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Logic and Coercion in Bentham's Theory of Law

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Unlike conventional moral standards and other social rules, laws can be deliberately laid down and changed by specified procedures. It therefore seems reasonable to think of laws as issuing from or adopted by lawmakers who are ordinary human beings. Since laws tell us what must or must not be done, and since there is some temptation to understand all laws on the same pattern, it is natural to think of them as either commands or prohibitions. This is indeed a traditional view.

The modern and most important form of this concept is the imperative theory of law ascribed to the nineteenth century English jurist, John Austin.[1] Austin believed that the entire content of a legal system could be reduced to commands and prohibitions issuing from the "sovereign" of an independent political state—some person or set of persons whose commands are generally followed and who is not in the habit of obeying others. By threatening punishment for disobedience, the sovereign imposes legal "obligations" on his subjects. Austin thus regarded individual laws as coercive commands.

Austin was the direct juristic heir of Jeremy Bentham, and it has generally been thought that Bentham had the same concept of law. As he never espoused that theory explicitly, one might suppose that he anticipated and perhaps paved the way for his successor's more rigorous and developed theory. But evidence to the contrary is now available in Bentham's most important although little known essay, *Of Laws in General*, discovered only in 1939.[2]

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1 This is the standard interpretation of Austin and I shall not challenge it here. *See* 1-2 J. AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (5th rev. ed. R. Campbell ed. 1885); J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1954).

2 J. BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed. 1970) [hereinafter cited as LAWS]. The manuscript was discovered in 1939 and first published as J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED (C. Everett ed. 1945).

I

BENTHAM'S IMPERATIONAL THEORY OF LAW

Although Bentham shared some of Austin's basic assumptions—for example that laws are to be viewed as expressions of a sovereign's will—and some of his conclusions—for example that a legal system may be considered a set of coercive commands—his theory is more subtle and complex, more interesting, and perhaps more defensible than the view ascribed to Austin. Bentham argued that *permissive* laws—which say what *may* or *need not* be done, rather than what ought or ought not to be done—can also express a sovereign's will. He showed how commands and prohibitions (and "imperatival" rules and utterances generally) are but one species of the genus *imperation*,[3] of which permissive laws and similar rules and utterances constitute another species. Working from the basic assumptions that were later the essential elements of the Austinian imperative theory, Bentham thus recognized more types of law as fundamental.

The imperative theory has been criticized for excluding important legal phenomena by its neglect of laws that confer "legal powers" as distinct from those that impose "obligations."[4] Bentham's imperational theory of law may be less vulnerable to that objection, for rather than maintain that legal powers and related phenomena reduce simply to restrictions, it recognizes that they may be analyzed in terms of permissions as well. Even if Bentham's theory proves incapable of accommodating all types of law, it may still be of interest, for it deals with what must be an enormous and central sector of the law—the part that *is* analyzable in terms of permissions and restrictions—which it seems to treat more adequately than the imperative theory can. We may therefore wish to preserve it within a more complete account of legal phenomena.

One reason for reexamining Bentham's theory of law, then, is to correct the historical record. Bentham's view diverges from the narrower imperative theory. It is significantly original, not only because it acknowledges permissive laws within an Austinian framework, but also because it incorporates one of the earliest systems of what we now call "deontic" logic—the logical principles that govern restrictions and permissions.[5] In attempting to reconstruct Bentham's full concept of

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3 LAWS 15 n.*h;* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 299 n.*b*2 (J. Burns & H.L.A. Hart eds. 1970) [hereinafter cited as INTRODUCTION].

4 H.L.A. HART, THE CONCEPT OF LAW 28-41 (1961).

5 Although discussion of the more general "modal" logic (concerning necessity and

law, however, one is faced with apparent contradictions. Even in *Of Laws in General,* Bentham suggests in one way that he subscribes to the imperative theory.[6] In arguing that all laws create some "mischief"—one of his characteristic claims—he seems to assume that all laws are coercive commands. Thus he explicitly accepts but implicitly rejects permissive laws.

The issues involved are central to Bentham's concerns. His attempt to understand the nature of law was chiefly motivated by his overriding interest in social reform, especially reform of the law. He believed, of course, that laws should always be judged by their tendency to promote human happiness or welfare—in short, by their "utilities."[7] And he saw that their beneficial consequences had to be weighed against the harm they could cause. It was therefore important for him to ascertain whether laws have *unavoidable* disutilities. His argument that all laws are mischievous, at least to some degree, provided an answer. Bentham also used the argument for polemical purposes—for example, to inveigh against "natural lawyers" who blindly extol the supposed virtues of English law, acknowledging neither its frequent inhumanity, corruption, and inefficiency nor the price that must be paid for having even the best of all possible laws.

How should we view the apparent contradictions in Bentham's legal philosophy? One might say that it contains divergent and sometimes incompatible tendencies, a verdict some critics would regard more generous than just. But *Of Laws in General* inspires greater confidence in Bentham's care and rigor, and the contradiction may well dissolve on closer scrutiny. One possible explanation is that this book, which he never prepared for publication, was written when Bentham's basic theory of law was developing most rapidly. There is evidence that the relevant parts of what is now Chapter X, in which he fully admits permissive laws, were written somewhat later than Chapter VI, in which he argues that laws are mischievous and implies that they are coercive commands.[8] One could imagine that the coercive command theory came first and that Bentham discovered only later, while reworking Chapter X, the full implications of the more basic idea that laws express a sovereign's will. It is not certain, however, that this appealingly simple

possibility) goes back at least to Aristotle, systematic treatment of deontic logic in particular is usually traced back to von Wrigbt, *Deontic Logic,* 60 MIND 1 (1951).

6 *See* text accompanying notes 10-20 *infra.*

7 *An Introduction to the Principles of Morals and Legislation* shows Bentham's general approach at the time *Of Laws in General* was written. The latter grew out of the former. *See* Hart, *Introduction* to LAWS xxxi-v.

8 *Id.* at xxxix.

solution of the problem can be sustained, for Bentham mentions permissive laws in another chapter that may be of early origin.[9] And I am unaware of any evidence that he later disavowed the claim that laws are mischievous. The second purpose of this article, then, is to explore the possibility that Bentham's imperational theory of law is compatible with some version of the claim that laws are mischievous.

Bentham shared Austin's conclusions, but he came to them less directly and by means of contingent considerations. It trivially follows from Austin's theory that a legal system is a set of coercive commands. On Bentham's view, there is a way of showing that a legal system is *equivalent* to a set of commands which are essentially coercive. Bentham's apparent subscription to the imperative theory might be viewed as a self-imposed caricature. His assumption that all laws are coercive commands could be an oversimplified version of the idea that all efficient laws are command-like and that these in turn are coercive. Given the polemical use to which Bentham puts his conclusion that laws are unavoidably mischievous, there was an obvious temptation for him to oversimplify—a temptation to which he may have submitted.

II

Law as Mischief

Bentham's full definition of "a law" indicates that his basic concept of law is similar in many ways to Austin's:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.[10]

This passage refers explicitly to "the sovereign in a state," who is later said to be the "source" of all its laws, at least in the sense of "adopting" laws actually laid down by subordinate lawmakers. The sovereign is briefly described as "any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed

9 Laws 27-28. *See generally* Hart, *Introduction* to Laws xxxi-vi.

10 *Id.* at 1 (emphasis in original).

. . . to pay obedience."[11] Although Bentham qualifies this notion of a sovereign,[12] the differences are immaterial here and can be ignored. If we assume that the sovereign's "declarations" are imperatival and that the motivation on which he relies for obedience is provided by his punitive sanctions, then we can regard Bentham's definition as stating an imperative theory of law. It can of course be read in other ways, but this particular interpretation is not foreign to its spirit and may be encouraged by other considerations. For example, Bentham refers to the motivational element of law as its "force,"[13] and this suggests the use of coercion. Moreover, one might expect Bentham's analysis to be less precise than that later developed by Austin. More persuasive still is the way Bentham seems to use the imperative theory. It supports his claim that law, whether good or bad, necessarily involves "mischief." Let us examine this argument more closely.

Bentham says in *Of Laws in General* that "there must be some person or persons who are bound or in other words coerced by" any law.[14] His language suggests that any other kind of law is inconceivable: "A law by which nobody is bound, a law by which nobody is coerced, a law by which nobody's liberty is curtailed, all these phrases which come to the same thing would be so many contradictions in terms."[15] He then argnes that "a condition equally necessary to the existence of a law is, that there should be some person or persons who are exposed at least to suffer by it. This condition is in truth a necessary consequence of the other."[16] Bentham thus seems to assume that individual laws are coercive commands.

As long as Bentham's conclusion is not overstated, this obvious reading of the passage is reinforced by the fact that one can distill a satisfactory argnment for it from the passage delineating his view about mischief in *An Introduction to the Principles of Morals and Legislation*.[17] There he explains that the mischief or disutility of an act is not limited to the actual pain or other unpleasant or unwanted

11 *Id.* at 18. *See also* J. BENTHAM, A FRAGMENT ON GOVERNMENT 37-39 (C. Wilson & R. McCallum eds. 1960).

12 *E.g.*, LAWS 18-20 nn.*a*, *b*, & *d*. The two concepts are contrasted in Hart, *Bentham on Sovereignty*, 2 THE IRISH JURIST 327-35 (n.s. 1967).

13 *See, e.g.*, LAWS I, 133.

14 *Id.* at 54. This may possibly be no more than one person, for Bentham's definition of a "law" is meant to cover not only general rules applying to many persons but also legally enforceable directives to single individuals.

15 *Id.*

16 *Id.*

17 INTRODUCTION 144.

conditions which it produces, but also includes both the "alarm" it causes—that is, the expectation or fear of such effects—which Bentham assumes is always painful or unpleasant, and the "danger" it creates, which is mere risk of pain. This means that the mischief of a law need not involve actual pain, but only the unpleasant awareness of being exposed to sanctions, or perhaps only some risk that someone will be frustrated. Bentham's claim that law is unavoidably mischievous requires him to show, therefore, only that such a risk is entailed by any law—that, as he says, "some person or persons . . . are exposed at least to suffer by it."[18] He claims that each law binds, coerces, and curtails the liberty of at least one person and thereby exposes at least one individual to mischief. It inevitably creates at the minimum some "danger," the chance, that is, that someone will experience pain, have unpleasant sensations, be frustrated, or suffer some other unwanted condition. Acts that are generally agreeable to perform can be disagreeable under some circumstances, he argues, so there is always the risk that to satisfy a legal requirement will be unpleasant. Even when the required act is otherwise pleasant to perform, "the idea of coercion intervening may of itself be sufficient to give it an opposite effect."[19] And the curtailment of liberty is a mischief because it reduces the chance that one will be able to do what he pleases and thus makes it more likely that he will be unable to get something he wants. These considerations, which are supposed to show that law is an "evil" even if "a necessary evil,"[20] seem to presuppose that all laws are essentially "imperative," "obligative," and "coercive."

The trouble, however, is that Bentham also explicitly recognizes laws that are in his words "*unimperative, unobligative* . . . [and] *uncoercive.*"[21]

III

Bentham's Two Basic Species of Law

The imperative theorist recognizes only two types of law: commands and prohibitions. Bentham calls such laws "imperative," but he does not insist that they be expressed in the imperative mood.[22] To contrast them with permissive laws, and leave open whether they

18 Laws 54.

19 *Id.*

20 *Id.*

21 *Id.* at 96 (emphasis in original).

22 *Id.* at 96, 104-05, 154-55, 302, app. D 7.

are essentially "coercive" or "obligative," I shall call them *restrictive.* Included in the class of restrictive laws are those that might be understood as telling us what must or ought to be done, what is required or forbidden, what is wrong to do or to fail to do, and so on. For convenience, we can follow Bentham's usage and call positive restrictions "commands" and negative ones "prohibitions," with the understanding that we are not committing ourselves to an "imperatival" analysis of laws.

One of the ways in which Bentham was led to acknowledge permissive laws may be reconstructed as follows. He began with the idea that laws are expressions of a sovereign's will, but in considering the attitudes expressed by restrictive laws he observed that theoretically their absence is equally possible: the absence of restrictive attitudes could be expressed in permissive laws. By relating permissive and restrictive laws in ways suggested by the attitudes they respectively express, he found it possible to describe logical principles applicable to laws. But laws are only one family of imperations, that is, those attributable to a sovereign, and so in discovering these logical principles he constructed, in effect, a more general logic of imperation. Permissive laws thus are just as real or just as possible as commands and prohibitions. Consequently, Bentham concluded that there are four rather than two elementary types of law, and that they fall into two species, restrictive and permissive.[23] Bentham was clearly no simple imperativist. He could not maintain that all laws must be coercive commands, because some laws, he held, are not command-like at all.

I turn now to some details of this imperational theory of law. A law is supposed to express certain attitudes of the lawmaker towards the performance of a given act. Let us say for now that a command expresses his desire to see a certain act performed, while a prohibition expresses the desire to see an act omitted. Thus "Do *A*" and "Do not do *A*" express what might be called "contrary attitudes" on the part of the sovereign towards the performance of act *A*. Nevertheless, Bentham realized that positive and negative forms of imperation are interchangeable. "The law which prohibits the mother from starving her child commands her to take care that it be fed. The one may be at pleasure translated or *converted* into the other."[24] It may be awkward or diffi-

23 *Id.* at 95-97. The four types of law include commands and prohibitions (restrictive) and non-commands and non-prohibitions (permissive). *See* text accompanying notes 25-26 *infra.*

24 LAWS 96 (emphasis in original). Bentham realized that the possibility of specifying behavior in alternative ways was independent of a real extra-linguistic distinction between acts and omissions. *See* INTRODUCTION 75-76.

cult to construct completely accurate conversions, but they are always possible in principle. The command of an act can be regarded as the prohibition of its omission, and vice versa.

Bentham's claim seems sound. Although it often makes a difference for linguistic convenience or other practical purposes, whether we use affirmative or negative forms in formulating restrictions seems immaterial from a purely logical standpoint. The substance of what is said can be expressed either way. This is so even if we use the imperative mood. "Do *A*" can always be stated, "Do not fail to do *A*," thus changing a command into a prohibition. Prohibitions can similarly be converted into commands.[25] Similar conversions are also possible between affirmative and negative types of permission.

Imperational conversion has an interesting theoretical consequence which was not expressly noted by Bentham. Since either form of restrictive law may be defined in terms of the other, the conceptual assumptions or the basic linguistic apparatus of, say, an imperative theory of law would need to include only one of the two restrictive forms. Since permissive laws are also convertible, an imperational theory of law such as Bentham's, in fact need recognize only two basic species of imperation—restrictive and permissive—not four basic types.

If a lawmaker lacks one or both of the restrictive attitudes towards a given act, the resultant permissive attitudes can be expressed in permissive laws. The two basic types of permissive law parallel the two types of restriction. A non-command expresses the mere lack of a wish to see a given act performed, the absence, that is, of the restrictive attitude that would be expressed by commanding the same act. This permissive attitude should not be confused with a wish to see the act not performed. Although not wanting to see the act performed is compatible with a desire to see it not performed, the former does not imply the latter. It follows that one can lack both restrictive attitudes towards a given act and be content to see it done or not done, or be content not to interfere. A non-command is not the same as a prohibition. A non-prohibition can be understood analogously: it expresses the absence of a wish to see the act not performed without implying the wish to see the act performed. Bentham offers these illustrations:

> "Every householder shall carry arms": this is an example of a command: "No householder shall carry arms": this of a prohibition: "Any householder may forbear to carry arms": this, of a

25 This point is of some interest, for it parallels conversion between, for example, predicative statements, such as the so-called *A* form statement and the corresponding *E* form statement, discussed in text accompanying notes 31-39 *infra*.

non-command: "Any householder may carry arms": this, of a non-prohibition or permission.[26]

In sum, Bentham maintains that four elementary legislative attitudes must be distinguished, each of which can be expressed in a kind of law. There are therefore four basic types of law, not merely restrictive commands and prohibitions. Finally, law is not essentially imperatival but imperational.

Before looking more closely at the ways in which these types of law are supposed to be logically related, I should note one complication that the preceding summary has thus far ignored. In developing his full theory, Bentham varies his formulations, saying for example that a law or mandate "expresses," "manifests," or "declares" the "will," "wish," or "intention" of the "sovereign," "legislator," or "magistrate." Most of these variations need not detain us, but one is especially relevant to our concerns. Although Bentham often states that the attitude expressed by a restrictive imperation is a mere desire to see the act performed or not performed, sometimes he also refers to the lawmaker's wish "to influence the conduct of the party in question."[27] This suggests that a restrictive law involves the sovereign's positive intention to interfere with and influence behavior, a suggestion which accords with Bentham's frequent reference to the sovereign's "will" or "volition" and with his definition of a law. Now Bentham is not likely to confuse the mere desire or wish to see an act performed with the positive intention to interfere and influence behavior, if only because differences between them are related to his evaluation of acts and laws. He would distinguish between, say, wishing to see a certain act performed because various interests would be served by it and wishing to motivate the agent to perform it (which might not be worthwhile from an overall utilitarian standpoint, if the benefits that could be gained from the act would not exceed the costs of interference). A utilitarian legislator could register the former preference without acting on it, because he would always take into account the mischief produced by the law itself.

I suggest that the difference between these two attitudes corresponds to the differences between imperations in general, which anyone can utter, and laws in particular, which are ascribable to the sovereign of a state. The logic of laws is a special case of the more general logic of imperations. Bentham develops his theory of imperations in terms of the law because it is his immediate concern; but he

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26 LAWS 95.

27 *Id.*

clearly wants it to apply outside that domain.[28] His theory concerns the logic of what are now called "normative" or "prescriptive" utterances, including their permissive counterparts, outside as well as within the law. In fact, Bentham's approach implies the possibility of such parallels. His idea seems to be that we can understand the essential nature of laws by means of a simple model, based on some familiar relations between ordinary persons and the relevant sort of utterance that may pass between them. Bentham's use of the sovereign illustrates this point. Bentham does not imagine that the supreme lawmaking power in a political community must reside in a single individual, so the personification of this power in an individual "sovereign" suggests an attempt to make down to earth sense, by analogy, of the extremely complicated, impersonal, and formal workings of the law.

The significance of the difference in formulations may then be this. The weaker attitude, the mere wish or desire, is the minimum expressed by any prescriptive imperational utterance, while the stronger attitude, that is, the intention of influencing behavior, may be expressed only by a restrictive law. Any statement about what ought to be done, can be taken as expressing the speaker's desire to see the act performed even if he is unwilling or unable to influence the conduct in question, while the sovereign by contrast does not merely say what ought to be done, but by his very nature endeavors to motivate compliance and is generally obeyed.

This distinction is also related to the difference, insisted upon by Bentham, between statements of what "ought" to be done, which may only express the speaker's "sentiments," and statements assigning to individuals "duties" or "obligations" in the strictest sense. The latter, he thinks, imply the existence of sanctions to motivate their performance.[29] This distinction is an important weapon for Bentham in his battle against natural law, for he claims that natural lawyers, confusing what one ought to do with what one is under an obligation to do, mistakenly assume that their moral principles are embedded in the law.[30]

IV

The Logic of Imperation

In *An Introduction to the Principles of Morals and Legislation*, Bentham hints at a new logic, "untouched by Aristotle," which con-

28 In conjunction with Bentham's logic of imperation in *Of Laws in General* one should also see Introduction 11-12, 15-28, 299-300.

29 Introduction 205-07; Fragment on Government, *supra* note 11, at 104-09.

30 Introduction 298 n.*a*2.

cerns the principles of "imperation" rather than "argumentation" and deals with expressions of the speaker's "will," not of his "understanding."[31] This is evidently the system he developed in *Of Laws in General*.[32] Bentham's logical claims are not unambiguous, but for our purposes many theoretical complications can be ignored or touched on only briefly.

Among the four basic types of imperation, the possible relations respecting a given act are analogous to the relations held to exist among the four elementary types of subject-predicate propositions in traditional Aristotelian logic. The latter include the *A* form: "All *S* is *P*" (for example, "All swans are white"); the *E* form: "No *S* is *P*" (for example, "No swans are white"); the *I* form: "Some *S* is *P*" (for example, "Some swans are white"); and the *O* form: "Some *S* is not *P*" (for example, "Some swans are not white"). The four basic forms of imperation are somewhat problematic. Bentham's examples[33] show that he does not require imperations in the law to be found in imperative form. But the examples concern classes of acts and individuals rather than single acts as performed by particular persons. Laws are typically of universal form, of course, but Bentham's logical claims are most straightforward and defensible when applied to very specific imperations.[34]

We might take the paradigm form of command to be, "Do *A*" (directed at some person *P*), and "Do not do *A*" as the paradigm form of a prohibition. The specific direction of these imperations can be indicated, however, in the following forms. Command: "*P* is to do *A*"; prohibition: "*P* is not to do *A*"; non-command: "*P* need not do *A*"; non-prohibition: "*P* may do *A*." The relations claimed by Bentham among these four forms directly parallel the relations assumed to exist among propositional forms *A*, *E*, *I*, and *O*. We have already seen Bentham's principle of imperational conversion:[35] just as "All swans are white" can be regarded from a logical point of view as equivalent to "No swans are not white," so "Jones is to carry arms" is equivalent to "Jones is not to fail to carry arms." Similar conversions are possible

31 *Id.* at 299-300 n.*b*2.

32 The *Introduction* was first printed in 1780 but was not published until 1789, when Bentham added both the *Concluding Note*, summarizing the conclusions in *Of Laws in General* (which was written between 1780 and 1782), and the *Preface*, which traces part of the history of these works. Bentham's reference to the new logic (text accompanying note 31 *supra*) was not in the *Introduction* as originally printed in 1780. *See* Burns & Hart, *Introduction* to INTRODUCTION xxxvii-viii, xlii.

33 Text accompanying note 26 *supra*.

34 We may suppose that universalized imperations may be constructed out of the specific ones.

35 Text accompanying note 24 *supra*.

between *I* and *O* forms and between corresponding non-commands and non-prohibitions. The rest of Bentham's new logic can be constructed around two principles, which I shall call "imperational contradiction" and "imperational contrariety." These principles are selected not because Bentham makes either of them central but because the corresponding relations are familiar and fundamental in traditional logic and are crucial to any system like Bentham's.

The two main types of logical opposition in ordinary logic are contradiction and contrariety; analogs to both are found in Bentham's system. As it concerns complete statements, contradiction in ordinary logic is exemplified most plainly in the relation between a statement and its denial. If one is true the other is false, and if the one is false then the other is true; they are said to have opposite "truth values." In the traditional logic of predicative statements, such a relation obtains between corresponding *A* and *O* forms and between corresponding *E* and *I* forms (between "All swans are white" and "Some swans are not white" on the one hand, and between "No swans are white" and "Some swans are white" on the other). Contrariety, a weaker relation between statements, exists when they cannot both be true though both might be false; from the fact that one is true we can infer that the other is false, but from one's being false we cannot conclude that the other is true. In the traditional logic of predicative statements, *A* and *E* forms are said to be contraries. Presuming that there are swans, "All swans are white" and "No swans are white" are logically incompatible, but not contradictory statements. In Bentham's system, contradiction is paralleled by the chief relation claimed to exist between restrictions and permissions, while contrariety is akin to the most important relation among restrictions themselves, that is, between commands and prohibitions.[36]

a. *Imperational Contradiction.* In explaining permissive laws, Bentham says that the non-command of a given act is the negation of its command and that its non-prohibition is the negation of its prohibition.[37] Presumably he also means that commands are negations of non-commands and prohibitions negations of non-prohibitions, for the idea of "being the negation of" something, as used in logic, is symmetrical. His complete logic of imperation seems to require that the relation be symmetrical. Bentham may be taken as saying that "Jones is to do *A*" and "Jones may refrain from doing *A*" are in some sense contradictories, and that "Jones is not to do *A*" and "Jones may do *A*"

36 This is suggested by Bentham himself. LAWS 110.

37 *Id.* at 95.

are also contradictories. The prohibition and permission of the same act are supposed to be mutually exclusive and exhaustive of the possibilities. A self-consistent system of imperations would not include both, but it would contain one or the other. What all of this means is not entirely clear, but we can defer this problem for a moment.

b. *Imperational Contrariety.* Bentham contends that the command and prohibition of a given act "are necessarily repugnant and exclusive"[38] too, but he neither says nor does he seem to mean that one is the total negation of the other, since he allows that with no inconsistency an act might be neither commanded nor prohibited.[39] The relation between "Jones is to do *A*" and "Jones is not to do *A*" therefore seems analogous to ordinary contrariety: the statements are incompatible but not contradictory. A self-consistent system of imperations would not include both the command and the prohibition of a given act, but it might include neither.

Given these two principles plus imperational conversion, we can reconstruct the whole of Bentham's logic of imperation. Two examples are especially important. In traditional logic, *A* forms and *E* forms are said to imply *I* forms and *O* forms respectively. For example, on the assumption that there are swans, "All swans are white" implies "Some swans are white." This is called "subalternation," and it has an analog in Bentham's system in that the command of an act includes its permission. This can be shown by arguing that its command excludes its prohibition, which means that it includes the negation of a prohibition; this non-prohibition is a permission. Parallel reasoning shows that the prohibition of an act includes its non-command or, in other words, that its nonperformance is permitted. In legal terms this means that one cannot possibly violate the law of a self-consistent system as long as one is either doing what it requires or abiding by its prohibitions.

We can also extract the imperational analog of sub-contrariety from our three principles. In its traditional form sub-contrariety means that corresponding *I* and *O* statements such as "Some swans are white" and "Some swans are not white" can both be true though they cannot both be false. In Bentham's system this becomes the claim that either an act or its nonperformance must be permitted—possibly both, but at least one of them. Thus, for example, if an act is not permitted, then it must be prohibited; its nonperformance is then commanded, and this implies that the nonperformance is permitted. In legal terms this means that in a self-consistent system of law either

38 *Id.* at 97.
39 *Id.*

an act or its nonperformance must be lawful. At every behavioral junction it should be possible to act within the law.

Bentham thus describes with respect to a given act performed by an individual a complete, determinate set of logical relations among the four basic types of imperation, and specifically the four basic types of law. The results can be summarized by saying that an act can purportedly be dealt with in one, but only one, of three possible ways within a self-consistent system of imperations: (*1*) it may be commanded, (*2*) it may be prohibited, or (*3*) it may be left entirely free, neither commanded nor prohibited. There are no other possibilities; these three cases completely determine the imperational condition of an act and its nonperformance. These principles of imperational logic could be displayed on a "square of opposition" such as the one often used for traditional logic.

V

The Interpretation of Bentham's New Logic

A few comments on Bentham's system are in order. One must ask, first, what Bentham means when he says that one imperation is the negation of another. The problem is to understand how ordinary logical concepts can apply to imperations at all. They preeminently apply to and may be definable in terms of the relations between items such as statements that are supposed to be true or false. However, commands and prohibitions can be authorized or unauthorized, reasonable or unreasonable, and so on—but they cannot be described as true or false. When Bentham says that the command of an act is the negation of its non-command, we cannot take him to be saying that the command is *true* if and only if the non-command is *false*, for this has no apparent meaning. Similarly, since the command and prohibition of an act are not logical contraries in the ordinary sense, it is difficult to understand the claim that they are "necessarily repugnant and exclusive." Bentham's principles need an interpretation. He seems to be extending logical concepts so that they can be applied to items to which they ordinarily do not apply, but he does not explain the outcome.

It is important to emphasize that my concern here is with logical relations and nothing else. If a legal system, for example, contains conflicting statutes, so that officials are authorized to treat as a criminal one doing a certain act or refraining from it, then the system might

be criticized as morally objectionable, as well as practically deficient. But these considerations have no direct bearing here. The question is, what is *logically* defective about conflicting laws? How should we understand the claim that two laws are "inconsistent"?

The problem would be avoided if the items to which the principles of imperational logic apply were supposed to have "truth values." Bentham almost seems to avoid the difficulty in this way, by suggesting that imperations are a specific kind of descriptive statement, unlike those dealt with by ordinary logic in that they express the speaker's volition and thus describe his will rather than express his beliefs or describe his understanding.[40] If Bentham thought this, then he presumably held that imperations are true or false. It would then be understandable for him to omit an account of imperational logic, for it would be no more than a sector or application of ordinary logic. But this interpretation is open to question. Bentham's discussion of the point is brief and confused and probably reflects a struggle to grasp the elusive distinction between asserting and expressing.[41] Bentham clearly wanted his logic to apply to laws and laws are neither true nor false. If laws are imperations, then imperations are not a species of descriptive statement and their logic is not just a sector of ordinary logic.

Bentham's logic still needs interpretation. It is natural to refer to imperationally contrary and contradictory laws as "conflicting." But what exactly does this mean? The nature of imperational contrariety seems clear: the same act is both required and forbidden, so it is impossible to satisfy the demands of both laws. One law must be broken. The nature of the conflict between imperationally contradictory laws, which require an act and permit its nonperformance or forbid and permit a single act, is different, however. This is a conflict between permissive and restrictive laws. Since a permissive law makes no relevant demands on us, there are no permissive demands that can be inconsistent with those of any restrictions. A permissive law cannot be broken. The conflict here is analogous to the conflict between contradictory

40 INTRODUCTION 299-300 n.*b*2.

41 *Id.* It is possible to appreciate Bentham's difficulty if we note that the ambiguity in David Hume's theory of moral language resulted from his failure to employ such a distinction. Hume never made clear whether he meant that moral judgments merely express one's attitudes or that they assert their existence. *See* D. HUME, A TREATISE OF HUMAN NATURE 455–76 (L. Selby-Bigge ed. 1960); D. HUME, ENQUIRIES CONCERNING THE PRINCIPLES OF MORALS 133-38, 234-46 (L. Selby-Bigge ed. 1957). Moral theorists, including such meticulous writers as Henry Sidgwick, for a century and a half after Bentham's work generally ignored the distinction.

assertions: one takes back, so to speak, what the other gives. This account might be extended to cover imperational contrariety as well. If I order someone to do something and then, without rescinding the order, tell him he must not do it or he need not do it, I wind up in much the same incoherent position as if I had asserted something and then denied it without withdrawing my original assertion. The clearer I make it that I stand by both imperations, or both assertions, just what I could possibly mean becomes the more mysterious. Bentham recognized that imperational discourse can be self-stultifying and thus that it has a "logic."

One might try to explain matters as follows. The existence of a law that forbids Jones to do *A* makes it the case that Jones is legally prohibited from doing *A*; the existence of a law allowing Jones to do *A* makes it the case that Jones is legally permitted to do *A*; and so on. But sentences of the form "X is permitted" are contradictories of corresponding sentences of the form "X is prohibited," because of the meanings of "permitted" and "prohibited." The trouble, then, with imperationally contradictory laws is that they would create contradictory states of affairs, which is logically impossible. If we assume that the command of an act includes its permission, then this account can be extended to cover imperational contrariety.

Such an approach minimizes the need to introduce new logical concepts and shows the extent to which imperational logic rests on ordinary logic even though it is not simply a sector or application of the latter. For there is no *formal* contradiction between imperations such as "Jones is to do *A*" and "Jones may refrain from doing *A*," or even between statements concerning imperations, such as "Jones is required to do *A*" and "Jones is permitted to refrain from doing *A*." The conflict turns on the *substance* of what is said, that is, on the relations between such concepts as "permitted," "required," and "forbidden." Ordinary logical principles do not concern such specific matters.

This suggests that Bentham's principles should be understood as follows. Imperational contradiction requires that a restrictive law exists if and only if the corresponding permissive law does not exist. Imperational contrariety requires that conflicting commands and prohibitions do not simultaneously exist. This means that any system of imperations, such as a system of laws, must be self-consistent. There are no conflicting laws within legal systems.

Could Bentham have meant this? Statutes or judicial precedents do in fact sometimes conflict, but this interpretation of Bentham's logic precludes the very possibility of conflict. It seems to follow that

either the interpretation is faulty or the logic is absurd. Of course, ordinary logic does not prevent the possibility of our making logical blunders. It does not describe our actual beliefs or discourse or guarantee that they will be consistent, but often serves as a critical standard for their coherence. Bentham's logic arguably should be viewed in a parallel way. He would not claim that a given act cannot be commanded and prohibited in a given system but only that such a system would be logically defective. It would not be impossible, but flawed.

There is very strong evidence, however, that Bentham did not intend his logic to be understood in this way. He so conceives of the "sovereign's will" that restrictive and permissive legislative attitudes towards a given act are mutually exclusive and exhaustive of the possibilities; and he seems to hold that a law exists if and only if the sovereign has the corresponding legislative attitude.[42]

Although that approach rules out the possibility of conflicting laws, it is compatible with the sort of conflict under consideration. Bentham would not recoguize conflicts between or within statutes and precedents as conflicts between *laws* in the theoretical complete sense of the term "law" with which he is concerned. The need for such a theory, the need, that is, at least for an interpretive notion of a "law," can readily be seen. We do not simply read the laws or legal rules directly out of books, from which they emerge whole and in no further need of qualification. One must extract laws from legal documents and pronouncements, and sometimes they must be constructed out of dispersed items of law. What is contained in a single statute, judicial precedent, or administrative ruling is one thing; what is contained in a "complete" law is quite another. Thus one can have a notion of a "law" which precludes the possibility of conflicting laws and yet concedes that particular documents and pronouncements actually conflict. If those conflicts cannot be resolved by ordinary legal criteria, then the law on the matter in question is so far indeterminate.

There is reason to believe that any system of deontic logic must be so understood when it is applied to the law; so Bentham's approach on this interpretation also appears to be sound.

VI

Abortive Solutions

To return to the main line of argument, we have seen that Bentham recognizes permissive as well as restrictive laws. In fact, he seems

42 *See* Laws 97-99.

to regard them as logically on a par, for they are negations of each other. But he also maintains that there cannot be "[a] law by which nobody is bound . . . by which nobody is coerced . . . by which nobody's liberty is curtailed."[43] This seems to preclude permissive laws which merely state what may or need not be done and do not bind, coerce, or curtail liberty.

One might try to dissolve the apparent contradiction as follows. Permissive laws indicate that certain persons have legal rights to behave in specified ways. But there are no personal rights without correlative obligations. One cannot have a right to do something unless others are prohibited from interfering. Permissive laws can therefore be said to bind, coerce, and curtail the liberty of those individuals whose interference they implicitly forbid. Thus, Bentham's recognition of permissive laws is compatible with the claim that all laws bind, coerce, and curtail liberty, and there is no real contradiction at all.

This argument fails, however, for two reasons. First, as we shall see, there is some basis for doubting that permissive laws *confer* legal liberties; they may simply confirm their existence. But if they do not confer such liberties, then it is questionable whether they can impose restrictions on interference. If we are speaking of laws that simply impose restrictions, then we are not speaking of permissive laws. Second, the alleged correlativity of rights and obligations is dubious. There is a straightforward sense of "having a right" or "being at liberty" to do something which entails no correlative obligations.[44] But we need not dispute the question now, for Bentham's theory alone is in question. He would not reason in the way suggested because he does not admit such correlations. He would allow that many rights imply correlative obligations, but he would not allow that the bare liberties included in permissive laws imply such obligations.[45] Bentham's notion of a permissive law amounts to the mere absence of a restrictive law, and thus does not imply any corresponding restrictions.

It is possible, of course, to suggest some correlations to which he may be committed. For example, he might agree that to speak of *legal* liberty is to imply the context of a legal system, and he would probably hold that there cannot be a legal system unless there are some

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43 *Id.* at 54.

44 *See* Lyons, *The Correlativity of Rights and Duties*, 4 NOUS 45-55 (1970).

45 Sometimes Bentham suggests that a right to do something implies a correlative obligation, and sometimes he suggests the opposite. *See* 3 THE WORKS OF JEREMY BENTHAM 159-60, 181, 217-18 (J. Bowring ed. 1843). The former view is compatible with the one attributed to him in the text, however, on the assumption that a relevant distinction must be made between a "right" and a bare "permission."

general restrictions on behavior. From these assumptions it would follow that whenever someone is legally at liberty to do something, it is also true that others fall under restrictions. But this is irrelevant, for it does not show that permissive laws themselves bind, coerce, or curtail liberty. It shows only that such things happen within a legal system concurrently with permissive laws. Bentham actually comes close to admitting the required correlations, for he holds that, as a matter of fact, interference with permitted behavior is always prohibited. But he does not say that these prohibitions are implied by the permissive laws themselves; he says that they are always added.[46] And it is clear that his notion of a permissive law allows him no alternative. Restriction on anyone's behavior requires a restrictive law. Bentham's permissive laws in themselves cannot be regarded as binding, coercing, or curtailing liberty, so his apparent contradiction still needs to be explained.

Another approach is suggested by Bentham's notion that "every efficient law whatever may be considered as a limitation or exception, grafted on a pre-established universal law of liberty."[47] A legal system is thus conceived of as restrictions imposed on a field of antecedently free behavior. This image is powerfully drawn, in Bentham's most eloquent prose, more than once in *Of Laws in General*.[48] Why does he look at law in this way? As permissive laws are the "negations" of restrictions, and vice versa, we might expect him to accept the opposite view just as readily, and be prepared to think of permissive laws imposed on a field of antecedently restricted behavior. But he does not do so.

One explanation might be based on a formal or structural asymmetry within legal systems exemplified by the fact that a self-consistent system can subject an act to both kinds of permission but to only one kind of restriction. It could be argued that permissive laws are strictly superfluous while restrictive laws are not. There may be permissive as well as restrictive laws in ordinary legal systems; but for any given legal system can be imagined an equivalent one with no permissive laws at all and in which all the specific laws are restrictive—a *restrictive law* system. But we cannot coherently imagine an equivalent system with permissive but no restrictive laws, that is, a *permissive law* system. Permissive laws are thus eliminable in principle, while restrictive laws

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46 LAWS 131-32.

47 *Id.* at 119.

48 *See, e.g., id.* at 119, 253.

are not, so that any legal system can be regarded as essentially restrictive.

There is no doubt that Bentham leans in this direction. Consider the functions that he assigns to permissive laws.[49] They can be used to revoke restrictive laws and thus to restore liberties; to qualify or limit existing restrictions; and to clarify existing law in order to allay unfounded fears about curtailed liberties. Two things are striking about this list of functions. First, it suggests that permissive laws do not confer liberties except through *restoring* them by qualifying or revoking antecedently established restrictive laws. Second, these functions presuppose a system constructed around restrictions on behavior. Permissive laws seem to have a secondary or parasitic role. Moreover, it may be possible to dispense with them entirely. Laws used to *confirm* the existence of legal liberties do not seem essential to a legal system. Laws used to qualify or limit restrictions might be eliminated too. One can at least imagine the alternative practice of revoking the laws that are to be qualified or limited and enacting suitably modified restrictive laws in their places. Indeed, it is unclear whether permissive laws that are used to qualify or limit restrictions should be regarded as independent, complete laws at all. They may constitute distinct enactments or judicial rulings, but once established they might best be regarded as elements of the restrictive laws that they qualify or limit. In any case, they seem theoretically eliminable.

This leaves the use of permissive laws to revoke restrictions entirely. Bentham calls these "countermands" and "repermissions."[50] If such changes are to be made, some laws of this general description would seem to be needed, and if provision for making such changes is essential to a sophisticated legal system, then permissive laws as a general class would not seem superfluous. But such laws would perform a very limited function within a legal system. Once they do their job of restoring liberties, neither the revoked nor the revoking laws should be thought of as contained in the resulting system.[51] The revoked laws no longer existing, the revoking laws have served their purpose, for liberties have thereby been restored. The revoking laws are part of the history of the system, but they do not determine its continuing content.

What all the laws of a given system, taken together, require and allow, forbid and permit, I shall call their imperational content. It

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49 *See id.* at 99-100, 110-24.

50 *Id.* at 110.

51 *See* J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 58-59, 76-77 (1970).

seems reasonable to suppose that the imperational content of any system of law at a given time could in principle be reproduced in a restrictive law system. Permissive laws might be needed to effect changes, but they would not be needed for any other essential purpose.

This way of viewing a legal system ignores, of course, the implications of Bentham's principle of imperational contradiction as we have interpreted it. For that principle provides in effect a permissive law for every item of behavior not restricted under the system, and thus permissive laws would not be eliminable. The only "system" in which there would be no permissive laws is one completely devoid of lawful behavior, in which one could not possibly do *anything* without breaking the law.[52] Although this doubtful and in any case absurd possibility can be ignored, I intend to pursue the image a bit further to show the contrast that is suggested.

Imagine, then, a system in which all the specific laws are restrictive, imposed upon a field of antecedently free behavior. In effect, we are imagining a system in which there is a permissive background principle which says that whatever is not prohibited by a specific law of the system is permitted. It may be argued that it would be impossible to have the opposite sort of system, that is, one in which permissive laws are imposed upon a field of antecedently restricted behavior, summarized in the background principle that whatever is not permitted by a specific law of the system is prohibited. To make an ordinary item of behavior lawful in that system we would need a law to that effect. But any single item of behavior is describable in indefinitely many ways, so that to "liberate" just one action we would need to enact an infinite number of permissive laws, which is logically impossible. Thus permissive and restrictive laws are not on a par. We can conceive of ordinary legal systems as if their imperational content were determined by restrictive laws alone, but we cannot reproduce them, even in our imaginations, in a permissive law system.

This reasoning seems to me unsound. Not only would it be possible to liberate ordinary acts in a permissive law system, but we could also conceive of permissive law systems without conflicting restrictions, systems in which it is always possible for a person to act within the law. The error in this reasoning is the assumption that there must be in such a system a separate permissive law for each distinguishable aspect of human action that is to be made lawful. This

52 For if an act is commanded and not prohibited, then the act, in Bentham's view, is permitted, and there is permissive law in the system.

is not necessary; we can cut wide swaths through the tangle of restrictions. To see how this can be done, consider the permissive law which says that anyone may do anything that does not harm or endanger others unless to avoid equal or greater harm or endangerment. Laws such as this would surely liberate a great deal of behavior, and they could be limited or supplemented as desired.[53]

This argument suggests that purely formal considerations are not likely to account for the asymmetry between restrictions and permissions in a legal system. Bentham does not suggest an argument of this type to explain his belief in such asymmetry, and we have now seen that he cannot be regarded as logically committed to the conclusion by such a route.

So I return to the relative functions of permissive and restrictive laws. Consider the two extreme, ideal systems we have sketched—one containing only permissive laws and the other containing only restrictive laws—with their respective contrasting background principles. It might be argued that the chief function of restrictions could not be performed within a permissive law system: commands and prohibitions lay down guidelines for behavior, and show the paths that must or must not be taken. Permissive laws, however, provide no guidelines; they simply indicate what is permitted and thus cannot be used to channel behavior in determinate directions.

This claim too is unsound. For there will be both permissions and restrictions in each system, even though there will be only one type of law in each. It can be granted that the specific functions of permissive and restrictive laws are different; but they do not function in isolation. When we know what restrictions are laid down in the restrictive law system, the permissive background principle enables us to determine what may and need not be done. Paths of free behavior can be tracked among restrictions. Similarly, when we know what is permitted by the laws of a permissive system, the restrictive background principle tells us what is still commanded or prohibited. Here the permissive laws directly indicate the paths of lawful behavior.

VII

The "Force" of a Law

So far, I have considered law chiefly in its role as a guide to action by virtue of its indicating what is "commanded," "prohibited," or

[53] This reasoning should also meet the objection suggested in G. von Wright, Norm and Action 86-88 (1963).

"permitted." But Bentham's full concept of the law does not simply label behavior "lawful" or "unlawful." Laws are not merely devices used for expressing the sovereign's preferences about his subjects' conduct; they also indicate his positive intention to influence that conduct. Bentham builds into his definition of a "law" reference to what he calls its "*force*," which concerns "the *motives* it relies on for enabling it to produce the effect it aims at."[54] There is an essential motivational aspect to the law, and this is responsible for the asymmetry between restrictions and permissions.

Bentham conceives of the law as a system of social control.[55] What is meant by social control is not direct manipulation by means of chains, walls, bars, drugs, or other such devices. These may be used by the law, but they do not fully explain the mode of control in question, which is getting people to behave in certain ways by affecting their own *self*-control through the use of rules and guidelines for them to follow. These rules neither move nor restrain the movement of persons, but they are understood to indicate what one is expected to do. How is control *effected* by means of such rules? Bentham's answer is that motivation must be supplied. In some cases preexisting motivation can be exploited; but motivation is in any case relied upon.

Motivation accounts for the asymmetry between restrictions and permissions for it concerns restrictions in a way it could not possibly concern permissions. This does not mean that, as a matter of fact, legal sanctions are required to goad people into compliance with restrictive laws, while they are not normally required to induce people to comply with permissive laws. It means, rather, that no sense can be attached to the idea of motivating someone to comply with, obey, conform to, or follow a permissive law, for permissive laws, which have no restrictive implications, cannot possibly be broken. But it makes a great deal of sense to speak of motivating someone to abide by a restriction, for he might otherwise fail to do so. What Bentham thought of as the essential element of motivation in the law would seem, therefore, to have special siguificance for restrictions. Even though there can be permissive laws, commands and prohibitions do the work of guiding behavior. Control is exercised through such laws, with permissions providing only the needed contrast. This is why Bentham calls such laws "efficient." And this is why he conceives of the law *as if* it were a system of restrictions.

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54 LAWS 1 (emphasis in original).

55 If the law has other functions, they are all reducible to or derivable from this primary one.

I do not mean that restrictive laws are always efficacious. Bentham surely would not insist on that, especially in a system that does not satisfy the dictates of utility. Nor do I mean that permissive laws can never be used to channel behavior. By drawing attention to lawful forms of behavior, by creating desires, and so on, an enactment which simply confirms the existence of certain permissions may lead people to take advantage of them. Bentham would indeed be happy to use the comparatively mischiefless device of permissive laws for such a purpose, but he clearly doubts that it would often be efficacious. He contends that motivation and control are exercised through restrictive laws. This contention could not be maintained as a logically necessary truth, however. The asymmetry of restrictive and permissive laws thus rests to some degree on logically contingent factors.

But there is another aspect of Bentham's concept of the law as essentially restrictive. He accepts a Hobbesian picture of political society.[56] Hobbes defines a "state of nature" as a condition without enforced restrictive rules, and this is how Bentham understands the term. In such a state there are innumerable "natural rights" because there are no enforced restrictions. In making law we introduce restrictions, imposing them upon the antecedent field of natural rights or liberties, thereby extinguishing some of them. The residue remains within the political system, where they are called "political" or "legal" liberties. Political liberty is thus seen as continuous with or as a species of natural liberty—a subtle manifestation of the philosophical "naturalism" of both Hobbes and Bentham. To make law is to *add* something to the world. What is added cannot be liberty, for that was there already. Law adds restrictions or obligations and thus takes away previously existing liberty. Hobbes reasons this way because he regards enforced restrictions as "impediments" to action: the threat of sanctions serves to avert one from certain actions.[57] Bentham shares this view. It is part of Bentham's very concept of what it is for there to *be* a legal system. The roots of his idea that restrictive laws are the efficient or really operative ones thus go very deep; they are anchored in his nominalist and empiricist metaphysics.

When Bentham says that all laws bind, coerce, and curtail liberty, he means not that there cannot be permissive laws, but that the law as a whole can be viewed *as if* there were none. Permissive laws may be used to restore liberties, but they are not needed for describing

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[56] *Compare* LAWS 253 *and* 3 THE WORKS OF JEREMY BENTHAM, *supra* note 45, at 217-18, *with* T. HOBBES, LEVIATHAN chs. XIII-XIV (Everyman's Library ed. 1950).

[57] T. HOBBES, *supra* note 56, at 179.

the imperational content of a system at any time. It may be granted that the principle of imperational contradiction requires permissive laws for any unrestricted behavior. Bentham collects this indefinitely large class of permissive laws under one permissive background principle which says that whatever is not prohibited by a specific law of the system is permitted. But he refuses to view the law in the alternative way, as permissions imposed on a field of restrictions, because his way seems to correspond with two important aspects of reality. First, restrictive laws are supposed to be the instruments of behavioral control. Second, the permissive background principle indicates that political liberty is conceived of as a species of natural liberty. Law gives us direction and control exercised through a central power or sovereign. It adds restrictions to the world. It adds no permissions—or liberty—at all.

VIII

The Need for Coercive Sanctions

Bentham's claim that all laws are necessarily coercive can be understood as referring only to "efficient" laws or restrictions. Can we now conclude that Bentham regarded these laws, at least, as invariably and essentially coercive? His actual position is not quite so simple.

Bentham says, in effect, that subjects must generally be motivated to obey their sovereign's restrictive laws; this follows from his notions of a law and of a sovereign. But this is not to say that restrictive laws are coercive, which would suggest that the motivation in question must be provided by the threat of legal punishment. There is another gap in Bentham's position, between the claim that efficient (restrictive) laws are necessarily coercive and the mere condition that conformity generally be motivated. How is this gap to be bridged?

First of all, when Bentham speaks of "sanctions," he means no more than a source of motivation.[58] "Coercive" sanctions motivate by the prospect of pain or some other unpleasant or unwanted condition. There are also "alluring" sanctions which attract rather than repel by the prospect of pleasure instead of pain.[59] Bentham's references to "coercion" might therefore be to some extent misleading. They do not necessarily refer to punishment or in fact to any legally authorized sanctions; they only imply that the psychological mechanism is aversion.

58 Laws 68, 133; Introduction 34-35.

59 Laws 133.

Moreover, the idea of punishment is not implicit in Bentham's notion of a law, for he allows the possibility of using rewards instead of coercive sanctions. He urges, however, that they be used only for supplementary motivation because punishments are more effective, reliable, and predictable, and thus generally more useful.[60] Finally, although Bentham requires that laws generally be obeyed, he does not hold that law itself must always provide the necessary motivation. General conformity is sometimes a consequence of a mere "habit" of obedience or a "disposition" on the part of subjects to comply with the law.[61] In specific cases, Bentham recognizes that sanctions may be supplied by religion or conventional morality.[62]

In sum, it is only on contingent grounds that Bentham shows a close connection between legally authorized coercive sanctions and individual laws, and then only on the assumption of a rational or utilitarian legislator. Bentham believes that, as a matter of fact, sanctions are generally coercive and legally authorized, and this is the way any rationally constructed system of law would have it. Only in that respect, then, would Bentham seem committed to the idea that restrictions, and thus "all laws," are *essentially* coercive.

To this degree, therefore, his claim that all laws are coercive and consequently mischievous cannot be reconciled with his fully elaborated legal philosophy. This claim is either a vestige of his early crude theorizing about the law or else it is an oversimplification. If the law can be viewed as a restrictive system, then Bentham may be entitled to say that all laws, meaning all efficient laws, are restrictive. Restrictive laws are of the type to which coercive sanctions can be attached. But they are not *necessarily* coercive.

We are now in a position to see why the relation between law and obligation is also problematic in Bentham.[63] He often speaks as if laws were essentially obligative, but this does not reflect his fully elaborated theory of law. Like Hobbes and Hume before him, Bentham sometimes suggests that obligations are simply acts that one is somewhat motivated to perform. All that is needed is a "sanction" as a source of motivation. However, this leads to rather implausible "obligations," including those that would result from the "physical sanction" alone, which is the natural sequence of cause and hedonic effect. On this view, if some activity is unpleasant, one would be "under an obligation" to avoid

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60 *Id.* at 134-36.

61 *Id.* at 109.

62 *Id.* at 68-71; *see also id.* at 248.

63 *See* INTRODUCTION 34-35, 205-07; J. BENTHAM, *supra* note 11, at 104-09.

it. More often, however, Bentham suggests that the stronger and consequently more plausible condition for being under an obligation is that there be a restriction to which punishment is attached as a sanction for noncompliance. But if restrictive laws are not necessarily coercive, then on this view neither are they necessarily obligative. The logical gap we have seen between law and coercion in Bentham's theory also creates a gap between law and obligation.

I have just noted the possibility of restrictive laws backed only by "alluring" sanctions or inducements. This notion presumes that rewards or other inducements are offered as a way of getting people to do certain things. But notice how different such laws would be from ordinary restrictious. Commands or prohibitions backed by sanctions would be understood to say, in effect, that certain behavior is lawful and other behavior unlawful. But suppose we have restrictions backed only by inducements. These look more like invitations, and one failing to take advantage of an offered inducement does not thereby act unlawfully. It would seem, however, that this distinction is relatively unimportant to Bentham since he assimilates such laws to restrictions backed by coercive sanctions.

Bentham views such laws in this way because he believes that the mechanism exploited by adding motivation is essentially the same in either case: the sovereign makes one type of action more attractive or less unattractive than another. It makes no difference in principle whether one is threatened with punishment for doing X or offered an inducement for not doing X. Either method makes the nonperformance of X more attractive. The main difference between these alternative approaches is supposed to be their relative efficiencies. If this is a correct understanding of Bentham, it suggests how important the motivational and control elements are to his concept of the law. From other points of view one would not so readily assimilate restrictive laws supported by rewards to those supported by coercive sanctions.

Conclusion

Bentham's basic concept of law should not be characterized as an Austinian imperative theory. It is true that Austin shared Bentham's approach to understanding law and that their conclusions about the nature of a legal system were similar. But the details of their views are significantly different. Bentham recognized laws that are permissive and thus "unimperative." To some degree, this follows from his "logic of imperation": if some behavior is either not commanded or not pro-

hibited then the principle of imperational contradiction entitles one to say that corresponding permissive laws exist. But permissive laws were not merely such logical constructs for Bentham. He also held that actual enactments could sometimes be understood in whole or in part as permissive laws. Such laws may occupy a secondary place within a legal system, but they nevertheless do exist.

Permissive laws are necessarily uncoercive and unobligative, for on Bentham's analysis they are *purely* permissive and not at all restrictive. But even Bentham's restrictive or "imperative" laws are not necessarily coercive or obligative. Bentham was unclear about the relations between sanctions and the restrictions they are supposed to support, but he did indicate that laws used only to lay down guidelines for behavior can be neither coercive nor obligative. Some laws might rely on extralegal sanctions entirely, and rewards might be used instead of punishments to motivate behavior. Bentham allowed these things to be possible, but he maintained that they would not be wise. He thought that rewards and extralegal sanctions were so unreliable that any guidelines worth propounding *ought* to be supported firmly by legally authorized coercive sanctions. Here Bentham doffs his analytical cap, dons his utilitarian helmet, and maintains in effect that all "efficient" laws—all laws for directing behavior—are *essentially* coercive. But this is more a recommendation than a discovery.