopher can judge the relative merits of wisdom,
profit, and honor.² A philosopher’s more comprehensive perspective
includes and transcends the partial perspectives of the lovers of profit or
honor.

By contrast, Aristotle, who strongly distinguishes theoretical from practi-
cal wisdom, does not offer the philosopher as the ideal judge of the rival
goods of human, but rather the accomplished man of affairs (spoudaios):

²Plato Republic 582a–e.
what appears good to him, he says, really is good.\(^3\) Aristotle seems to draw on an implicit distinction between partial and comprehensive perspectives when he observes about the members of a democratic assembly, that “although individually they may be worse judges than are those with special expertise, as a body they are as good or better.”\(^4\) Presumably, the process of democratic deliberation melds a variety of partial perspectives into a more comprehensive and adequate perspective. In this same discussion of the merits of democracy, Aristotle goes on to say that in some arts, the user of an artifact will actually be a better judge of it than the maker: the master of a house, he says, is a better judge of it than the builder and the guest is a better judge of a meal than the cook.\(^5\) Given Aristotle’s teleology, this makes sense: since houses are built to be lived in and since meals are prepared to be eaten, the perspective of the dweller and the diner have logical priority. Yet this principle seems to conflict with the principle of the superiority of the most comprehensive perspective: since every house-builder is also a house-dweller and since every cook is also a diner we should expect the builder’s and the cook’s perspective to include and transcend that of the mere dweller and the mere diner. We can, however, reconcile these principles simply by observing that although the diner and the dweller have the most important perspectives on houses and meals, a builder and a cook are in the best position to grasp that truth since they alone occupy both rival perspectives.

I shall be exploring the rise and significance of two perspectives on law, that of the lawyer (broadly) and the layman. I find evidence for these rival perspectives in the distinctive ways in which each refers to law: lawyers speak of “the law” (\textit{ius, droit, Recht}) while laymen speak of “a law” (\textit{lex, loi, Gesetz}) and of “laws”. I argue that this linguistic contrast reveals a set of systematic conceptual contrasts. Lawyers and laymen have systematically different ways of talking and thinking about the nature of the rule of law and about the relation of law to government. Since all lawyers were once laymen, but not the converse, I will try to show that the lawyer’s understanding of law includes and transcends the layman’s: the concept of “the law” includes and transcends the concept of “a law.”

**The Lawyer and the Layman**

Many law professors have commented on the gulf between the lay and the lawyerly view of law. After all, law professors, such as Lon Fuller and


\(^4\)Aristotle \textit{Politics} 1282a 15 (Jowett translation).

\(^5\)Aristotle \textit{Politics} 1282a 17.
Phillip Areeda of Harvard and Fred Rodell of Yale, are charged with the task of initiating laymen (including, of course, women) into the mysteries of the legal profession. According to these professors, how do laymen view the law? First, the layman thinks of “the law” as an aggregate of laws, that is, statutes, ordinances, and by-laws; these are the laws we read about in the newspapers.6 “The layman...views the law—both statutory and common law, if he is aware of the difference—as a self-contained array of detailed rules, like the Internal Revenue Code. The source of this lay view is easy to understand. Most citizens have little conscious contact with the law beyond traffic or tax regulation or occasional news stories about a Supreme Court pronouncement.”7 Professor Areeda goes on to note that even Supreme Court decisions are presented in the media as legislative edicts rather than as the product of judicial reasoning.

Prominent among these laws are the statutes, ordinances, and codes defining criminal conduct. That the criminal law should be so salient to laymen is hardly surprising; we all have a strong and well-founded aversion to (and fascination with) the coercive power of the criminal law.8 Indeed, it has long been observed that the criminal law is the only branch of law about which the layman feels entitled to have opinions—though contemporary American laymen frequently have opinions about their constitutional rights as well. Yet because the criminal law is so widely taken to be the paradigm of law, by metonymy, the features of criminal law are regarded as features of all law. Laws are, thus, discrete precepts, rules, commandments forbidding, permitting, or requiring specific actions—necessarily accompanied by some penalty. Where do we find laws? Primarily, for laymen, in the enactments of legislatures. When a layman exclaims: “There ought to be a law!” he means a statute, not a principle, standard, or rule of jurisprudence. Nor have popular views of law changed much over time: Cicero frequently complains that the crowd takes law (ius) to be only what is enacted by statute (lex).9 Although Cicero was not a jurist, as a pleader, he learned a good deal about Roman law from the jurists he consulted.

One of the chief purposes of legal education, especially in common law jurisdictions, is to undermine the lay view of the laws as a promiscuous

6“The chief reason why it is so hard for the ordinary man to get the lawyer’s picture of the Law . . . is that the ordinary man generally thinks of law as a composite of all the little laws that his various governments are forever passing and amending and, occasionally, repealing” (Fred Rodell, Woe Unto You, Lawyers! [New York: Reynal and Hitchcock, 1939], p. 25).
8“For the lay observer the criminal law in some measure symbolizes the law as a whole” (Lon Fuller, Anatomy of the Law [New York: Mentor Books, 1968], p. 17).
9Cicero De Legibus I, vi, 19.
heap of statutes and to introduce students to the Law. As Rodell puts it: “To the lawyer, there is a vast difference between The Law and the laws. The Law is something beyond and above every statute that ever has been or could be passed.”10 What do lawyers mean by “the Law”? When lawyers speak of “the law of England” or “the law of contract,” they are not referring to an aggregate of “laws”: as Salmond says, “that a will requires two witnesses is not rightly spoken of as a law of England; it is a rule of English law.”11

To begin with, it is misleading to speak of the law as an aggregate of discrete rules, first because it is not an aggregate, and second because it is not made up solely of rules. The law includes a bewildering assortment of heterogeneous items including, but not limited to: rules, principles, customs, standards, categories of classification, canons of interpretation, maxims, doctrines, and ideals. The law is not merely an aggregate of discrete rules because law is crucially the art and technique of interpreting, developing, and applying these heterogeneous norms in the administration of justice.12 Although most students begin the study of law assuming that they will be required to memorize a large number of laws, law school deans and professors try to explain that the study of law is not so much the study of laws as the study of legal reasoning, of the techniques and methods for discovering, interpreting, reconciling, and applying legal norms to specific cases.13 Even if one knew every discrete rule of law ad seriatim, such knowledge would be all but useless if one did not also know how to reconcile competing rules, how to interpret vague statutes, or how to meet situations never anticipated. The law is the complex enterprise of coordinating and harmonizing a diverse set of overlapping norms to guide conduct and to adjudicate disputes. Talk of “the laws” creates the misleading impression that the rules, principles, standards, customs, and doctrines can be understood as isolated monads.14 Since the lawyers’ expression “the law” focuses attention on the unity and integrity of a body of precepts, and since the common law has the most complex (and, perhaps, elusive) unity, the common law is taken

10Rodell, Woe Unto You, Lawyers!, p. 25.
11“Law or the law does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws but rules of law or legal principles.” John Salmond, Jurisprudence (London: Stevens and Haynes, 1902), p. 11.
12“It is The Law, working unimpeded to produce the common law, working through the words of constitutions to produce constitutional law, working through the words of both statutes and constitutions to produce statutory law” (Rodell, Woe Unto You, Lawyers!, p. 33).
13True, some legal theorists reject the view that there is a distinctive form of legal reasoning but most lawyers think there is.
14“If we were to adopt the habit of describing ‘a rule of the common law’ as ‘a common law,’ we might soon forget that to understand this ‘law’ we must see it in the context of a larger system of thought of which it is a part” (Fuller, Anatomy of the Law, p. 153).
by most Anglo-American lawyers to be the prototype of law, just as the individual provisions of the criminal code are taken by most laymen to be the prototypes of laws. Ultimately, however, the law cannot be identified with the common law; rather, the law is the complex system of principles and juristic techniques whereby common law, statutory law, constitutional law, administrative law, and other bodies of law are woven into harmony.

The layman is typically surprised to discover that the law is not merely a set of specific rules defining what constitutes a crime or makes a will valid, but that it is also, and perhaps more fundamentally, a set of principles, such as “no man may profit by his own wrongdoing” and “hear the other side”—many of which we have inherited from classical antiquity.15 Where there are no applicable rules or where the applicable rules might lead to gross injustice, cases are often decided by reference to these basic principles. In the famous case of *Riggs v. Palmer* (1889) a New York court had to decide whether a legatee who had murdered his testator would be permitted to enjoy the benefits of the will. The court began by admitting that the statutory rules governing the making, proof, and effect of wills, if literally construed, give the property to the murderer. But the court continued by observing that “all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.”16 The murderer did not receive his inheritance because laws are ultimately controlled by the law, and rules by principles. 17 Statutes, rules, doctrines, standards, and even constitutions come and go, but the fundamental principles of the law endure.18

Since the layman is also accustomed to thinking that American laws, for example, derive from American political institutions, he may well be surprised to discover that some English court decisions have had more effect on American law than virtually any American statute (e.g., *Hadley v. Baxendale*), and that important parts of our common law were lifted from Justinian’s Digest of Roman Law as well as from the work of private

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15On the role of leading principles in English law, see Herbert Broom, *Legal Maxims* (London: Sweet and Maxwell, 1900).

16For discussions of this and analogous cases, and for an argument that there is an important logical distinction between rules and principles, see Ronald Dworkin, “The Model of Rules” in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), pp. 14–45.

17For a discussion of other cases, Anglo-American as well as civilian, in which the rules of law were set aside in favor of principles of justice, see Edgar Bodenheimer, *Jurisprudence* (Cambridge, MA: Harvard University Press, 1974), pp. 350–57.

18The principle decisive in the case of *Riggs v. Palmer*, for example, is found in Justinian’s Digest of Roman Law (D. 50.17.134): *Nemo ex suo delicto meliorem suam condicionem facere potest*. 
scholars such as Blackstone and Vattel. Now the law is beginning to look very different from enacted laws: the law seems more permanent, more coherent and, perhaps, more just, than the laws. While laws seem to rest on political authority, the law seems to have its own authority—an authority resting largely on its prestige for a community of lawyers not limited by time or place to our particular political community.

Thus, lawyers have spoken the discourse of the Law (ius) while laymen have preferred the discourse of a law and laws (lex and leges). In this sense, philosophers turn out to be rank amateurs. Philosophers, like all laymen, tend to refer to “laws” in the plural: thus Plato’s treatise is titled Nomoi, leading Cicero, Aquinas, and Suarez to write their treatises as De Legibus; Hobbes, too, titles his work A Dialogue between a Philosopher and a Lawyer on the Common Laws of England. The leading jurists of the Roman law, by contrast, whether the ancient Ulpian, Gaius, and Paulus or the modern Grotius, Pufendorf, Vattel, and Wolff, title their treatises “On The Law” (De Jure). Of course, legal philosophers who are also professional lawyers tend to speak more holistically about the law (Fuller, Hart, Raz, Dworkin, Finnis).

Ius and Lex: Two Concepts of the Rule of Law

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If philosophy is the glory that was Greece, law is the grandeur that was Rome. The private citizens of the Roman Republic who acquired expertise in law and who offered their legal analysis to Roman citizens and officials were the first class of expert jurists, or what I shall call “professional lawyers” in the Western legal tradition. The ancient Athenian legal process wholly lacked legal professionals and involved lay orators pleading before lay judges and juries. Ever since the rise of the professional jurists at

19“The judges of the common law have always drawn their general rules from a variety of sources and with rather free disregard for political and jurisdictional boundaries” (Fuller, Anatomy of the Law, pp. 153–54). “Some of the greatest of our judges—Mansfield in England, Kent and Story here—were never weary of supporting their judgments by citations from the Digest” (Benjamin Cardozo, The Nature of the Judicial Process [New Haven: Yale University Press, 1921], p. 123).
Rome, lawyers have talked about the law in ways subtly but importantly different from the ways in which laymen talk about it. Modern civilian jurists have preserved this conceptual contrast by means of wholly new words. I will attempt to theorize the complex set of conceptual contrasts embodied in the verbal contrast of *ius* and *lex* and attempt to relate them to the contrast between the lawyer’s and the layman’s view of law.

Few jurisprudential words have as long, as complex, and as momentous a history as do *ius* and *lex*; indeed, a history of these two words would be tantamount to a history of the ancient and modern Roman law. It would be folly to attempt to exhaustively define words with such a storied history. Moreover, my interest here is not philological but philosophical; I am concerned not with the words *ius* and *lex* as lexical items, but rather with the concepts broadly signified by these words. Indeed, there is no etymological relation between the ancient *ius* and *lex* and their modern counterparts in the languages of European jurisprudence. Nonetheless, with the notable exceptions of English and Greek, most modern European languages have managed to preserve the basic conceptual contrasts of *ius* and *lex* by means of wholly unrelated words. So, when I speak of *ius* and *lex*, I mean to refer not to the Latin words, but to the set of concepts signified by those ancient words and their modern counterparts. I will attempt to draw philosophical lessons about the rule of law from the meanings of *ius* and *lex* in ancient Roman jurisprudence. Justinian solemnly prohibited all commentary upon his compilation of the ancient Roman law, so it is ironic that his work has provoked more scholarship over the past millennium than any other set of books apart from the Bible. I have attempted to glean some philosophical pearls from the vast ocean of Roman law scholarship by relying upon some of the leading modern scholars of the ancient Roman law. The scholarly conclusions I report have broad support across this international body of scholars, though few generalizations about the 1,000 year history of Roman law are beyond contest.

What is the significance of this twofold vocabulary and twofold conceptual scheme in jurisprudence and legal philosophy? In each language, these terms signify a series of jurisprudential contrasts: between the body of law as a whole and an individual statute, between the traditional legal techniques and new enactments, between the ethical and the imperative dimensions of law, and between law as a medium of individual liberty and law as a managerial directive. Of course, the ancient *ius*, like its modern counterparts, refers not only to what is objectively right but also to a subjective right or claim. In the plural, *ius* (*iura*), usually refers to rights, not laws. But the much controverted question of the origin and meaning of subjective rights is not relevant to the central contrasts between *ius* and *lex*. While the lawyer has a sophisticated understanding of the relation of *ius* to *lex*, the layman tends to think of law as nothing more than an aggregate of *leges*. 
I am aware that the lexical meanings of *ius* and *lex* (as well as their modern counterparts) have shifted and evolved over time, and I will discuss some of these shifts. The history of the relation of *ius* to *lex* is nothing less than the history of the ancient and modern Roman law. I will attempt no such history. Just because *ius* and *lex* have an evolving and contingent history does not mean that they lack an essential conceptual core. As a philosopher, I will take the liberty of developing *ius* and *lex* into transhistorical ideal types; my aim will not be to describe how *ius* and *lex* have been used in this or that period by this or that author, but, based upon the best Roman jurists, to prescribe how *ius* and *lex* ought to be used. Let us explore these two words for law and see what they might tell us about lawyers, laymen, and the rule of law.

Since the ancient and the modern words for *ius* and *lex* are not etymologically related, the etymology of *ius* and *lex* will certainly not settle the question of their conceptual significance. To borrow a helpful biological distinction, *ius* and *lex* resemble their modern counterparts not from lexical homology but from conceptual analogy. Nonetheless, the etymology may be suggestive of some of the broad contrasts between these two sets of words. Even when etymologies are fanciful, they are revealing of an author’s understanding of what a word’s origins ought to be. The leading historical linguists of the twentieth century agree about the origins of *ius*: Benveniste derives *ius* from the Indo-European “yous,” which means “a state of regularity or normality, as required by the religious rules.” Dumézil adds that the “yaus” refers to what is normal as well as to what is optimal. There is less agreement about the origin of *lex*. Most modern scholars derive it, as did Thomas Aquinas, from *ligare* (to bind), though it has also been linked to words for what is laid down and what is read out or stipulated.

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22 The other candidates for *lex* are the Indo-European “lagh” (laid down) or “legere” (to read out). For Aquinas’s view, see *Summa Theologicae*, I–II, 90.1c. Bleichen agrees that *lex* is a binding stipulation: “lex als Bedingung ist Form der Bindung”; see *Lex Publica*, p. 61n. Cf. A. Arthur Schiller, *Roman Law: Mechanisms of Development*
What these etymologies suggest is that *ius* refers more widely to the normative order as a whole, while *lex* refers to a particular kind of norm, whether described as binding, or laid down, or read out. In this contrast, *ius* refers to the body of law as a whole, or indeed, to the rule of law in general, while *lex* refers to one particular instrument or part of that whole, namely, an enactment or statute that is binding, laid down, and read out. Moreover, the etymology of *ius* points to the ethical dimension of the normative order: the normative order is not just normal but optimal; *ius* means the rule of law as well as the rule of what is right and just (*iustum*). So *ius* refers to the ethical, and *lex* to the imperative, dimension of the rule of law. It thus makes sense that those who deny any necessary connection between the ethical and the imperative dimension of law tend to use *lex* rather than *ius* as their main word for law, as do Hobbes, Bentham, and Oakeshott. Many of the traditional descriptions of the relation of *ius* to *lex* in ancient Roman law have been discredited by modern scholarship. *Ius* and *lex* are not related as custom to law, or as unwritten law to written law, or as private law to public law; rather, the best scholarship characterizes the relationship as that of lawyers’ law (sometimes including statutory law) to statutory law alone.23

Still, despite these very different etymologies, and despite the fact that, in Republican and Classical Roman jurisprudence, *ius* primarily refers to the whole body of law (*ius civile*) while *lex* primarily refers only to a statute,24 throughout antiquity, the Middle Ages, and modernity, *lex* and *leges* have also been used even by jurists to refer to the whole rule of law. As we shall see, one reason for this use of *lex* to refer to the whole body of law is that statutes have a special salience and prestige, especially to laymen, so

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24Ateius Capito (in Gellius’s *Noctes Atticae* X.20.2): “*Lex* is a general order of the people or of the plebs, upon a proposal of a magistrate.” Gaius (*Institutes* I, 3): “*Lex* is what the people orders and decrees.”
that the statutory part of law is commonly and understandably taken for the whole of law. A second and closely related reason is that philosophers ever since Plato have defined law in terms of a law (nomos) or an aggregate of laws (nomoi). Because Cicero translates Plato’s nomos as “lex,” Cicero frequently refers to the whole body of law as lex or an aggregate of leges, especially in his treatise (De Legibus) modeled after Plato’s Nomoi. Even Roman jurists, who should know better, are sometimes slaves to Greek fashion and use lex to refer to the whole of the law or use the expression “laws and customs”—terminology utterly foreign to Roman law. Third, as imperial edicts, decrees, and other enactments began to dominate the growth of law, lex understandably came to be used increasingly to refer to the legal system as a whole. Although Gaius says (Institutes I, 5) that an imperial enactment (constitutio) obtains the place of a lex (legis vicem), later jurists will simply call an imperial enactment a lex. With the growth of imperial legislation in the period from Diocletian (284) to Justinian, the word lex increasingly came to refer to the whole legal order.

Still, despite the vagaries of historical usage, jurists have always attempted to preserve the fundamental distinction between ius as the law and lex as a law (or statute). The contrast of ius and lex was born and will flourish wherever we find a contrast between legal professionals and laymen, which is why ius and lex is foreign to ancient Greek legal

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25Cicero explains why he renders nomos as lex in De Legibus I, VI, 19.

26When he is following the example of the jurists, Cicero uses ius to refer to the body of law and lex as one of the partes iuris (De inventione 2.65–68 and 2.160–162); but when he is following the example of the Greek philosophers and rhetoricians, he sometimes divides the whole ratio iuris into natura and lex or refers to law as nostrs mores legesque (Partitiones oratoriae 37.129–130; or he uses lex to refer to the entire body of law: “ergo est lex iustorum iniustorumque distinctio” (De Legibus II, V.13); “sed quoniam lege firmius in controversias disceptandis esse nihil debet…” (Topica 25.95). For other examples, see Peter Stein “The Sources of Law in Cicero,” Ciceroniana 3 (1978): 19–31.

27See the references to lex as universam ius civitatis or lex Romanae or lex municipalis among the jurists in Vocabularium iurisprudentiae romanae, s.v. lex (p. 1533). Even Gaius is clearly seduced by Greek fashion when he opens his Institutes by saying that “omnes populi, qui legibus et moribus reguntur”; this is just a translation of the Greek cliché nomois kai ethesi. See Fritz Schulz, History of Roman Legal Science (Oxford: Clarendon Press, 1946), p. 137.

28Roscoe Pound says that the first use of lex to refer to the whole legal system after Cicero is in the Lex Dei siue Mosaicarum et Romanarum Legum Collatio, from the end of the fourth or early fifth century. See his Jurisprudence, 2:29. This treatise in comparative law cites Moses along with Paulus and Ulpianus on the criminal and civil law, see Textes de Droit Romain, ed. Paul Girard, 6th ed. (Paris: Rousseau, 1937), pp. 572ff. And Savigny said of codes such as the Lex Salica and the Lex Romana that “lex here means not Gesetz but Recht” (see Savigny, Geschichte des Römischen Rechts im Mittelalter, vol. 1, 2nd edition [Heidelberg: Mohr, 1834], par. 37.
discourse. John Salmond rightly noted the superiority of the Roman over the Greek legal discourse: “Greeks spoke and wrote of the laws (nomoi), while the Romans, perhaps with truer legal insight, concerned themselves with the law (jus).” The Greek philosophers were certainly aware that not all legal norms were statutory; they frequently contrasted law imposed from above (nomos or nomothesia) to custom arising from below (nomima or ethos): indeed, nomos can refer to both statute and custom. Greek philosophers and orators often distinguish the statutory law as written (nomos gegrammenos) from the customary law as unwritten (nomos agraphos). There is widespread agreement among leading modern scholars that these commonplaces of Greek legal discourse are utterly alien to Roman jurisprudence and, despite the fact that Roman jurists often adorn their treatises with them, these Greek distinctions distort our understanding of Roman law and of lawyers’ law generally. For example, the distinguished scholar of medieval law, Walter Ullmann, frequently attempted to interpret Roman law in these Greek terms as either ascending from custom or descending from legislation. But it is deeply misleading to characterize any complex legal system simply in terms of ascending custom and descending legislation, for to do so is to neglect the fundamental role of the legal profession to create a body of law by mediating the pressures of popular custom from below and the legislative acts from above. Law in any complex legal system cannot be understood apart from the activity, the ideas, and the customs of the legal profession itself: the custom of the court is the law of the court (cursus curiae est lex curiae).

29 jus was rendered in classical Greek alternatively by dikaion (the just), nomos (law), and exousia (authority); see Thesaurus Linguae Latinae, s.v. ius (679.60). “There is nothing in the Greek language exactly corresponding to the Latin jus. The Roman term cannot be translated by nomos, which is mainly used for statutory law—lex. Nor is to dikaion an equivalent, for it signifies ‘the just,’ and is so employed, for instance, by Cicero, who does not even attempt to translate the term” (Paul Vinogradoff, Outlines of Historical Jurisprudence vol. 2 [Oxford: Oxford University Press, 1922], p. 19).

30 Salmond, Jurisprudence, p. 625.

31 “The distinction between written law and unwritten law may well have had meaning and use for the rhetoricians, but not until the very end of the classical period was any attention paid by the jurists to theoretical consideration of custom and customary law.” Similarly, Schiller says of the ius non scriptum: “it seems to have remained a learned theoretical generalization as far as the jurists were concerned, and of no practical importance.” See Schiller, Roman Law, pp. 254 and 256. On the chasm between Greek legal discourse and Roman law, see Fritz Schulz, History of Roman Legal Science (Oxford: Clarendon Press, 1946), pp. 71–74.

32 For example, Ullmann says that “during the period of the principate in ancient Rome the ascending theme came to be supplanted by its descending counterpart” (see his Law and Politics in the Middle Ages [Ithaca: Cornell University Press, 1975], p. 32).
The Law vs. A Law

In terms of linguistics, *lex* is a count noun and *ius* is a mass noun. *Lex* is like “hair”: my hair is the aggregate of my hairs, just as the law is often seen by philosophers and other laymen as an aggregate of laws. *Lex*, when used by the Roman jurists, almost always refers unambiguously to a statute; by contrast, when *lex* is used by philosophers, from Cicero to Hobbes, it is ambiguous between law in the abstract (the law) and law in the concrete (a law)—just like the English “law” without an article. This ambiguity is justifiable only on the assumption that law in the abstract is an aggregate of laws (meaning, presumably, statutes or rules). Consequently, those who adopt the *lex* model of law refer to the legal system indifferently as the law (*lex*) or the laws (*leges*), just as Thomas Aquinas’s treatise on legal theory is variously titled *de legibus* or *de lege*. By contrast, *ius* is not a collection of *iura* any more than water is a collection of waters. The law (*ius*) could be said to be a collection of laws (*iura*) only in the sense of several distinct bodies of law. We could say that the law of England encompasses ecclesiastical law, common law, and equity; or, territorial law, foreign law, and private international law. In the same way, we could say that water encompasses various kinds of waters, mineral, spring, ocean, fresh, etc. Indeed, the Roman jurists frequently describe their law (*ius*) as a body of water fed by various springs—what we call “sources” of law (*fontes iuris*). Since lawyers in complex legal systems must coordinate and harmonize many different and overlapping sources of law, they tend to emphasize the integrity of law rather than the discreteness of laws.

Plato, Aristotle, Thomas Aquinas, Thomas Hobbes, Jeremy Bentham, and John Austin differ on many points, but they agree that the fundamental unit of legal analysis is a law. “Law or the law,” says Bentham, “taken indefinitely, is an abstract or collective term, which, when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together.” When Bentham says of the existing law of England that

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33The titles of the various treatises within the *Summa Theologiae* are not authentic. Some editions title the treatise on law *de legibus* others *de lege*. Virtually all Thomists refer to the treatise as *de legibus* (*traité de lois*) and indeed, this seems to be how Thomas himself refers to it in other parts of the *Summa* (e.g., II-II, 120.1c).

34When used in the plural, *iura* almost always means “rights” not laws. Of course, sometimes even Roman jurists, in the grip of Greek fashion, will use *iura* to mean laws, as when Gaius refers to the “*iura populi Romani*” (*Institutes I, 2*).

it is an aggregate of laws, he certainly did not mean, as might a layman, that
the law of England was an aggregate of statutes. By “a law” Bentham meant
a complete legal norm which was abstracted from the many different
statutes and common law rules that contribute to the complete norm as an
intellectual whole.\textsuperscript{36} In this sense, Bentham’s analysis of “a law” as an in-
tegral whole, because it draws upon many diverse sources of law, more closely
resembles the lawyer’s conception of “the law” than a layman’s conception of
“a law” or statute.\textsuperscript{37} If, therefore, Bentham’s analytical jurisprudence is
rooted in a lawyerly view of law, his normative jurisprudence aspires to
the layman’s conception of the legal system as an aggregate of statutes.
Bentham hated the manner in which the common law scattered legal
norms over a mass of legal argument, cases, and principles: such law “is
nothing more than jurisprudence, \textit{jus}, not \textit{lex}.”\textsuperscript{38} In replacing the common
law \textit{ius} with a codified \textit{lex}, Bentham proposed a legislative science in
which each statute could be drafted in such a way as to be a complete
legal norm, a norm that set forth a command, the specifications of the
scope of the command, and the penalty; such a complete legal norm
would be self-interpreting and self-applying.\textsuperscript{39} Here Bentham develops
the layman’s ideal of a code of law in which all the legal implications of
each and every law are explicitly provided for in the language of each
complete and self-sufficient provision. Bentham’s disciple, John Austin
scaled back Bentham’s aspirations by proposing that common law not be
replaced but codified by extracting all of the abstract holdings (\textit{rationes
decidendi}) in every case and jettisoning all the facts and argumentation.

\textsuperscript{36}Bentham asks: “What is a law? What are the parts of a law? The subject of the
questions, it is to be observed, is the \textit{logical}, the \textit{ideal}, the \textit{intellectual} whole, not the
\textit{physical} one: the \textit{law} and not the \textit{statute}.” Bentham, cited in Joseph Raz, \textit{The Concept
\textsuperscript{37}As Raz says: “It is only to be expected that the jurisprudential division of law will
more closely resemble the lawyers’ division of it than that of the legislators” \textit{(The
Concept of a Legal System}, p. 72).
\textsuperscript{38}Bentham, cited in Postema, \textit{Bentham and the Common Law Tradition}, p. 292n. As
Postema says of Bentham’s insistence on complete, self-sufficient laws: “Where we
need clear, determinate, public rules, the content and authenticity of which are
beyond contest, Common Law offers us only endlessly contestable, constantly fluctu-
ating rules and criteria of validity” \textit{(p. 295).}
\textsuperscript{39}See Bentham, \textit{Of Laws in General}, ed. H. L. A. Hart (University of London: Athlone
Each of these holdings could be codified as a statutory rule, so that law could then become an aggregate of discrete laws. 40

By taking the view that lex is an aggregate of leges, these legal theorists have provoked other jurists to defend their holistic conception of the law. For example, Roger Shiner says: "‘Laws’ in the sense of individual statutes or rationes decidendi are not independent, self-subsistent norms. ... it seems much more plausible to see a municipal legal system as held together holistically by a set of principles or concepts rather than as an aggregate of individualized particular laws." 41 It has now become almost universally accepted that "the central idea of juridical theory is not lex but jus, not Gesetz but Recht." 42 Many contemporary definitions of law emphasize the variety of norms, concepts, and categories at play in the legal process; like the ancient Roman treatises, modern legal scholars will often define law as a combination of the sources of law and the technique of interpreting and applying them. 43 Similarly, just as Roman jurists often identified law with the art of interpretation, so many contemporary theorists have emphasized the importance of interpretation for integrating a body of law. 44 Although Bentham thought that properly drafted statutes would
need no interpretation, Ronald Dworkin sometimes says that law is just interpretation. Interpretation creates law intersticially; it is the mortar of the legal edifice.

To define law as an aggregate of legal precepts is to flatten out and homogenize what is actually a multilayered and heterogeneous body of ideas. Samuel Pufendorf captured this sense of law when he said that one meaning of *ius* is a system or complex of homogeneous laws (*leges*). The narrow rules of law, such as the rules defining a valid contract or a felony, take in only a small domain of human activity but seem to define it quite sharply: you know when the rule applies and when it does not. The principles of law, by contrast, are much broader, such as the principle of contract law that “he who derives the advantage ought to sustain the burden.” Because this principle takes in a much wider range of human activity, its applicability is never as clear. Consequently, although rules only sometimes come into conflict, principles frequently do. In his discussion of the case of *Riggs v. Palmer*, Benjamin Cardozo identifies three principles at issue: the principle of the binding force of a will in conformity with the law, the principle that the civil courts may not add to the penalties of crimes, and the principle that no man should profit from his own wrongdoing. I think these three principles can be ranked in ordered of increasing breadth: each grounds an increasingly wider range of legal rules. Principles are pithy rationales for a body of legal rules; they relate to the rules of law as preambles relate to statutory provisions. Principles help remind us what the point of a set of rules is, just as a preamble may remind us of the point of a statute. As such, they can help us to interpret and apply rules of law in accordance with the deeper rationales of those rules—namely the aspiration to justice.

Is this contrast between the law and the laws important only to lawyers or philosophers? If laymen are concerned chiefly with steering clear of legal

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45 Bentham simply asserts that well-drafted statutes are self-explanatory: “Rules which are laid down in determinate words, may ... be understood without art.” Bentham, cited in Postema, *Bentham and the Common Law Tradition*, p. 292. Lon Fuller comments on the neglect of interpretation in legal positivism; he suggests a reason for this neglect: “the difficulties involved in interpreting statutes are commonly much greater than the layman is inclined to suppose” (see Fuller’s *Anatomy of the Law*, pp. 180 and 92).

46 *Ius* is “complexus seu systema legum homogenearum.” A *lex* is “a decree by which a superior obligates a subject to adapt his actions to the former’s command” (Pufendorf, *De Jure Naturae et Gentium* [1688], trans. C. H. Oldfather [Oxford: Clarendon Press, 1934], I, 1.20 and I, 4.4).


48 The Roman lawyers well understood the danger of attempting to use principles as a short-cut to the law; but principles are extremely misleading guides to conduct apart from the set of rules they justify. Paulus tells us (D. 50.17.1) that we cannot derive the rules of law from the principles, instead we find the principles through the rules (*non ex regula ius sumatur, sed ex iure quod est regula fiat*).
penalties, why should they be concerned with the subtleties of the law? As it happens, laymen should have a very strong interest in this distinction because the penalties associated with disobedience to the law are often much more severe than the penalties associated with disobedience to a law. It is bad enough to knowingly commit the tort of trespass, but it is much worse to continue to do so in the face of a court order enjoining me to desist; it is bad enough to drive a car without a license, but it is much worse to continue to drive despite a court order not to do so. Disobeying a law displays contempt for one precept; disobeying the law displays contempt for the whole legal system.49

The Sources of Law: Professional Legal Tradition or Sovereign Imposition?

Many philosophers of law, like other laymen, take the statute to be the prototype of all law. Indeed, once the law (ius) has been individuated into a collection of laws (leges), statutes inevitably begin to appear as the prototypes of all law. As Salmond says: “this consideration of laws instead of law tends almost necessarily to the conclusion that statute law is the type of all law and the form to which all of it is reducible in the last analysis.”50 Although many major philosophers of law turn out to be mere legal laymen, no legal philosopher so self-consciously champions the layman’s perspective as does Thomas Hobbes. Hobbes begins by proposing a definition of “the Nature and Essence of a Law.” He admits that by a law (lex) he means a statute: “Law is a just Statute, Commanding those things which are honest, and Forbidding the contrary.”51 Hobbes’s definition of law captures the layman’s view: “A Law is the Command of him, or them that have the Soveraign Power, given to those that be his or their Subjects, declaring Publickly, and plainly what every of them may do, and what they must forbear to do.” Hobbes clearly champions the layman’s perspective on law when he brags that he will show us, not “what is law here or there, but simply what is law (as Plato, Aristotle, Cicero, and divers others have done, without taking upon them the profession of the study of law).”52 Hobbes is right that Plato, Aristotle, and Cicero were not jurists but mere laymen; but he is wrong to assert that a proper philosophy of law has no need for the lawyerly understanding of law. Nothing reveals

50 Salmond, Jurisprudence, p. 13.
Hobbes’s contempt for the lawyer’s view of law better than his argument that a man ought to be able to master the laws of England, and even serve as a judge, after only two months of study; moreover, he insists that the book of statutes ought to be as common in every English home as the Bible: “I think it were well that every Man that can Read had a Statute Book.”

From the layman’s point of view, since all law is statutory, then the legal order forms a unitary chain of command, with each ordinance at a lower level authorized by an ordinance at a higher level, all the way up to the supreme national legislature or court. Lawyers, however, at least in common law jurisdictions, recognize two independent sources of legal authority: legislation and common law. Just as legislation does not derive its authority from the common law, neither does the common law derive its authority from legislation.

The question of the relation of statutory law to the lawyers’ law, of laws to the law, is at the center of any complex legal system. The nature of this relation, of course, is quite historically contingent: in some epochs jurists play the leading role in the development of law, while, in other epochs, legislation is dominant; in some jurisdictions, statutory codes are the primary source of law, while in others, law is found primarily in the body of judicial decisions and juristic commentary. What can be said in a general way about this? First, we can say that a legal system without any legislative institutions is conceivable, assuming that the jurisdiction of courts rests upon custom or constitutional law. But legislation is practically necessary in any complex or changing society to revoke precedents and to resolve conflicts prospectively. Second, we can say that no society can rely on statutory law alone. Statutory and lawyers’ law are essential and interlocking components of every legal system. Disputes over the meaning of statutes require adjudication; adjudication leads to precedents and commentary, which in turn inevitably create law. Moreover, although the civil codes were adopted by legislation, they are the product of the centuries of judicial precedent and juristic commentary known as the ius commune. True, in civilian jurisdictions, Justinian’s mandate that “cases should be decided on the basis of laws, not precedents” (Codex VII, 45.13) continues to be acknowledged in theory, but, in practice, a body of case law and commentary has arisen alongside statutory codes. In short, the Roman formula of ius lexque, the subtle and evolving interaction

54 Bodenheimer describes the role of judicial precedent in civilian jurisdictions, where court decisions carry a great deal of de facto authority: “A series of decisions containing identical statements of legal propositions carries an authority almost equal to that of an Anglo-American court decision or series of court decisions. It is of interest to observe that in Germany, for instance, the supreme court has held that an attorney disregarding a decision published in the official reports of the court makes himself liable to his clients for the consequences” (Bodenheimer, Jurisprudence, p. 345).
of statutory and lawyers’ law, is at the center of the lawyer’s perspective on law, but it is virtually invisible to the layman.

Why is it that, in one sense, *ius* means the entire body of law (*ius civile*), including statutes, while in another sense *ius* is contrasted with *lex* as statute? If *ius* means the entire body of law, built up by lawyers out of various sources, then why should ancient Roman jurists often use the formula *ius lexque*? To some extent, we do the same thing by using the expression “the common law” both in contrast to statutory law and to include statutory law. Many statutes become incorporated into common law by being construed in adjudication or merely discussed by jurists, just as many ancient Roman statutes become incorporated into the *ius civile* through juristic commentary.\(^{55}\) Indeed, if one reads Pomponius’s account of the origin of law (D. I, 2.2), one can easily get the impression that the *ius civile* does not include statutes. Pomponius tells us that after the enactment of the XII Tables (*leges*) there arose problems of interpretation, addressed by forensic debate of learned persons, thus leading to “law (*ius*), which without formal writing emerges as expounded by jurists, and is called *ius civile*.” Later he summarizes his history of law by saying that “our state is constituted by law (*iure*), that is, by statute (*lege*), or by our own *ius civile*, which without writing consists in nothing more than the interpretation of the jurists.”\(^{56}\) It is not surprising, then, that many scholars of Roman law have insisted that the *ius civile* excludes statutory law, that the Romans contrasted *ius civile* and *ius legitimum* exactly as we contrast common law and statutory law.\(^{57}\) Since statutes played such a minor role

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\(^{55}\) For instance, English statutes prior to colonization . . . are part of our American common law in the form in which they were construed at the Revolution . . . The older statutes are part of the common law as they were worked into it by Coke. . . . The Statute of Frauds and the Statute of Limitations are conspicuous examples of statutes that have taken their place in the body of the common law. . . . Compare a like phenomenon in Roman law: ‘As for the statutory enactments of the republic and the senatus consults of the early empire, these had long ceased to be referred to as authoritative monuments of legislation; they were recognized only in the form in which they had been embodied in the writings of the juris-consults, and were regarded as part of the *ius*, or jurisprudential law rather than of the *leges* or statute law’’ (Muirhead, cited in Pound “Theories of Law,” Yale Law Journal 22 [1912–1913]: 114–150, at p. 114n).

\(^{56}\) “Ius quod sine scripto venit compositum a prudentibus” and “Ita in civitate nostra aut iure, id est lege, constituitur, aut est proprium ius civile, quod sine scripto in sola prudentium interpretatione consistit” (D. 2.2.5 and 12). Given that the lawyers’ law of Rome and England filled or fills thousands of volumes, the description of this law as unwritten, by jurists from Pomponius to Blackstone, reveals the distortions introduced into legal thought by Greek philosophy and rhetoric.

\(^{57}\) In English law we find the distinction between common law and statute law, which exactly corresponds to the distinction between *ius civile* and *ius legitimum*” (Eugen Ehrlich, Principles of the Sociology of Law, p. 439).
in the formative era of the Roman law, there is no doubt that, as we have noted, to the custodians of the lawyers’ law, statutes appear as an interference with or intervention in—even as an attack on—the integrity of the existing law.\textsuperscript{58}

At the same time, there are many passages in the juristic literature that treat statutes, along with \textit{Juristenrecht}, as a source of \textit{ius civile}. Livy describes the XII Tables as the source of all public and private law (\textit{fons omnis publici privatique iuris}); and Pomponius says that once the XII Tables were enacted, the \textit{ius civile} began to flow (D. I, 1.2.2.6). Gaius says that the “laws of the Roman people are based upon statutes (\textit{leges}), plebiscites, resolutions of the senate, imperial enactments, edicts of those having the right to issue them, and answers given by jurists.” Gaius lists the lawyers’ law last, not because it is least important, but because, in addition to developing their own body of private law, jurists are also responsible for harmonizing all the various sources of law: “Juristic answers are the opinions and advice of those entrusted with the task of building up the laws.”\textsuperscript{59}

In short, the Roman forumla \textit{ius lexque} embodies the twofold reality of any complex legal system: first, the contrast between lawyers’ law legislation, between \textit{Juristenrecht} and statute, between the customs of the court and authoritative enactment; and second, the employment of the lawyerly techniques of interpretation and casuistry for the purpose of harmonizing the various sources of law into a coherent system. Thus, to contrast common law and statutory law is only part of the story, for it is the common law itself that furnishes lawyers with the principles, canons of interpretation, and techniques of reasoning which make it possible to integrate statutory and common law. \textit{ius}, therefore, ultimately means the body of law as a whole, for it is the task of the lawyers to develop the sinews of that body. As Schulz comments, “what object could a lawyer have in drawing a line between statutory and non-statutory law, when the two were inseparably interlocked?”\textsuperscript{60} Indeed, Joseph Raz says that “the function of the rule of

\textsuperscript{58}“Das Gesetz aber ist in Rom nicht anders als in England ein zwar bindender, aber singulä rer Eingriff” (Max Kaser, “Lexus und ius civile,” p. 19). “Why the various Roman legislative assemblies, with power to make law of the most authoritative kind which could also be the most systematic, made such sparing use of statute for the growth of private law remains an unsolved mystery” (Alan Watson, \textit{Sources of Law, Legal Change, and Ambiguity} [Philadelphia: University of Pennsylvania Press, 1984], p. 14).

\textsuperscript{59}“Constant autem iura populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum, qui ius edicendi habent, responsis prudentium. ... Responsa prudentium sunt sententiae et opiniones eorum, quibus permisssum est iura condere” (The Institutes of Gaius, trans. W. M. Gordon and O. F. Robinson [Ithaca: Cornell University Press, 1988], I, 2 and 7). Gaius’s use of \textit{iura} (laws) seems distinctly unwlawyerly and indeed, scholars now argue that this reveals the influence of Greek rhetoric. See Fritz Schulz, \textit{History of Roman Legal Science} (Oxford: Clarendon Press, 1946), p. 137.

\textsuperscript{60}Schulz, \textit{History of Roman Legal Science}, p. 74.
law is to facilitate the integration of particular pieces of legislation with the underlying doctrines of the legal system.” 61 That integration is what the Romans meant by *ius lexque*.

So at a deeper level, the contrast between *ius civile* and *lex* is not a contrast between unwritten law and written law, or between custom and law, or between common law and statutory law, or any of the other misleading Greek antitheses; it is rather a contrast between the body of law and a member of that body, between what is old and what is new. 62 For this reason, Franz Wieacker interprets the formula *ius lexque* as a hendiadys, meaning “law as modified by statute.” 63 Over time, the *lex* swallowed up the other kinds of legal enactments, first plebiscites, then the *senatus consultae*, and finally the decrees of the emperors. In the final decadence of Roman law, Justinian enacted a compilation of the lawyers’ law in the form of a collection of statutes. It required centuries of legal commentary and scholarship to restore the integrity of Roman law, which had been mutilated by having its complex and heterogeneous unity of rules, principles, ideals, doctrines, canons of interpretation fragmented into thousands of discrete and chaotically ordered statutes. 64

### The Ethical and the Imperative

A crucial thing to note about *ius* is that it means not only law, in the sense of the integrity of the whole legal system, but also what is right—both the objective justice of a right relation and the moral faculty of subjective rights. In Latin, *ius* was the origin of the word for justice (*iustitia*) and many modern European languages preserve this etymological relation between law and justice (*Recht* and *Gerechtigkeit*). Of course, these meanings are all closely related in Roman legal thought: the purpose of law is to establish right (that is, just) relations among people which requires, among other things,

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62 “After the XII Tables, particular statutes, few in number, treated only narrow facts. Every new *lex* of this kind was added to the already established law as a modification or supplement. . . . If a *lex* is created and jurisprudence seizes it to add to the old order, the *ius civile*, an absorption process develops through which the *lex* itself will be swallowed up by the *ius civile* as an organic element. . . . In this integration process, the opposition of *lex* and *ius civile* is explained as the opposition of old and new” (Kaser, “Lex und ius civile,” p. 18).
63 Wieacker, “*Ius e Lex in Roma Arcaica,*” p. 3601. Hendiadys is a figure of speech in which two connotative words connected by a conjunction are used to express a single complex notion that would normally be expressed by an adjective and a substantive; for example, “furious sound” becomes “sound and fury.” Schiller also says (*Roman Law*, p. 225): “enacted law (*lex lata*) was utilized to supplement the body of law (*ius*) which was already in existence.”
64 The *Digest* is still officially cited by Book, Title, and *Lex*. 
the assignment of subjective rights (powers, privileges, liberties, and immunities)—the law as a *norma agendi* confers a right or *facultas agendi*. There has been so much controversy of late about the relation of objective to subjective right in the concept of *ius* that many scholars seem to have forgotten that *ius* means first and foremost “the law.”65 Perhaps this is because in the modern versions of *ius*, the ethical meaning has taken priority over the legal meaning, whereas in the ancient *ius*, the legal meaning predominated.66 *Ius* and its modern counterparts refer to the unity of right and might, the ethical and the imperative; they refer to law as the aspiration to justice, in this respect not unlike the English word “equity”. We can see the influence of the ethical dimension of *ius* on the vocabulary even of English law when we recall that the original English rendering of the civil *ius commune*, was not “common law” but “common right.”67

By contrast, *lex* and its modern counterparts refer solely to the imperative aspect of law without any suggestion of morality or justice. Recall that most scholars think that *lex* derives from *ligare*, to bind. A *lex* is a binding imperative, no matter what its content. A *lex*, loi, Gesetz, zakon may be just or unjust; but an *ius intustum*, an ungerechtes Recht, is an obvious contradiction in terms, like an iniquitous rule of equity. Because *lex* represents power unconstrained by the aspiration to justice, statutes are the most dangerous weapons in the legal arsenal. Indeed, F. A. Hayek compares the development of legislation to the development of fire or dynamite in its powerful capacity for good or ill. *Ius*, as the accumulation of centuries of juristic activity, evolves constantly but resists sudden radical change; *lex* is much more easily manipulated for transient political goals. Roscoe Pound said that whereas *lex* is easily made the instrument of dictators, *ius* is the arch-enemy of dictators.68

65For example, John Finnis takes Thomas Aquinas’s definition of *ius* as “the just thing” as a guide to the meaning of *ius* in Roman law—despite the fact that Roman lawyers had been using *ius* as their primary word for law for over 1000 years. Following Aquinas, Finnis treats *ius* in the context of right and justice rather than in the context of law. See Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 206–209. Muirhead rightly says: “if we can ascertain the meaning of the name *ius* we shall thus have an unconscious definition of what the Romans understood by law” (James Muirhead, *Historical Introduction to the Private Law of Rome*, revised by Henry Goudy [London: Adam and Charles Black, 1899], p. 18).

66Salmond says that *ius* primarily means law, “the juridical sense having a much greater predominance over the ethical in the case of *ius*, than in that of its modern representatives Recht and droit.” See Salmond, *Jurisprudence*, p. 620.

67The OED lists “common right” as equivalent to the French “droit commun” since at least 1298; by contrast, “common law” first appears in 1350. Edward Coke, of course, frequently uses “common right” to refer to common law.

Lawyers’ Law and The Ironies of Legal History

One of the most profound ironies of the Western legal tradition is that, in many respects, the ancient Roman law resembles our Anglo-American common law much more than it does the codified civil law of Europe. Although the codified civilian legal systems are the direct heirs of the modern Roman ius commune, the ancient Roman law, in its vital Republican and classical periods, privileged lawyers’ law over legislation and codification.69 Despite important differences in the salience of precedents and learned commentary,70 at Rome and in England bar and bench collaborated closely to build up a body of law best described as lawyers’ law. In short, statutes played a very minor role in the formative eras of the private law of Rome and England.71 Nothing reveals the shared outlook of Roman and Anglo-American lawyers (at least of the classic mold) more than their common disdain for statutes.72 From the point of view of ius, statutes are always going to appear as foreign matter that


70At Rome, precedents had merely persuasive authority, chiefly through being discussed in juristic commentary; in Anglo-American law, precedents are divided into binding and persuasive. At Rome, casuistry was more hypothetical than historical; in England, more historical than hypothetical. Roman jurists organized law by substantive categories (sale, lease, possession) while English common law before Blackstone was organized by procedural categories (writs).


must be grafted onto the legal body; statutes may be in the law but they are not of the law. Schiller says that of the 800 statutes in over 500 years of Roman history, a mere 25 to 30 concern private law. Far from aspiring to a codified law, the Romans resisted codification of their law for one thousand years after the XII Tables; by the time of Justinian’s codification, Roman law had long since fallen into decadence.

At issue here is more than just the question of an adequate account of legal practice, for the relation of statutory to lawyers’ law involves deeper issues of the role of reason and fiat in the legal process and, ultimately, the issue of the moral integrity of our community over time. Legislation, like dynamite, is a powerful tool for good or ill; its powerful capacity for repealing whole departments of existing law, for erasing centuries of jurisprudence overnight, is striking. And statutes, unlike judicial decisions, need not justify themselves; through them the supreme authority says: let it be done (ita lex scripta est). Rule by legislation alone, uncontrolled by Juristenrecht, would necessarily become the tyranny of arbitrary fiat. Legislation must be tamed, and the way it is tamed in our legal tradition is by being brought into relation with the lawyers’ law. The lawyer’s task is to articulate the rationale of the statute (ratio legis) and to attempt to reconcile it with the rationale of the law as a whole (ratio iuris); the lawyer’s task is to determine how much existing law is abrogated and how far to extend a statute through strict or liberal construction and, in some jurisdictions, to determine whether the statute has fallen into desuetude. By thus attempting to reconcile a law with the law, the lawyer tends to reduce the capacity of a statute to radically alter the existing law. Of course, history has shown that whole bodies of law may become corrupted, as in the case of the legal disabilities of slaves and women, requiring recourse to non-legal principles of natural justice. Though even in the case of the law of status, the equality of all human beings was a principle incorporated in Roman law (D. 15, 1.41) and helped to mitigate the arbitrary power of masters, husbands, and fathers over slaves, wives, and children.

Unlike statutes, lawyers’ law often has authority despite never having been formally adopted. The authority of Justinian’s Corpus Iuris Civilis and of Gratian’s Corpus Iuris Canonici in the legal systems of medieval Europe was mainly the authority of reason. Thomas Aquinas asserts (ST, I-II, 96.4) that a statute contrary to the law of nature is not binding in conscience, meaning that, depending upon circumstances, we may be permitted to disobey it; if a statute is contrary to divine law, then, he says, we are required to disobey it. The Roman lawyers, however, had a variety of ways to control

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73 Schiller, Roman Law, p. 225.
74 These are not the original titles of the work of Justinian or of Gratian.
statutes without having to appeal to extralegal principles and command-
ments. Originally, lex was thought to be merely declarative of ius, in this
sense a lex formulated ius into a rule and authoritatively declared it. In the
traditional account, plebians demanded a promulgation of the law adminis-
tered by the priestly college of the patricians, leading to the enactment of the
XII Tables. As Peter Stein says, “If lex is the authoritative declaration of what
is ius, there is no possibility of conflict between the two.”\(^7\)\(^5\) Over time, of
course, it became obvious that statutes were not only, as Blackstone puts
it, declarative but also remedial of law. Throughout the Republican era,
statutes were used sparingly to cope with specific issues. Even the Roman
people as a whole had no authority to enact anything incompatible with
the ancient concepts of the ius civile. To ensure that such statutes did not
derogue from the law, most were equipped with a salvatory clause that
read: If this bill contains anything which is not ius, then no such thing is
proposed in this bill.\(^7\)\(^6\) Yet, although to say that an unjust lex is no lex
sounds paradoxical—since a lex has no connotation of intrinsic rightness—
it does not sound paradoxical to say that a statute contradicting the law
(ius) lacks validity. After all, our own Coke said that “when an Act of
Parliament is against Common right and reason, or repugnant, or impossible
to be performed, the common law will controul it, and adjudge such Act to be
void.”\(^7\)\(^7\)

Of necessity, lawyers must attempt to reconcile the diverse and competing
sources of law, whether from juristic decisions, commentary, statutes, or
customs, for law cannot guide conduct if it provides inconsistent directives.
Thus although jurists in the Republican era were merely private citizens
with no official standing, the practical sphere of action of a public statute
was determined by the interpretation of the jurists. They could restrict a
statute by construing it narrowly, they could extend it by analogy, or they
could allow it to fall into desuetude.\(^7\)\(^8\) This enterprise of modernizing the
barbarism of archaic laws, of moderating the violence of new laws, of
determining the proper relation of the new to the old, and of the part to
the whole, represents, in general, the triumph of reason over arbitrary fiat.
For this reason, Gibbon gives his ironic encomium to the Roman lawyers:

A more liberal art was cultivated, however, by the sages of Rome, who, in
a stricter sense, may be considered the authors of the civil law. The

\(^{75}\)“It is in this sense that Varro contrasts lex with aequum, the declared law as
opposed to unformulated ideas of what is right.” See Stein, Regulae Iuris, p. 13.

\(^{76}\)“Si quid ius non esset rogarier, eius hoc lege nihilum rogatum.” See Wolff, Roman
Law, p. 67.

\(^{77}\)Coke in Bonham’s Case, in The Selected Writings and Speeches of Sir Edward Coke,

\(^{78}\)The lex is the most respected and, as an expression of the will of the people, the
noblest among the sources of ius, but its practical sphere of action vis-a-vis the general
alteration of the idiom and manners of the Romans rendered the style of the Twelve Tables less familiar to each rising generation, and the doubtful passages were imperfectly explained by the study of legal antiquarians. To define the ambiguities, to circumscribe the latitude, to apply the principles, to extend the consequences, to reconcile the real or apparent contradictions, was a much nobler and more important task; and the province of legislation was silently invaded by the expounders of ancient statutes. Their subtle interpretations concurred with the equity of the praetors to reform the tyranny of the darker ages; however strange or intricate the means, it was the aim of artificial jurisprudence to restore the simple dictates of nature and reason, and the skill of private citizens was usefully employed to undermine the public institutions of their country.\textsuperscript{79}

Here Gibbon celebrates the “artificial” reason of the Roman lawyers who, by controlling the arbitrary fiat of statutes, bring law into accord with natural reason. As the product of centuries of legal experience and thought, this artificial reason is a crucial first line of defense against the weak natural reason of sovereigns. Coke similarly defends the artificial reason of English lawyers against the natural reason of sovereigns. Coke reports his conversation with James I:

Then the King said, that he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges: To which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the Lawes of his Realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificiall reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it.\textsuperscript{80}

Law as Framework of Justice or Managerial Directive?

In short, laymen tend to think of law in terms of laws, in particular in terms of those statutes and judicial decisions that command, enjoin, permit, or forbid. Many legal philosophers, and not just the legal positivists, develop this lay perspective into a theory of law as a species of command. Nor is this surprising: we are all intimately familiar with commands from our parents, teachers, officers, and bosses so it is natural to think of laws as commands from the government. Isn’t law essentially the set of directives issued by the government to manage the citizens? Just as the manager of a

\textsuperscript{79}Edward Gibbon, \textit{Decline and Fall of the Roman Empire} (London: Murray, 1862), vol. 5, p. 273.
\textsuperscript{80}Coke, from “Prohibitions del Roy,” in \textit{The Selected Writings and Speeches of Sir Edward Coke}, 1:481.
corporation issues orders to his subordinates, so the government issues orders to its citizens.\(^81\) Although the government does issue commands and other managerial directives, the rule of law itself ought not to be understood as a kind of management. Why not? Consider this example: a layman considers a speed limit on a public road to be an order issued by the government to a driver on that road; here we seem to have the familiar top-down, bilateral relation of a command familiar to us from family life, from the military, and from business. But the speed limit is better understood as a rule for coordinating the expectations of all citizens than as a command to a driver: after all, pedestrians, bicyclists, not to mention the passengers in a car other than the driver, all have an interest in knowing the speed limit. Law is understood better as a framework in which myriad individual purposes can be coordinated than as the effort of the government to see its purposes imposed on citizens. A command is essentially a vertical and bilateral relation between two parties: when a father commands a child, or an officer commands a soldier, or a manager commands a worker, that command might well be restricted to a single person and have no bearing on the conduct of others; but laws are not essentially bilateral or vertical, they are horizontal frameworks for adjusting the expectations and conduct of all subject to them. I often need not take notice of what my father commands my brother or what my officer commands my comrade or what my boss commands my colleague—commands to others are usually none of my business. But I probably ought to take notice of what the law requires of my close associates.\(^82\)

The conception of laws as commands underpins the political interpretation of the rule of law. On this view, laws are instruments of public policy wielded by those authorized by sovereign political power. We are thus ruled, not by law, but by laws, that is, by the commands of the current holders of political power. But to be ruled by laws is ultimately to be ruled by men, since laws are the instruments of rulers. Although it is natural to think of law in terms of the hierarchy of political command and control, the ideal of the rule of law depends upon some considerable degree of autonomy of legal institutions and norms from direct political control. The ideal of the rule of law defines our political, civil, and personal

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\(^{81}\)“Laymen and legal philosophers alike have often thought of law as being something like a command or order, issued by the state and directed to the citizen” (Fuller, *Anatomy of the Law*, p. 153).

\(^{82}\)“The directives of a managerial system regulate primarily the relations between the subordinate and the superior and only collateral relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen’s relations with other citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed” (Fuller, *The Morality of Law* [New Haven: Yale University Press, 1969], pp. 207–208).
freedom, all of which depend upon the availability of certain legal procedures and the stability of many legal rules. If our basic civil and political liberties and our basic rights of private ordering were subject to electoral caprice, we would lack meaningful liberty.

The rule of law is like a ship at sea: repairs can be made so long as the basic structure remains intact. There are several ways to draw a line between those parts of a legal system that can be readily altered and those that cannot: for example, one can imagine repealing many of our constitutional amendments, but not the first. Historically, this crucial line was first drawn by Roman lawyers to distinguish public law from private law. Roman jurists argued that private law cannot serve as a framework for coordinating the expectations of individuals so as to foster sound private ordering unless that framework is relatively free of transient political manipulation. In this way, the Roman jurists secured a realm of individual freedom and autonomy in the private ordering of family, contract, and property amidst radical changes in regime and public law. What is crucial is the general principle that some part of the legal system must be substantially autonomous from transient political change, not the particular Roman distinction between public and private law—after all Roman private law included the law of slavery.

The idea that a system of private law could persist through profound political and constitutional transformation is a Roman idea. Aristotle, by contrast, insists that law must be subordinated to constitutional principles and that a change in constitution requires a corresponding change in the legal system as a whole: “For the same laws cannot be equally suited to all oligarchies or to all democracies, since there is certainly more than one form both of democracy and of oligarchy.”83 Aristotle insists that all laws must be drafted and redrafted in relation to the political demands of a particular regime: “the laws are, and ought to be, framed with a view to the constitution, and not the constitution to the laws.”84 Yet the ideal of the rule of law depends in part precisely on what Aristotle explicitly rejects—namely, that the constitution be subordinated to the laws, in the sense that the constitution ought to respect the broad integrity of private law. The law of private ordering could not proceed without the expectation that contracts and property be largely secure from transient political change.

Cicero articulates the Roman conception of the rule of law in his famous “praise of the civil law” (laus iuris civilis) in the pro Caecina (65–78).85 In this eulogy to the Roman law, Cicero strongly links the ius civile to the

83 Aristotle Politics 1289a 22.
84 Aristotle Politics 1289a 12.
85 For the Latin text and English translation of the Pro Caecina, see Cicero: The Speeches, ed. and trans. H. Grose Hodge (London: Heinemann, 1927). I have modified his translations.
class of professional jurists (*iurisconsulti*): respect for the integrity of law, he says, means respect for the judgments of the jurists.\(^{86}\) The autonomy of private law, thus, is historically and sociologically dependent upon the autonomy of the class of professional jurists.\(^{87}\) Cicero here defends the integrity of the law and of the legal profession from manipulation by social or political power: “For he who holds the law (*ius civile*) in contempt breaks the bonds not only of judicial process but also of the welfare and life of the community” (70). According to Bruce Frier, Cicero asserts two propositions: “1) private law’s central function is to preserve the long-term material security of the existing social order, and for this reason its rules must be insulated from transient social and political influences; 2) the jurists, interposed between the *ius civile* and the courts, are uniquely empowered to make authoritative statements regarding the substance of the *ius civile*, and their statements are presumptively binding on private judges. Further, Cicero clearly sees a link between these two propositions: the *ius civile* is unable to fulfill its central function unless the *response* of jurists are authoritative within courts.”\(^{88}\) The strong separation of law from politics makes it possible for individuals to order their affairs with the expectation that private order will be secure. For it is characteristic of much of private law that individuals care more, as Justice Brandeis famously put it, that law be settled than that it be settled right. By strongly distinguishing public and private law, Roman political culture allowed the jurists to create a large body of settled private law in the face of violent political revolutions, civil wars, and the transformation of a republican city-state into an imperial colossus.

Lon Fuller develops this Ciceronian theme of the autonomy of law when he argues that law should not be seen as an instrument for realizing the purposes of the government but as a framework for realizing the myriad purposes of citizens, with the government as a guardian of the integrity of that framework. So although the layman and many legal philosophers describe law in terms of commands and in terms of management, the rule of law is better understood as providing “a baseline for self-directed action, not a detailed set of instructions for accomplishing specific objectives.”\(^{89}\) Although lex is often a vehicle for political command and

\(^{86}\) Cicero professes to be shocked at the claim of his adversary that “we ought not defer to the authority of the jurists (*auctoritati iurisconsullorum*); later he sums up his adversary’s view that “neither should the jurists be followed nor should the *ius civile* always decide the case” (*Pro Caecina* 65 and 67).


control, *ius*, as the body of law and legal reasoning we inherit from the Roman jurists, is largely immune from transient political manipulation. To answer the question of the scholastics, we must, then distinguish: The king makes *lex*, but *ius* makes the king.