THE INTERNATIONAL LIBRARY OF CRITICAL ESSAYS IN THE HISTORY OF PHILOSOPHY

# BENTHAM: MORAL, POLITICAL AND LEGAL PHILOSOPHY

## Volume II

Gerald J. Postema

# Bentham: Moral, Political and Legal Philosophy Volume II

Legal Philosophy

*Edited by*

Gerald J. Postema

*University of North Carolina at Chapel Hill, USA*

**Ashgate**

DARTMOUTH

Published by
Dartmouth Publishing Company
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Ashgate Publishing Company
131 Main Street
Burlington, VT 05401-5600 USA

Ashgate website: http://www.ashgate.com

**British Library Cataloguing in Publication Data**
Bentham : moral, political and legal philosophy. – (The international library of critical essays in the history of philosophy)
1. Bentham, Jeremy, 1748–1832 2. Ethics 3. Political science – Philosophy 4. Law – Philosophy
I. Postema, Gerald J. II. Moral and political philosophy
III. Legal philosophy
192

**Library of Congress Cataloging-in-Publication Data**
Jeremy Bentham : moral, political, and legal philosophy / [edited by] Gerald J. Postema.
p. cm.
Includes bibliographical references.
Contents: v. 1. Moral and political philosophy — v. 2. Legal philosophy.
ISBN 1-84014-038-0
1. Bentham, Jeremy, 1748–1832—Ethics. 2. Bentham, Jeremy, 1748–1832—Contributions in political science. 3. Ethics, Modern—18th century. 4. Political science—History—18th century. 5. Ethics, Modern—19th century. 6. Political science—History—19th century. I. Postema, Gerald J.

B1574.B34 J48 2001
171'.5'092—dc21 00-051059

ISBN 1 84014 038 0

Printed in Great Britain by The Cromwell Press, Trowbridge, Wiltshire

# Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material.

American Philosophical Quarterly: David Lyons (1969), 'Rights, Claimants, and Beneficiaries,' *American Philosophical Quarterly*, **6**, pp. 173–85.

Hugo Adam Bedau (1983), 'Bentham's Utilitarian Critique of the Death Penalty', *Journal of Criminal Law & Criminology*, **74** , pp. 1033–65. Copyright © 1983 Hugo A. Bedau.

Blackwell Publishers for the essay: H.L.A. Hart (1973), 'Bentham and the Demystification of the Law', *Modern Law Review*, **36**, pp. 2–17.

Cambridge University Press for the essay: David Lieberman (1989), 'The Critique of Common Law', in David Lieberman, *The Province of Legislation Determined*, Cambridge: Cambridge University Press, pp. 219–40.

Cornell Law Review for the essay: David Lyons (1972), 'Logic and Coercion in Bentham's Theory of Law', *Cornell Law Review*, **57**, pp. 335–62.

Edinburgh University Press for the essays: Gerald J. Postema (1989), 'Bentham on the Public Character of Law', *Utilitas*, **1**, pp. 41–61; J.R. Dinwiddy (1989), 'Adjudication under Bentham's Pannomion', *Utilitas*, **1**, pp. 283–89.

Peter M.S. Hacker (1976), 'Bentham's Theory of Action and Intention', *Archiv für Rechts- und Sozialphilosophie*, **62**, pp. 89–109. Copyright © 1976 Peter M.S. Hacker.

Humanity Books for the essay: Igor Primoratz (1989), 'The Utility of Punishment: Bentham', in Igor Primoratz, *Justifying Legal Punishment*, Amhurst, NY: Humanity Books, pp. 15–31 and notes pp. 171–72. Copyright © 1989 Humanity Books. Reprinted by permission of the publisher.

Journal of Philosophy, Inc. for the essay: David Lyons (1969), 'On Sanctioning Excuses', *The Journal of Philosophy*, **66**, pp. 646–60.

Oxford University Press for the essays: H.L.A. Hart (1982), 'Sovereignty and Legally Limited Government', in H.L.A. Hart, *Essays on Bentham*, Oxford: Clarendon Press, pp. 220–42; Gerald J. Postema (1989), 'Development of Bentham's Doctrine of Sovereignty', in Gerald J. Postema, *Bentham and the Common Law Tradition*, Oxford: Clarendon Press, pp. 237–62; H.L.A. Hart (1982), 'Legal Duty and Obligation', in H.L.A. Hart, *Essays on Bentham*, Oxford: Clarendon Press, pp. 127–61; H.L.A. Hart (1973), 'Bentham on Legal Rights', in A.W.B. Simpson (ed.),

*Oxford Essays in Jurisprudence (Second Series)*, Oxford: Clarendon Press, pp. 171–201; Jeremy Waldron (1998), 'Custom Redeemed by Statute', in M.D.A. Freeman (ed.), *Current Legal Problems 1998*, **51**, pp. 93–114; Philip Schofield (1998), 'Jeremy Bentham: Legislator of the World', in M.D.A. Freeman (ed.), *Current Legal Problems 1998*, **51**, pp. 115–47. Reprinted by permission of Oxford University Press.

Gerald J. Postema (1983), 'Facts, Fictions, and Law: Bentham on the Foundations of Evidence', *Archiv für Rechts- und Sozialphilosophie*, Beiheft **16**, pp. 37–64. Copyright © 1983 Gerald J. Postema.

Revue Internationale de Philosophie for the essay: Gerald J. Postema (1982), 'Bentham's Early Reflections on Law, Justice and Adjudication', *Revue Internationale de Philosophie*, **36**, pp. 219–41.

SLS Legal Publications for the essay: M.H. James (1973), 'Bentham on the Individuation of Laws', *Northern Ireland Legal Quarterly*, **24**, pp. 357–82.

Stanford University Press and Weidenfeld and Nicolson for the essay: William Twining (1985), 'Bentham on Evidence', in William Twining, *Theories of Evidence: Bentham and Wigmore*, Stanford: Stanford University Press, pp. 52–72, notes and bibliography pp. 200–206.

Yale Law Journal for the essay: H.L.A. Hart (1972), 'Bentham on Legal Powers', *Yale Law Journal*, **81**, pp. 799–822. Reprinted by permission of The Yale Law Journal Company and William S. Hein Company from *The Yale Law Journal*, **81**, pages 799–822.

Every effort has been made to trace all the copyright holders, but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

# Series Preface

The International Library of Critical Essays in the History of Philosophy is designed to bring together, in an accessible form, the best journal essays in English on the history of philosophy. The series makes readily available, in a systematic manner, the most important essays in the history of philosophy, selected and presented by volume editors who are highly respected in their fields. The original essays are reproduced in full which helps to make the series an invaluable reference tool for all scholars interested in the history of philosophy. It is of particular assistance to advanced undergraduate and graduate students in the history of philosophy as well as those who research in this area. The series focuses primarily on the philosophical traditions of Germany, France, Britain and the United States.

The dominant approach of the series is philosophical in that the essays are primarily accounts and critiques from the perspective on the philosophical issues of the time. Some essays trace philosophical influences and elucidate the context of the major philosophical writings. Other essays offer commentary on the texts in the light of current theories of interpretation and historical understanding.

The overriding criteria for the selection of essays are their quality and importance. The essays overall are chosen to ensure a systematic coverage of all important scholarly debates but they also reflect the interests and perspectives of the individual editors which gives each volume a distinctive flavour. I am very grateful to all the editors for the enthusiasm and experience they have brought to the difficult task of selecting essays which bring out the central controversies over the interpretation and understanding of the work of the enduring figures and schools in the history of philosophy.

The International Library of Critical Essays in the History of Philosophy complements the highly successful International Research Library of Philosophy, edited by Professor John Skorupski, which now runs to over 20 volumes and is widely used throughout the world.

The series owes much to the vision and persistence of John Irwin and the great work done by Valerie Saunders, Sonia Hubbard and the Ashgate editorial team.

TOM CAMPBELL
*Series Editor*
*Centre for Applied Philosophy and Public Ethics*
*Charles Sturt University*

# Introduction

'Happiness is man's end. Law is an instrument he has for compassing it . . . . We have examined the nature of our end . . . . It remains that we do the same by this our instrument' (UC 70a.2). With these words, written in the early 1770s, Bentham launched a lifelong inquiry into the nature of law and its ideal utilitarian deployment.[1] Bentham was pre-eminently a jurist – a philosopher with 'a genius for legislation', as he put it. His writings on law loom largest by far in his vast corpus, and he wrote extensively on almost every important topic in law, including major treatises on constitutional law, the law of evidence, procedural law and judicial institutions, civil law, inheritance law and the law of property, international law and, of course, penal law and the theory of punishment. 'The whole science of jurisprudence is his,' wrote Macaulay (1829, p. 298). And John Stuart Mill wrote, 'he found the philosophy of law a chaos, he left it a science' (Mill, 1969, p. 100).

It is not a little surprising, then, to find an English reviewer writing the following in 1906 in a respected legal journal: 'So far from agreeing with John Stuart Mill's aphorism . . . we venture to assert that his contributions to pure Jurisprudence are comparatively insignificant' (Randall, 1906, p. 317). There is one possible explanation for this extraordinarily inaccurate assessment that somewhat exonerates the author and also explains why Bentham's reputation and influence has been given new life only recently. While much of what we might call Bentham's 'applied legal philosophy' – his application of utilitarian ideas to penal, civil, international, procedural and constitutional law, and the law of evidence – was published in his lifetime or shortly after his death, his philosophically most impressive work on the nature of law was not discovered and published until well into the twentieth century. The manuscripts for *Of Laws in General* were first published (under the title, *The Limits of Jurisprudence Defined*) by Charles Everett in 1945, but the work received little attention from legal philosophers until the *Collected Works* edition was published in 1970. Bentham announced some of his views, rhetorically and by implication, in his devastating critique of Blackstone's *Commentaries* (Blackstone, 1765–69), but his *Comment on the Commentaries* was also not published until 1928. Moreover, extremely interesting, albeit fragmentary, work from the 1770s – in which Bentham writes about the nature of law, legal reasoning, fictions, language, justice and utility – remain unpublished. It is perhaps not surprising, then, that Bentham's reputation as a legal philosopher of the first rank dipped in the mid-nineteenth century and has only begun to rise again in the past three decades. The publication of *Of Laws in General* and *The Comment on the Commentaries* and the *Comment* stimulated scholars to plunge back into the mass of unpublished manuscripts in the library of University College, London and the British Library. From this work, a new appreciation for the remarkable depth, precision, clarity, ingenuity and rich inventiveness (if not the overall consistency) of Bentham's legal philosophy has emerged.

This volume brings together scholarly expositions and assessments of some of Bentham's most important jurisprudential work. Most of the volume is devoted to Bentham's explorations of 'universal jurisprudence' – his analysis of the concept of law and cognate concepts of

command, permission, duty, rights, powers, liberty, sovereignty and the like. This part of Bentham's corpus is at once the most philosophically challenging, most worthy of careful and critical reading, and the least familiar. Part II of this volume selects, from a vast field, three main issues in Bentham's 'applied legal philosophy' for consideration: his penal theory including his theory of action and theory of punishment; his theory of evidence; and his theory adjudication under the an ideal utilitarian code. These issues were selected to illustrate Bentham's attempt to apply his fundamental utilitarian principle and the results of his analytic researches to all corners of law.

## Universal Jurisprudence

Bentham fancied himself as both the Newton of jurisprudence and its Luther[2] – as the one to put the moral sciences, and jurisprudence in particular, on a rock-solid rational foundation, and as jurisprudence's most radical reformer. He sensed no great dissonance between these two personae. In Chapter 1 Hart says that, in his writings on universal jurisprudence, Bentham sought to work out a morally neutral, flatly descriptive terminology for law. This, he claims, is the sane and healthy centre of Bentham's legal positivism. Hart and others have held that Bentham's positivist account of the nature of law was constructed from this resolutely neutral methodological perspective. However, other scholars have argued that Bentham's positivism – particularly his vigorous efforts to distinguish questions of the existence and validity of laws from questions of their moral reasonableness or utility – itself rested on his view of the utilitarian tasks for the fulfilment of which law was the primary instrument (Postema, 1989, ch. 9). On this view, Bentham espoused not a neutral, but rather a normative, positivism – a positivist model of law designed to serve broadly utilitarian ends.

This reading at least appears consistent with descriptions Bentham gave of his project at various points in his career. For example, in a letter to Voltaire (1776), he stated that the object of his work to date, which at the time he called 'Principles of Legal Policy' or 'Elements of Critical Jurisprudence', was 'to trace out a new model for the Laws . . . . To ascertain what the Laws ought to be, *in form and tenor* as well as matter, and that elsewhere as well as here [in England] . . . I have built solely on the foundation of utility' (*Correspondence*, I, 367, emphasis added). Also, in a letter to Lord Ashburton in 1782, he freely admitted that his work in *Of Laws in General* is 'virtually a project of reformation . . . every title of [which] may be considered as a proposal for the alteration of the laws at present in force in so far as they differ from the model of supposed perfection which it is the design of such title to exhibit' (OLG, 310). His painstaking conceptual work represented the best in 'scientific' analysis of law, he thought, because it was systematic, and exhibited and elaborated a rational method tethered to an ontology confirmed by the senses. But at the same time it was intended to produce a model of law that radically departed from that envisioned in the natural law tradition of Grotius, Pufendorf and Barbeyrac and in the common law tradition of Coke, Hale and Blackstone (*Correspondence*, I, 367). Bentham admitted that it did not describe law as it existed in any legal system existing at the time, whether centred around common law, statute or code. He offered a rational reconstruction of our concept of law and its practice, an account of 'the *logical*, the *ideal*, the *intellectual* whole', rather than 'the *physical* one', an account of 'the *law* and not the *statute*' (IPML, 301, emphasis in the original).[3]

Bentham's contributions to jurisprudence, it appears, break all the jurisprudential moulds that other theorists and practitioners had made for it, including the dominant mould fashioned by Bentham's own disciple, John Austin. Reading Bentham's work on the nature of law forces a reassessment of legal positivism, and breathes new life into jurisprudential issues many have thought dead and withered.

*Bentham's Critique of Common Law*

One of the many ironies of Bentham's jurisprudence is the fact that, for all its iconoclasm and originality, it was first of all *reactive*, the product of a lifelong confrontation with Blackstone and the common law that he championed (see Burns, 1989) – in short, 'No Blackstone, No Bentham' (Lewis, 1990, p. 217). In the words of his protégé John Stuart Mill, Bentham was 'the great questioner of all things established' (Mill, 1969, p. 78), and Bentham challenged nothing more aggressively, persistently and productively than English common law. The avowed aim of his critique of Blackstone and the common law was 'to pluck the mask of Mystery from the face of Jurisprudence' (FG, 410). In Chapter 1, Hart points out that, in Bentham's hands, the idea of law as command was a potent tool of reform. It made manifest the fact that law is an artifact of the powerful, not a natural and unquestionable fact to the force of which one could only submit. Although he was no utopian revolutionary (indeed, he believed that there would always be a need for coercive law), Bentham shared some key views with Marx, Hart argues. In particular, he believed that the myths, fictions and illusions of common law shielded from criticism the legal system, and the powerful who stood to benefit from it. The task, as he saw it, was to clear men's minds about the true character of society.

The main elements of Bentham's devastating critique of common law are carefully laid out by Lieberman in Chapter 2 (see also Waldron, Chapter 3 and Postema, Chapter 4). Bentham attacked both the practice and the theory of common law. For example, he attacked the celebrated 'artificial reason' of the law charging that it was 'technical', 'absurd', and ultimately 'dishonest' (B iv, 498). He also argued that, despite its protestations to the contrary, common law is literally *nothing* if it is not judge-made (Comm., 223; B iii, 223–24). Moreover, because judge-made law was retroactive ('dog law' he called it, because it is typically the way one teaches a dog to behave), it systematically undermined rational and responsible allegiance to the law. It secures social order, he argued, only by playing on the blind fear of citizens, not by addressing clear directives to them and articulating reasons for these directives (B i, 161).

While some of his criticisms of the performance of common law may have been original to Bentham, at least in formulation, most could have been heard from other quarters in the eighteenth century and earlier. Original to Bentham, and far more profound, was his attempt to drive these criticisms back to the very way in which common lawyers, and hence the English generally, thought about law. As Lieberman shows, Bentham's critique of common law theory echoes his criticism of natural rights (and, we might add, his criticism of 'the principle of sympathy and antipathy' in his *Introduction to the Principles of Morals and Legislation*) that we explored in the Introduction to Volume I, but it also drew on key principles of common law theory.

Bentham's argument can be stated simply in the form of a dilemma arising from two simple and uncontroversial premises, that, first, in order for laws to guide the actions of those whom they address, they must be authoritative and general: 'To serve as ingredients in a system of

Law we must have not ideas of individual items of conduct, but ideas of sorts of . . . conduct' (UC 69. 151), and that, second, we must have some reason to take such general directives as legally authoritative and binding. The dilemma for common law theory arises immediately, according to Bentham. For, if a proposition of common law is authoritative, it can only be particular – the decision of a judge regarding solely the resolution of the particular case before him – and hence is not law, because it is not general; but if it purports to be a statement of a general rule of law, it cannot, on common law theory's own assumptions, be authoritative, and hence, again, is not law (Comm., 153–4).

But, we might ask, what of the rules and standards that we draw from past decisions and their frequent use in legal argument? Can we not construct such rule – defeasibly, to be sure, but still with some confidence – by 'induction' or 'abstraction' (or, as we might now say, by 'interpretation')? Bentham conceded this possibility. The general propositions we construct may 'appear to be the just expression of the judicial practice in like cases' (UC 100.98), he wrote, conceding further that judicial acts or decisions can, 'in virtue of the more extensive interpretations which the people are disposed to but upon them, have somewhat the effect of general laws' (OLG, 152). But ultimately, he argued, such rules are illusory; they are merely 'inferential entities' – conjectures. The alleged rules of common law exist, not as explicitly expressed, publicly accessible general prescriptive propositions, but as private conjectures. The constructed rules are nothing more than 'the idea that *you* have formed of the act in question, the idea that *I* have formed of it, the idea that *Titus* has formed of it' (UC 69.151).

There are two problems with this in Bentham's view. First, on the assumptions of common law theory, no private conjecture or opinion has authoritative status, so they cannot count as law.[4] But more fundamental is the problem that these private conjectures and personal inferences will converge only by accident. 'These ideas exist,' he argued, 'but are . . . these ideas of one and the same description? Perhaps they are; perhaps not . . .' (UC 69, 151), and whether the rule one party constructs happens to be the same as that of another, or either of them match that of a judge is entirely a matter of sheer chance (Comm., 210). But, as Postema shows in Chapter 4, Bentham insisted that law is, and must be, a matter of public standards, publicly declared, publicly authorized and publicly accessible. What we need from law are 'common standard[s] which all men acknowledge, and all men are ready to resort to' (UC 69.188). Private conjectures, no matter how clever, or expert, or reliable, cannot serve as law and cannot claim status as law. So, the uncertainty Bentham decried in the ordinary practice of common law was not merely an unfortunate failure to live up to its standards; it sprang from the very way in which law was conceived by common law theory.

Waldron (Chapter 3) alerts us to another key feature of Bentham's critique of common law theory. One of the myths which Bentham sought to explode was the attempt of common law lawyers to ground the validity of law in the custom, and hence the consent, of the people. Bentham argued that this claim is demonstrably false. Common law, if it is a matter of custom, it is custom of the *courts*, not custom of the *people*. As Waldron puts it, common law is 'judge-made law *masquerading* as customary law' (p. 46). Bentham did not deny that some common law doctrines might have originated in popular custom. But he insisted that, once it was subjected to judicial recognition and interpretation, its tether to spontaneous custom was cut and such 'legalized' customs can only be known through plumbing the minds of judges (Comm., 192).

Waldron points out that Bentham advocated explicitly legislated, statutory law to take the place of judge-made law. However, as Lieberman stresses, Bentham was keenly aware of the

inadequacies of statutory law as well. Hence, he set out 'to lay the foundation for the plan of the complete body of laws supposing it to be constructed *ab origine*, according to a method of division grounded on natural and universal principles' (OLG, 232). These 'natural and universal principles' were articulated and defended in his most important work in legal philosophy, *Of Laws in General*, the conceptual blueprint for his codification project and for most of his subsequent, voluminous work on substantive areas of law.

*The Concept of Law and the Logic of Imperation*

Since the law can only be understood as a system of law*s* (IPML, 294), Bentham concluded that the first question of universal jurisprudence is: 'What is it for something to be *a law*?'. For his answer, Bentham initially drew on a long tradition of reflection on law that defined a law as a command of a superior to an inferior.[5] With this useful definition in hand, Bentham plunged into his work on penal law. He was ready to publish his results when he discovered that his working definition of law proved inadequate to his purposes[6] because he could not plausibly treat all laws as commands backed by sanctions. Some laws clearly lacked the backing of sanctions, some did not even impose duties or obligations and many merely defined conditions of valid transfer of property or the legal status of various conditions of persons. Consequently, Bentham was forced to rethink the relation between law and coercion, the place of commands in law and the relationship between civil and penal law. He found that he primarily needed to address two problems, solutions to which, he believed, held the key to uncovering the logical structure of any system of laws. First, he needed to explore the logical relations between commands and other species of 'imperation'. Second, he needed to determine what is to count as one complete and unitary law. Entangled in this 'unsuspected corner of [a] metaphysical maze' by these researches (IPML, 1), he warehoused already printed copies of *Introduction to the Principles of Morals and Legislation* and threw himself into the task of working his way out of this maze. The result was a sophisticated refinement of the traditional command theory with impressive scope, power and originality.

James (Chapter 5) offers a useful overview of Bentham's account of the concept of law. He quotes the definition of *a law* with which Bentham opened *Of Laws in General* (OLG, 1). While this definition is far more complex than the definitions typically offered in the command tradition, it follows that tradition in simply offering this definition, without any effort to defend it. Thus, Bentham's argument for it must be constructed from his discussion elsewhere, especially his critique of common law theory. Postema (Chapter 4) sketches this argument and critically assesses Bentham's conception of the public character of law and the model of law he devised to fit this conception.

Bentham's definition departs from the command tradition, including the Austinian positivist branch of it, in several respects. First, he does not focus on command, but on the more abstract notion of *volition* and its *expression*. 'Imperations', as he calls them, include commands, prohibitions, countermands and permissions. One of Bentham's most impressive contributions to jurisprudence is his detailed exploration of deontic logic ('logic of imperation') in *Of Laws in General*, chapter X. Lyons (Chapter 6) seeks to reconcile Bentham's claim that all law is coercive with his recognition that some laws are permissive. To this end, Lyons argues that Bentham is committed to the view that in the background of every legal system is general law, according to which whatever is not expressly prohibited by law is permitted. Lyons' proposal

is controversial, since it commits Bentham to the view that there are no normative gaps in the law. But it is possible to take Bentham's permissive background principle to be an idealization, a companion to his idealized principles of completeness and unity (discussed by James in Chapter 5), which together are key components in his rational reconstruction of law.

Bentham's definition of law is remarkable for a second reason. Unlike Austin's definition, Bentham's does not insist that laws are *general* commands (or imperations). On Bentham's view, laws can be general or logically particular. Moreover, he held that laws may originate either in the sovereign or in others (whose commands acquire legal status through 'adoption' by the sovereign). We shall see below that his account of legal powers depends crucially on the interdependence of 'legislation *de classibus*' – that is, laws governing classes of agents and actions – and 'legislation *de singulis*' – laws addressed to specific agents regarding specific actions. Through legislation *de singulis* adopted by the sovereign, the power of imperation is *shared* among agents vested with such power. Third, Bentham also departs from the standard view in the tradition which holds that commands are peremptory, displacing the judgement of the subject with the will of the commander. Hobbes put the view well: 'Command is when a man saith do this or do not do this yet without expecting any other reason than the will of him that saith it.'[7] Bentham, however, objected to any such notion attaching to law. Law required submission of conduct, of course, but not submission of judgement (Comm., 346): 'Those who are able to convince men, will treat them like men; those who only command [in the sense of the word Hobbes had in mind], avow their inability to convince' and thereby lose their right to command (B i, 160). Imperations, in Bentham's view, express the will of the sovereign and thus mark out a course of action to be followed, but they do not purport to pre-empt the individual subject's judgement. Hence, he thought that it was always necessary, for the *effectiveness* of law, to attach reasons or sanctions.

The role of sanctions in this definition of law is its fourth remarkable feature. The command tradition held that coercive sanctions are *logically entailed* by the concept of command and hence the concept of law. Bentham rejected this view. Some laws (permissive or 'deobligative' ones), he observed, are not sanctioned at all, and he allowed that, in rare cases, rewards can provide the requisite supplementary motivation. In addition, he allowed that some obligative laws are supported only by 'moral' sanctions – the disapproval of the public and the obliged agent's sense of honour and respect for the law and its aims. Nevertheless, he agreed with the command tradition that mandatory laws (commands or prohibitions) typically rely on coercive sanctions provided by law. (For more on subsidiary, law-enforcing laws see the discussion of Bentham's analysis of legal obligations below.)

In addition to carefully defining law, Bentham sought to articulate an auxiliary principle of *individuation* of laws, the task of which was to distinguish one law from another and, more importantly, to determine which 'portions of legal matter' belong together in one complete and unitary law. As James shows in Chapter 5, Bentham located the unity of a law in the unity of the class of acts to which its imperation was principally addressed. However, this directive or 'penal' aspect was only a *part* of a law, although perhaps the most visible and influential part. A *complete* law also included all necessary 'expository and qualificative matter' which equally formed part of individual laws. Much of the civil law, Bentham argued, must be explained as parts of laws in this way, rather than as discrete and complete laws in their own right.[8]

This conceptual move enabled Bentham to hold to his original view that penal law is *logically* primary, while allowing him, within this basically 'imperational' model, to recognize the

importance of essential features of any legal system that cannot be reduced to commands, especially those that define the wide variety of legal conditions of citizens and officials, thereby distributing rights, responsibilities and duties and their attendant benefits and burdens, and the ways in which people can be vested and divested of these conditions or offices. Postema (Chapter 4) argues, further, that, while Bentham insisted on the *logical* priority of penal law over civil law, he believed that civil law was *functionally* prior. 'With relation to the civil code' Bentham wrote, 'the matter of the penal code is but a means' (B ix, 12). The most important task of law, he came to believe, was not regulative, but rather constitutive, to define and constitute the legal relations within which people carry on their lives and coordinate their interactions (Postema, 1989, pp. 175–83). The directive part of law is subordinated to and is designed to serve this larger purpose.

*Legal Duties, Rights and Powers*

Obligations, rights and powers were, in Bentham's view, 'fictitious entities'. Language ostensibly referring to them, while utterly indispensable to thought about law and to the use and practice of law, was still liable to lure us into confusion unless it was properly disciplined. Consequently, Bentham thought it essential for his larger jurisprudential and political project to work out precise analyses of these concepts. In Chapter 7 Hart explores Bentham's analysis of legal duty or obligation, the most basic notion of the group, showing that, for Bentham, at the core of the notion of obligation was the idea of the likelihood of suffering pain (sanction) upon doing or omitting some action. His notion of sanction was very wide, almost indiscriminate, encompassing not only legal punishment, but also the moral (or popular), religious (or divine) sanctions, and even physical consequences of behaviour. 'Physical sanctions' are literally *natural* consequences, he recognized, but legal and moral (and presumably religious) consequences are additions, threatened and imposed by agents other than the person sanctioned. The notion of legal obligation builds on this initial, probabilistic base. Bentham's refinement of this base is noteworthy. On the 'mixed' account that Hart attributes to Bentham, to be subject to a legal obligation is to be liable to suffer at the hands of officials *as provided for by law*. The legal provisions are twofold: first, the official actions are taken in response to alleged violations of primary mandatory laws; second, the official response is directed by a secondary or subsidiary law addressed to them. Not only are officials *likely* to sanction violations of primary laws, they themselves are *under legal obligation* to do so.

This has two important implications and raises one key question. One implication is that Bentham recognized that the notion of legal obligation is a normative, not merely descriptive, notion and so found a merely probabilistic analysis inadequate. He tried to capture this element in the same way he tried to capture the normative aspect of law, namely through linking it to two sets of imperatives, one addressed to the obligation-bearer and the other addressed to officials charged with enforcing the obligation. Second, on Bentham's account, since enforcement officials are also subject to obligations, legal obligations on citizens are actually supported by a complex set or series of subsidiary laws. The series is not infinite or indefinite, of course. It bottoms out, Bentham thought, in official duties supported by the moral sanction. In his constitutional writings he situated this institutional structure in the Public Opinion Tribunal and the popular power to remove or dismiss officials who fail properly to discharge their duties. In view of this institutionalization, he regarded even this popular sanction as legal (as well as moral).

This raises the question: did Bentham regard the operation of the moral or popular sanction as merely a natural consequence (like the physical sanction), or did it have a normative dimension as well? The answer to this question depends on how Bentham's notion of the moral sanction is understood. If it is nothing more than the natural fact of the likely displeasure or discontent publicly expressed by individuals in response to violations of mandates addressed to officials, then Bentham's attempt to capture the normative element of legal obligation would seem to fail. However, there is some evidence that Bentham thought that the moral sanction was not merely a natural fact about likely displeasure or discontent of people, but also included the more complex (moral) fact of disapproval on the part of the people and a sense of dishonour on the part of the allegedly offending agent as well.[9] It is an interesting interpretive question whether Bentham actually held such a view of the moral sanction, and an even more interesting philosophical question whether it would be sufficient to capture the normative character of legal obligations. Although Hart does not explore the interpretation in Chapter 7, he does explore some dimensions of the philosophical question.

With this analysis of the notion of obligation in hand, Bentham turned to the notion of rights. He famously rejected the idea of *natural* or moral rights as a dangerous fiction,[10] but his rejection depended on his analysis of the *necessary* fiction of *legal* rights. In Bentham's analysis rights entail obligations – indeed, they are the progeny of obligations, which in turn are the progeny of law and law-directed sanctions. 'Naked' liberty rights are products of permissive laws; they consist of nothing more than the absence of an obligation to carry out some kind of action. All other rights entail a correlative obligation on some party other than the right-bearer. 'Corroborated' liberty rights are protected by laws directing others (officials in the first instance) to refrain from interfering in the permitted actions. Rights to all kinds of service from others are products of obligations on other people to provide services or otherwise act for the benefit of the right-bearer. In his essay 'Lecture on a Master Mind: Bentham' (Volume I, Chapter 1), Hart maintains that Bentham was committed to the view that to have a right is simply to stand to benefit from the performance of a duty imposed on someone else. Hart argues that this account of rights fails for two key reasons. First, one may benefit accidentally or collaterally by others performing their duties without being *entitled* to any such performance. Second, it ignores the essential power rights-bearers have over the obligations others owe to them. Rights-bearers have 'limited sovereignty' over those who owe them obligations, Hart argues, and he insists that, by virtue of these two features, bearers of rights are not mere *beneficiaries*, but are *claimants*.

In Chapter 8, Lyons defends Bentham's 'beneficiary theory' of rights against these criticisms, offering a 'qualified' version of that theory, according to which to have a right is to be the legally intended beneficiary of another's duty. He then defends this qualified theory against Hart's counterexamples, the most interesting being cases of 'third party beneficiaries'. In Chapter 9, after a broad survey of Bentham's theory of rights, Hart challenges Lyons' qualified version of it. His most important criticism elaborates his earlier charge that the beneficiary theory has no room for the control that rights grant to their bearers over the actions and obligations of others. Using Bentham's theory as a springboard, Hart and Lyons here debate a central philosophical issue in the theory of rights.

The notion of control over the legal or normative standing of someone else is itself central to our understanding of law. In *The Concept of Law*, Hart argued that this notion is theoretically fundamental and not reducible to or explainable strictly in terms of mandates or duties (Hart,

1961, ch. 3). On this basis he criticized positivist jurisprudence for attempting to reduce all laws to species of commands. Although Hart largely had John Austin and Hans Kelsen in mind when he levelled this criticism, it should apply equally to Bentham's theory. Indeed, Bentham was so concerned about this kind of objection – which has the result, *inter alia*, of treating civil law as very different in kind from penal law – that he halted the publication of *Introduction to the Principles of Morals and Legislation* until he could work out a satisfactory response. In Chapter 10, Hart explores his theory in detail.

According to Bentham, legal powers are a species of rights, and so we can make use of the materials that the concept of rights puts at our disposal. Bentham distinguished two species of powers. 'Powers of contrectation' are liberties, conferred and 'corroborated' by law, to handle physically other bodies. Where the power is exercised over other human beings, it is a power over their 'passive faculties'. Examples are the power to use one's property and the power of arrest. These liberties can be conferred by law in one of two ways. They can be the product of permissive *exceptions* added to general laws and prohibiting interference in the actions of others, as in the case of the power of arrest. Alternatively, they can be the product of a natural, defining *limitation* on a general duty – for example, the limitation on the general duty not to 'meddle' with things that do not belong to us and thereby permit us to do what we wish with our own property. The basis for this key distinction lies in the rationale or justification of the general duty and the restriction on it. Limitations flow from the justification of the general duty – the point of prohibiting someone else from meddling with our property would be undermined if we were not free to meddle with them. Exceptions restrict the general duty on independent grounds that, in certain cases, override those which justify the duty.

'Powers of imperation', the second fundamental kind of legal power, are exercised over the active faculties of persons, according to Bentham. They are powers to motivate or direct a person to act in a certain way. The paradigm case of such a power, of course, is the power of a military officer to give orders to his troops or of the legislature to make a law. But, according to Bentham's theory, it is also the root of all other legal powers that enable one person to alter the legal position of himself or others, including the power to enter contracts, make wills, transfer property, appoint judges, elect officials and invest legislators with legislative power. This wide variety of legal powers in particular, Hart had argued, resist explanation if we use only the concept of command and its cognates. Bentham disagreed. Two crucial notions open the way for a unified, comprehensive theory of law and theory of legal powers. The first is that the power of imperation can be divided. To implement this idea, Bentham distinguishes between imperation *de classibus* – that is, for general cases – and imperation *de singulis* – 'legislating' with respect to specific persons, acts, times and places. He then tried to explain making contracts or conveying property as legislating *de singulis*, filling out incomplete laws legislated *de classibus*. For example, the general duty to respect others' property and the right to use one's own leaves unspecified who is the specific owner of a specific thing at a particular point in time. This is accomplished by a person legislating *de singulis* to invest a person with the status of owner or to divest himself of that status and invest another. The details, of course, are important, and Hart traces some of them very helpfully. The second key idea is that we should regard legal powers, especially investitive powers, as *parts* of laws, rather than whole and complete laws in their own right. On Bentham's view, laws conferring powers of imperation of either kind are conditions forming part of general laws that define duties. Hart objects that Bentham's drive to unify the conceptual structure of law under the single concept of imperation,

even when it allows for complex relations among fragments of duty-imposing rules, blinded him to the distinctive normative functions of legal powers. But Bentham might justly ask for a more detailed account of this normative function and an explanation of why his approach fails ultimately to capture it. Bentham may have been too singleminded at this point, but the defects of his account are not obvious, and the originality and sophistication of his account are undeniable.

*Sovereignty*

The concept of sovereignty plays at least two critical roles in Bentham's positivist theory of law. First, as Hart (Chapter 11) notes, it grounds the power of imperation (legislative power) in a legal system. Ultimate legislative power belongs to the sovereign, as Bentham's definition of law made clear, and this power is conferred or constituted by the habit of obedience of subjects in the community. Second, the concept of sovereignty supplies the criteria by which authentic rules of law in a community are distinguished from pretenders. In other words, the doctrine of sovereignty articulates the conditions of validity of law, properties in virtue of the possession of which laws are, and are seen to be, authentic laws of a legal system. (On the importance of the 'epistemic function' of such criteria see Postema, Chapter 12.)

Bentham's doctrine of sovereignty intentionally parts company from two influential traditions regarding the foundations of law. First, he rejects the tradition – represented by Hobbes, Locke, Grotius and Pufendorf – that grounds the authority of law in an alleged social contract. Following Hume, Bentham considered the social contract to be a myth and insisted that an adequate account of law's foundations must be rooted in empirical facts. Hence he proposed not a social contract or some other explicit or tacit *agreement* but a certain 'habit' or 'disposition' of people regularly to comply with the sovereign's commands. However, this resolutely empirical understanding of sovereignty also separated his view decisively from the tradition of Hobbes and Bodin that defined sovereignty as an absolutely unlimited, undivided, supreme coercive power expressed in legislation. Since sovereignty was constituted by empirical social facts and those facts admit of wide variation, whether sovereignty was limited or divided or unlimited and unified could not be settled *a priori* but could only be determined by looking at the relevant social facts. This flexible concept of sovereignty proved descriptively more accurate and theoretically more fertile than the Austinian doctrine usually associated with classical legal positivism. Not only could it account for legal systems in federated countries such as the Dutch Republic, but it also opened the door for an explanation of legal limitations on the exercise of sovereign legislative power.

Bentham's doctrine of sovereignty went through a process of development and sophistication over his long career. Part of the story of this development is told by Postema in Chapter 12 (see also Burns, 1974, 1989). Two key issues are discussed in the essays on Bentham's theory of sovereignty included in this volume. One concerns the interpretation of Bentham's notion of the 'habit of obedience'. The other concerns the interpretation and evaluation of Bentham's account of legally limited government. Hart (Chapter 11) and Postema (Chapter 12) address both issues, although Postema focuses primarily on the first and Hart on the second.

It is tempting to interpret Bentham's notion of the habit of obedience at the foundations of law in 'mechanical' and strictly psychological terms, following Hart's reading of Austin's

understanding of this notion (Hart, 1961, ch. 4). On this reading, the habit is simply a fact about the unreflective, behavioural disposition of individuals separately to respond to the sovereign's commands. Postema argues, however, that this does not do justice to the phenomena on which Bentham's use of the term focuses. On the 'interactional' interpretation he defends, the disposition to obey is a complex, reflective willingness to obey sovereign commands on the expectation that most other subjects will also obey. In other words, the disposition of each subject is conditional upon the disposition of most other members of the community to obey. This interdependent disposition is focused on certain 'accustomed formalities' (UC 69.87), 'ceremonies of authentication' (OLG, 126 n.12), or 'express conventions' (FG, 484) to which laws must conform if they are to be publicly recognized as authentic or valid. Described in this way, the social facts constituting the law's authority and sovereign power of imperation look more like a Humean convention than a mere 'habit'. Postema argues that this is precisely what Bentham must have had in mind.

In Chapter 11 Hart explores in detail Bentham's attempt to explain the possibility of legally limited government within the confines of his doctrine of sovereignty. Bentham relied on two devices. First, he sought to explain the limits on government in a given political society in terms of the simple, empirical limits of the habit of obedience of the subjects in that society. Hart objects that this cannot succeed, since it confuses limits of the valid exercise of legislative power with the extent to which a government is able to secure compliance. Moreover, as an explanation of constitutional limitations, it fails to recognize that the constitution sets a standard by which courts and others assess the products of legislation. These are important objections, but it is an interesting question whether Bentham's view is vulnerable to them if we adopt the 'interactional' understanding of the habit of obedience.

Bentham's second device is most interesting from a theoretical point of view. Early on, Bentham introduced the notion of *leges in principem* – laws addressed to the sovereign (OLG, 64–69). These could not be the commands of some other being, or the sovereign would not be supreme; rather, they are self-addressed – covenants or promises undertaken by the sovereign, and enforced not by legal punishment but by moral sanctions. From this modest beginning Bentham quietly allowed the notion of such sovereign-limiting laws to expand, suggesting that they may rest on custom (OLG, 109) and supply the foundations of ordinary laws (OLG, 64). It is an intriguing question whether this notion merely shows Bentham at his most flexible and inventive, or instead threatens to unravel his elaborate theory. However, Hart insists that, even if we allow him constitutional limits modelled after *leges in principem*, his account fails, the problem being that Bentham still confuses conditions of the validity of laws with conditions of the legality of law-making activity. There is an important difference, he maintains, between violating an obligation not to make laws of a certain kind and failing actually to make them because the alleged law-making activities were *ultra vires*. As long as Bentham continues to conceive of the constitutional limits as duty-imposing rules rather than as criteria of validity, he will not be able to give an adequate account of legal limits on legislative power. Postema argues, in reply, that Bentham may in fact have the resources to meet this objection in his theory of legal powers. However, this reply depends on the controversial assumption that qualifications of the investitive conditions of sovereign legislative power can equally be seen as conditions on the validity of the products of the exercise of that power.