

# THEORIES OF LAW AND JUSTICE

Professor Burrel Vann Jr

# Questions Theorists Consider

- What accounts for **development** of law?
- How has law **evolved**?
- Can law be used to **reform** or **impact** society?
- Is law **neutral**, or does it serve certain interests?

# What constitutes the legal system?

1. Written civil and criminal codes
2. Drafted by legislatures
3. Interpreted by a network of trial and appellate courts
4. Enforced by police and other law enforcement agencies



# Types of Legal Systems

## 1. Premodern

- Hunter-gatherer
- Members share common ethnicity
- Collective help settles disputes

## 2. Transitional

- Transition to agricultural society
- Landowners accumulate wealth
- Institutions develop to settle disputes over land, crops, employment, and goods value

## 3. Modern

- Extensive criminal and civil laws
- Specialized agencies to regulate specialized areas of banking, drugs, food
- Court system allows bringing cases to ensure fair results from disputes

# Theoretical Perspectives on Law

- Natural law
- Legal positivism
- Utilitarianism
- Historical school
- Classical Sociological
- Sociological Jurisprudence
- Critical Legal Studies
- Critical Race Theory
- Critical Feminist Theory



# Natural Law

- **Universal** principle applicable to all societies
- Principles discovered through **reason**
- **Divine** ordered plan for the universe

# Natural Law

## Thomas Aquinas

Influenced by Aristotle's take that:

- “*Everywhere has the same forces and does not exist by people's thinking this or that*”

Identified four categories of law

- **Eternal** (known to god)
- **Natural** (eternal, but also may be known to humans)
- **Divine** (eternal/natural, but revealed in scripture)
- **Human** (enacted by humans)

Argued that law is just:

- Human law is just to the extent that it conforms to eternal or natural law
  - Therefore, serves good of humanity
- And law NOT serving humanity is “no law at all!”



# Legal Positivism

Command or order accompanied by threats to impose punishment for disobedience

- Law simply *is*...
- Law is command of sovereign
- Morality of law plays no role in evaluating legitimacy

# Legal Positivism

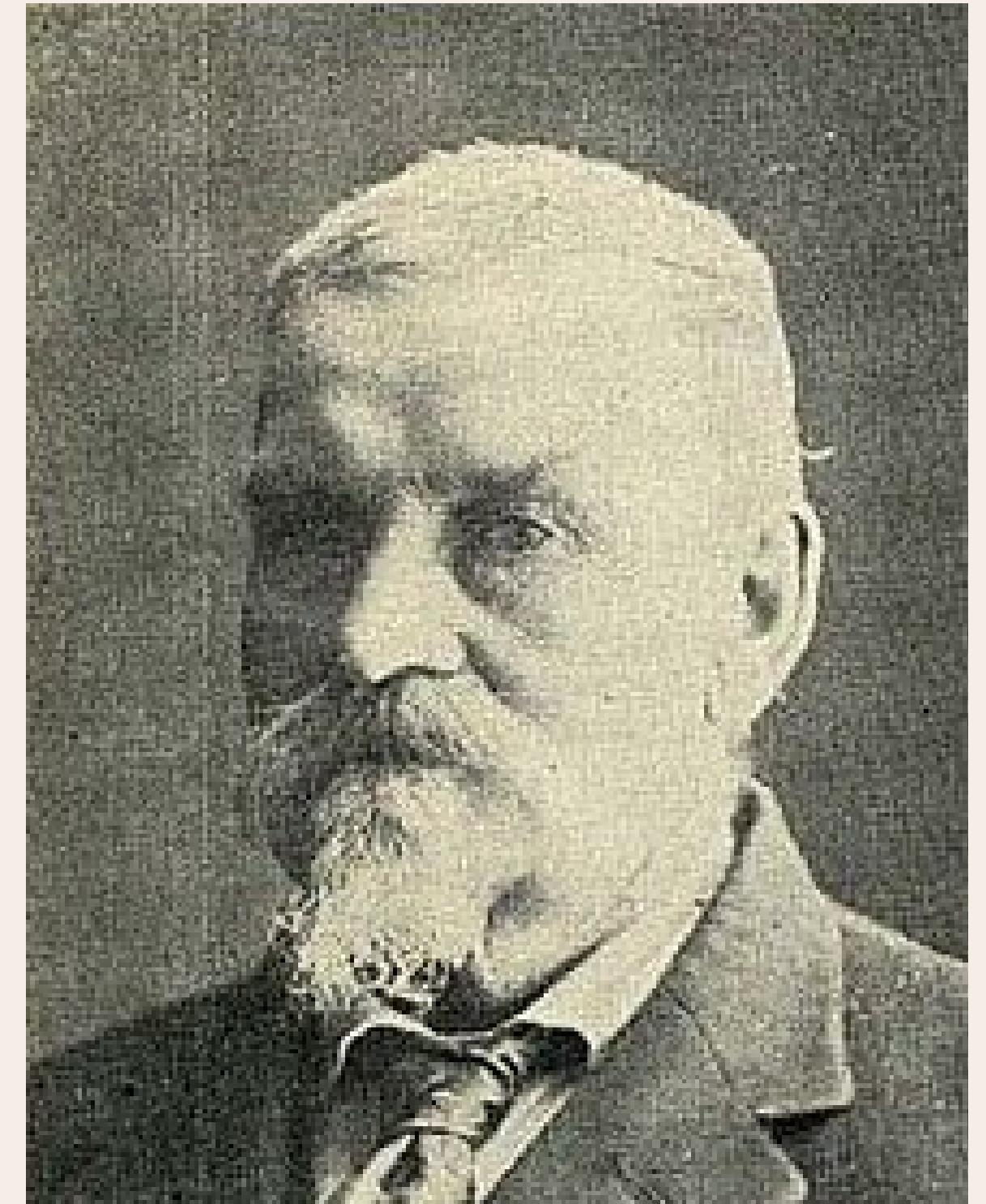
## John Austin

### Obedience

- Unconcerned by goodness/badness of laws
  - Immoral laws should be obeyed, if in accordance with established procedures
  - Law is law, even if we dislike it
  - To call laws bad or contrary to god's will "void and not to be tolerated" is anarchy
  - Law should be obeyed until it is changed or modified

### Sovereignty

- The sovereign are those individuals to whom the most of society has the habit of obedience



# Utilitarianism

Law should be based on the fact  
that individuals strive to **maximize  
pleasure** and **minimize pain**

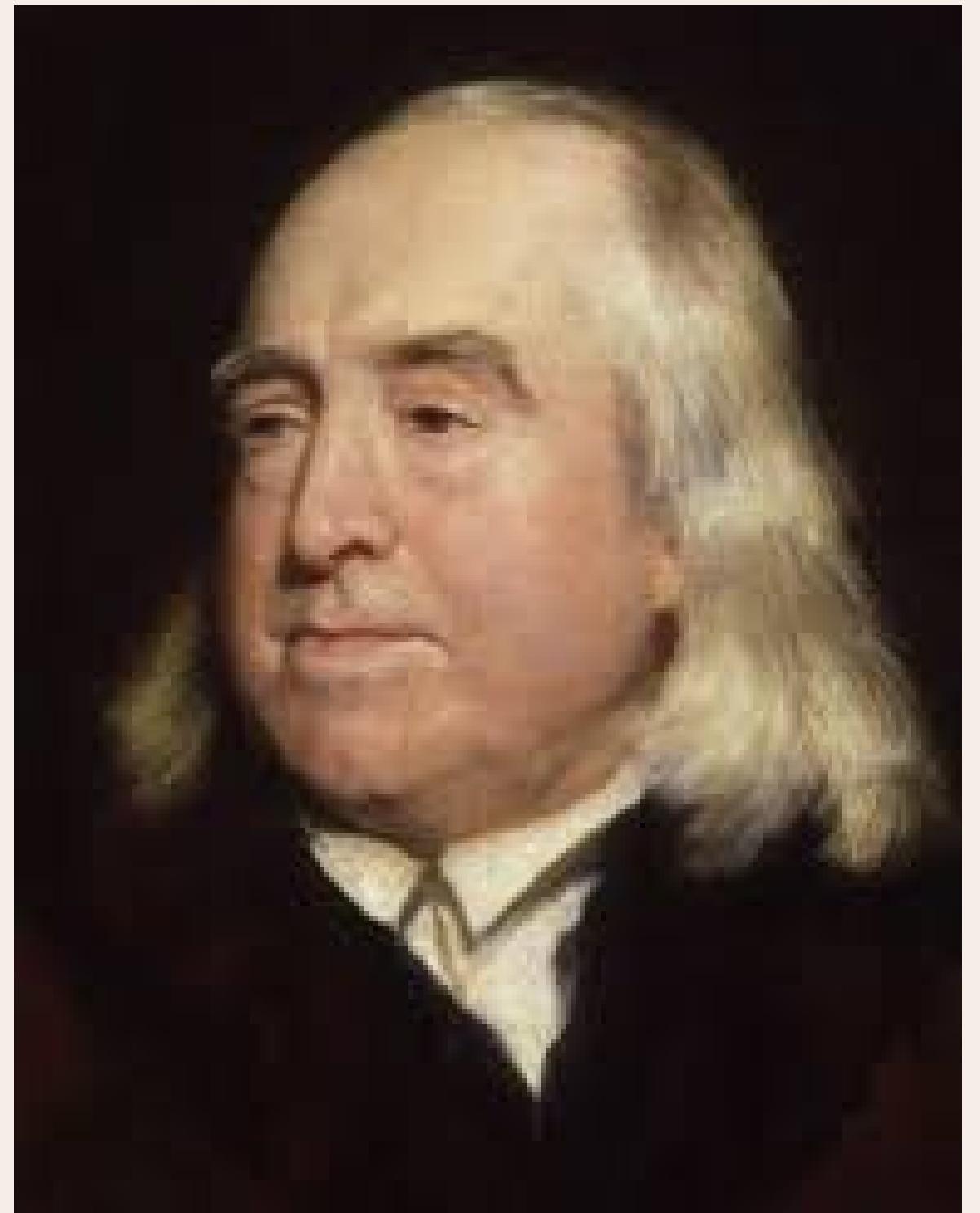
# Utilitarianism

## Jeremy Bentham

Argued that “*Natural law is nonsense*”

Believed utility should guide policy

- Incentive to **obey** law should be counterbalanced by incentive to **violate**
  - Obeying law should minimize pain *relative* to violation
  - Obeying law should be relatively painless, but violating shouldn’t be



# Historical School

As society develops, so too does the legal system

New industries require new laws not necessary in earlier societies

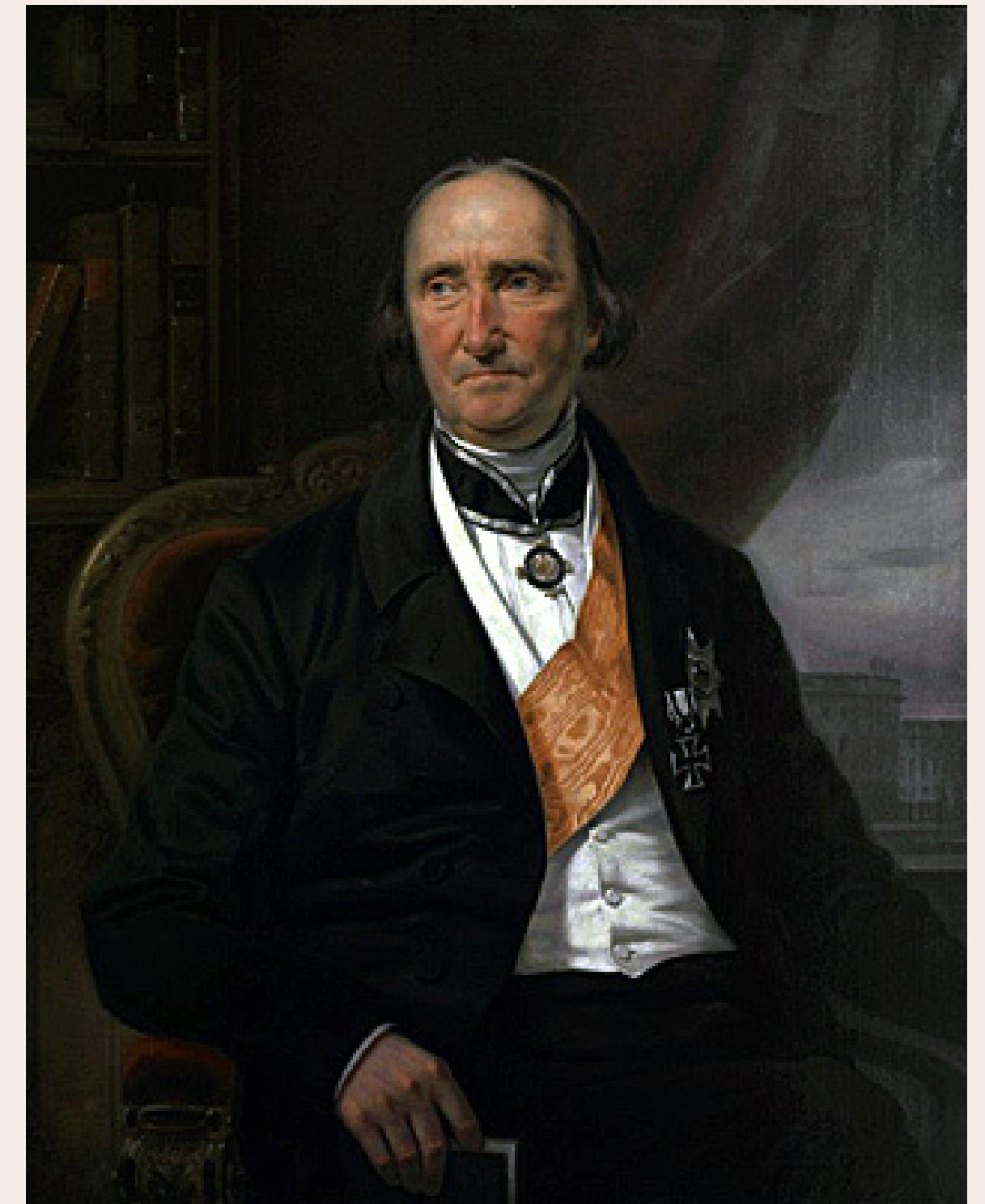
- Farming, banking, factories, etc

# Historical School

## Friedrich Karl von Savigny

Law evolves with society

- No such thing as timeless, universal, natural law applied to all individuals
- Law is not applied by some “sovereign” ruler
  - Rejected idea of sovereign
- Law should align with the spirit of the people
  - Sovereign ruler would have difficulty imposing law that conflicts with will of the people



# Classical Sociological School

Aims to answer the question:

- How does law **protect status, advantage, inequality**, etc. in society?

# Classical Sociological School

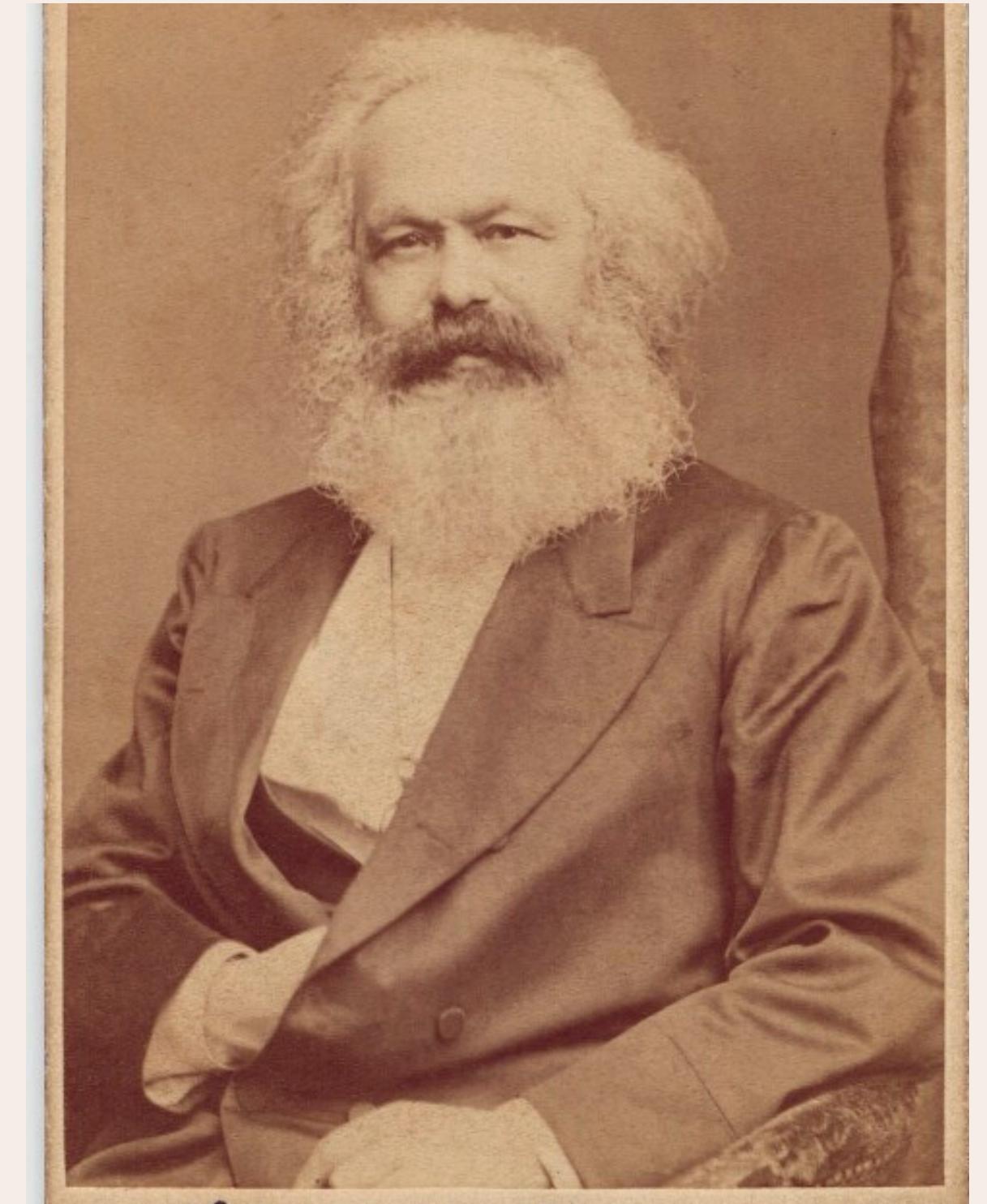
## Karl Marx

Law protects interests of **industry**

- Bourgeoisie over proletariat
- Owners of means of production

*“The law, although on the surface appears to be fair, serves the interests of industry...”*

*“Legal rules are interpreted and used by the economic elites to maintain their control of property and to induce a false consciousness among the proletariat by convincing them that society is fair and just”*



# Classical Sociological School

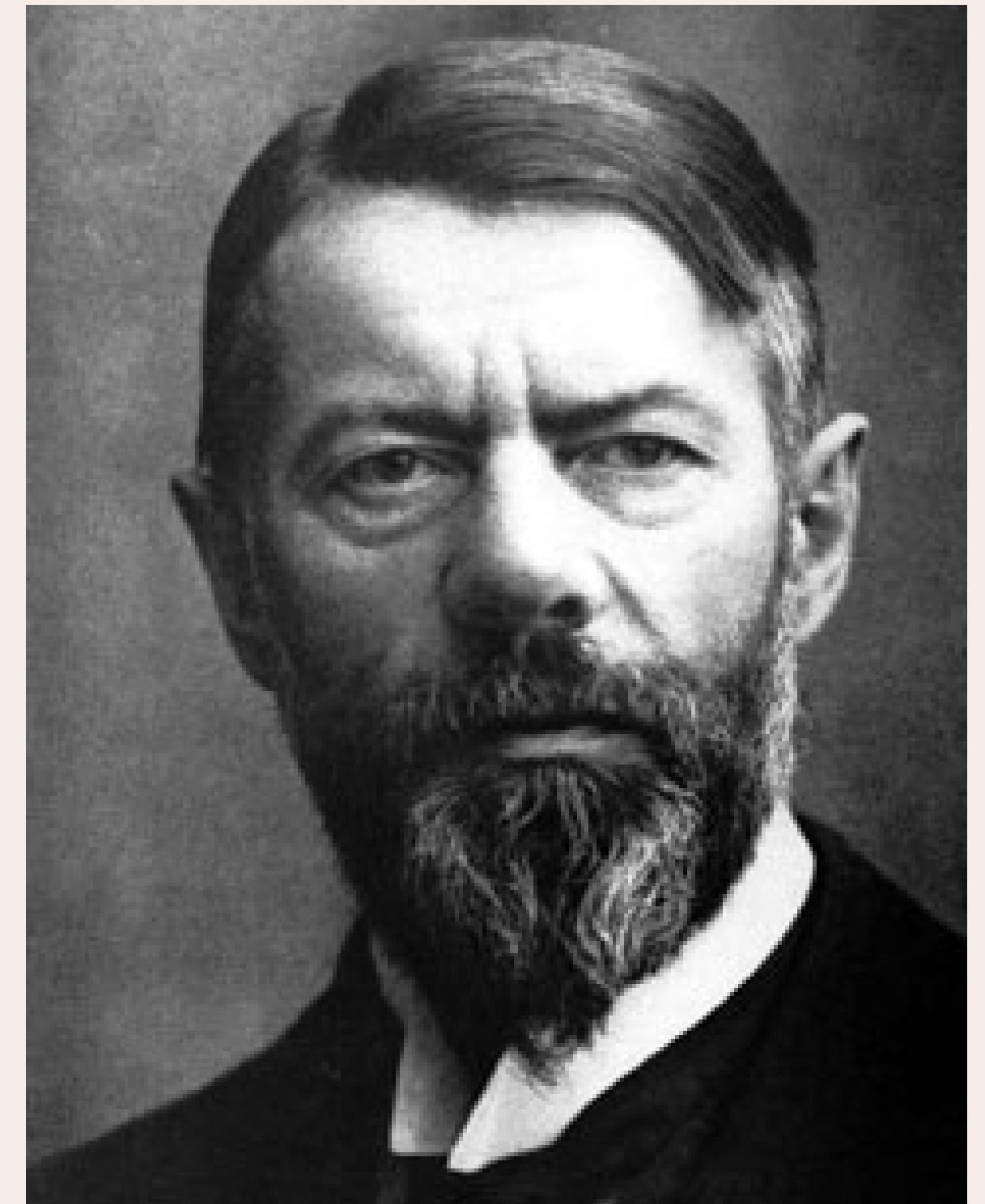
## Max Weber

Law is **political domination** and legitimates **authority**

- Creates compliance
  - A group of people will comply with orders given by those with authority
- Commands given by leader are seen as “rightful”

Argued that there are **many types of authority**:

- **Charismatic**: “god-given”, heroic powers, extraordinary qualities
- **Traditional**: based on their position/office, inherited
- **Rational/legal**: given based on written documents



# Classical Sociological School

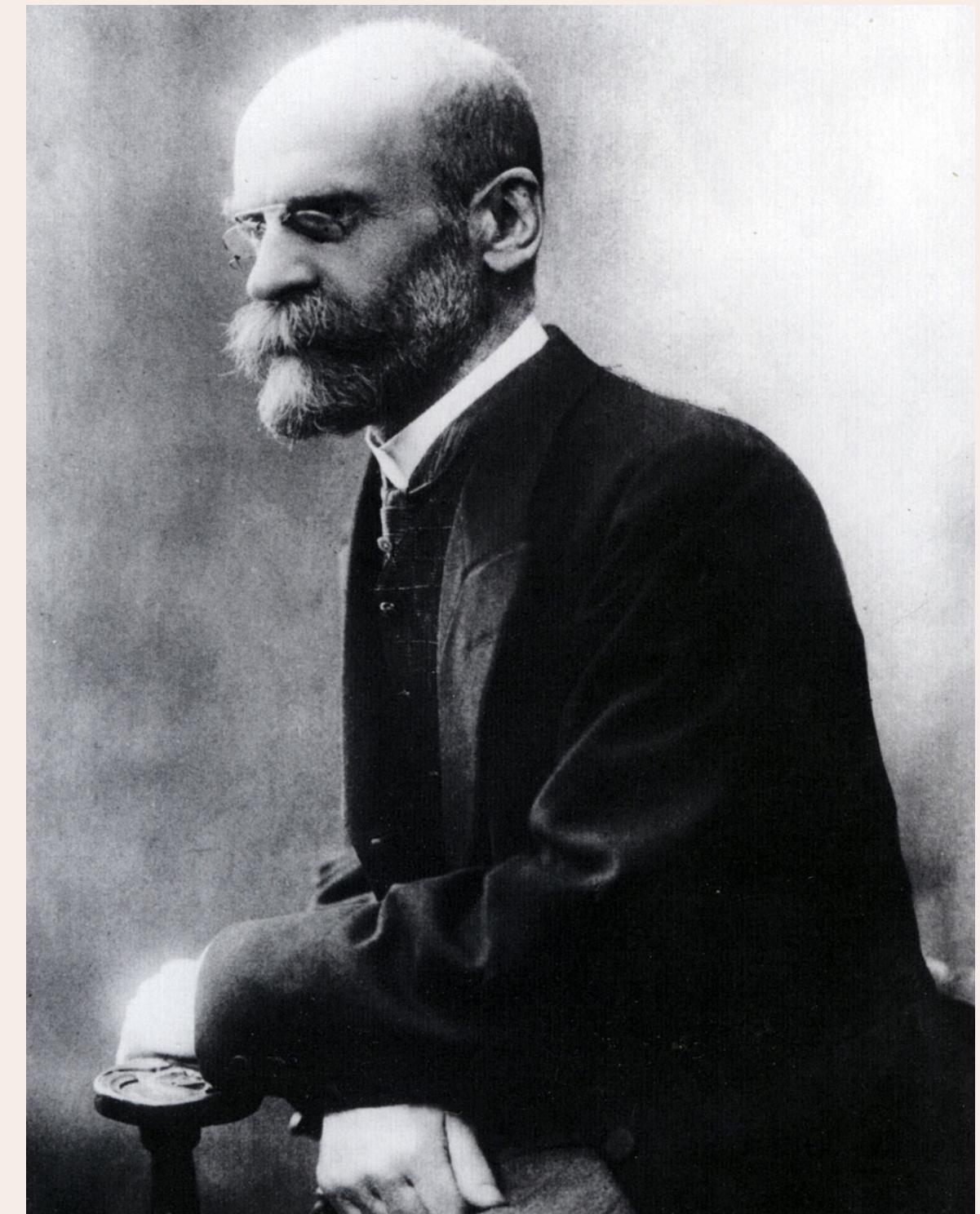
## Emile Durkheim

Developed concept of **solidarity** - the glue that holds society together

- **Mechanical Solidarity**: everyone tied together by similar ethnoracial background, religion, labor, etc.
- **Organic Solidarity**: everyone tied together by function - the fact that each person can perform a task required by others

Violating laws violates solidarity:

- **Mechanical**: violation seen as affront to community, results in moral outrage, results in repressive sanctions
- **Organic**: violation seen as affront to the functioning of the system, results in imprisonment and fines or compensating individuals for injuries suffered, is restitutive



# Sociological Jurisprudence

Law should help **solve** social problems

Must rely on social **data** to figure out social problems

# Sociological Jurisprudence

## Roscoe Pound

Law should be **evaluated by results** it achieves

- Should make people's lives easier
- Solve societal problems
- Be less focused on logical consistency/precedent between rules

Law should **rely on social science data** to solve problems

- Law development should depend on public opinion
- There are dominant beliefs, sentiments, principles in society that make up the entirety of public opinion... which should be used to shape/reshape law



# Critical Legal Studies

Critical of positivism, precedent, and traditional approaches to law

# Critical Legal Studies

Various stances:

## **Indeterminacy**

- No single correct answer. Judges can reach numerous decisions, even when relying on precedent

## **Antiformalism**

- Judges use precedent/laws to reach decisions that reflect their ideology, not just logic

## **Marginality**

- Most people don't even think about the law in their personal lives, not as important as legal scholars think

## **Ideology**

- Law reflects underlying philosophy that favors wealthy, props up inequality

# Critical Race Theory

Focuses on the role of the law in  
**race relations and racism**



# Critical Race Theory

Laws are not neutral

- Mechanism for dominance of those powerful economic and political interests at the expense of those excluded from those systems of power

Perpetuates racism

- Racism is as American as apple pie... deeply embedded in our fabric – not just the exception, but the rule

# Critical Feminist Theory

Addresses the **gendered** nature of law that was not addressed by other critical legal studies

# Critical Feminist Theory

Sees law as **perpetuating subordinance** of women

Attempts to reform legal system to ensure equality between men and women

Sees existing laws as male-centric (male-designed), which cannot provide true equality