ESSAYS ON BENTHAM

Studies in Jurisprudence and Political Theory

by

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A pervasive theme of the later essays in this book is that the central concepts of Bentham’s imperative theory of law, viz. command and permission, habits of obedience, legality and illegality, are inadequate in the sense that there are important features of law which cannot be successfully analysed in these terms and are distorted by Bentham’s attempted analysis of them. These features include legal obligation and duty, legislative power, legally limited government, and the existence of a constitution conferring legislative power and legally limiting its scope, and also the notions of legal validity and invalidity as distinct from what is legally permitted and prohibited. I have argued that to understand these features of law there must be introduced the idea of an authoritative legal reason: that is a consideration (which in simple systems may include the giving of a command) which is recognized by at least the Courts of an effective legal system as constituting a reason for action of a special kind. This kind of reason I call ‘content independent and peremptory’ and I explain these terms below. In touching on this idea I have expressed the view much disputed by some contemporary writers, that while its introduction into the analysis of the features of law which I have mentioned would certainly involve discarding Bentham’s imperative theory of law, it would still be possible to preserve a distinctive ‘pósitivist’ part of his theory which insists on a conceptual separation of law and morality. Accordingly in this concluding essay I attempt a threefold task. The first is to examine critically Bentham’s account of what a command is and the curious theory of assertion, indeed of meaning, on which his analysis in part rests. The second part is to show that though Bentham’s account of what a command is is in various ways defective, he does touch on certain elements embedded in the notion of command out of which the idea of an authoritative legal reason may be illuminatingly constructed. Thirdly
and lastly I raise the question (but certainly do not dispose of it here) whether, as I think, it is possible to bring the notion of an authoritative legal reason into the analysis of the relevant legal phenomenon without surrendering the conceptual separation of law and morality.

I

Given the importance which Bentham attributes to the notion of a command, he is surprisingly cavalier about its analysis. He does indeed say important and interesting things. He presents, as explained in Chapter V, with great originality and clarity the elements of a logic of imperatives in his Logic of the Will exhibiting relationships of compatibility, incompatibility, and necessary connection between the four 'forms of imperation' which he calls command, prohibition, permission, and non-command,1 and he also correctly identifies a command as a form of rational communication. But what he gives us by way of analysis is open to certain criticisms partly along lines made familiar by contemporary philosophers2 in their discussion of 'speech acts' and their analysis of meaning. The main criticism which I shall make, though it is consistent with and indeed supported by this modern analysis of meaning, was first suggested to me by Hobbes who said some simple but illuminating things about commands and the similarity and differences between commands and covenants as sources of obligation or as obligation-creating acts. But I do not think I should have seen the full importance of Hobbes's remarks on these topics had I not had the benefit of the work of Joseph Raz3 on what he terms 'exclusionary reasons' which resembles in many respects the notion which I have taken from Hobbes.

Bentham, in his first simple account of the connection


2 For this modern analysis, which is both wider and far more complex than appears from the simple use of a part of it which I make here to elucidate the notion of a command, see the seminal work of H.P. Grice in 'Meaning' in Philosophical Review 66 (1967) and a critique of Grice's theory in Schiffer, Meaning (OUP 1972).

3 See his Practical Reason and Norms (London 1975); The Authority of the Law (OUP 1979).
between laws and commands given in his first considerable work *A Fragment on Government*,\(^4\) tells us that statutes passed by legislatures are commands and that commands are the expression of a will of a superior concerning the conduct of others. He does not define here the term 'superior' but seems to treat it as a synonym for 'governors' defined as the person or assembly of persons to whom a number of persons are supposed to be in the habit of paying obedience.\(^5\)

Bentham distinguishes explicit commands (which he calls 'parole expressions of will') where the expression of will is made by words, from what he calls 'fictitious' or 'quasi-commands' where the commander's will is expressed by acts other than speech acts and of these he cites acts of punishment as an example.\(^6\) For Bentham the common law was comprised of such quasi-commands, and his thought was that the judge expresses his will that an act be done by punishing the non-performance of such an act and the sovereign adopts the judge's will as his own by allowing judges thus to punish those who disobey.

In the more elaborate definition of law with which *Of Laws in General*\(^7\) opens Bentham introduces the wider notion of the 'volition' conceived or adopted by the sovereign; this comprises the four aspects of the will distinguished as command, prohibition, and the two forms of permission (non-prohibition and non-command). He then distinguishes the following different constituents of law:

(i) a volition which is conceived by the sovereign or if conceived by someone else is adopted by the sovereign concerning the conduct to be observed by other persons who either are or are supposed to be subject to a sovereign's power.

(ii) words or other signs which are declarative of the volition conceived or adopted by the sovereign.

To this Bentham adds that the legislator must rely upon

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\(^4\) *Fragment* Chap. I, para. 12, n. o in *CW* 429.

\(^5\) Op. cit. Chap. I, para. 10 in *CW* 428, but see *Comment* (Alternative Draft for Chap. I) in *CW* 275, where Bentham says: 'When I speak of a superior being making laws for me I mean only that he can make my happiness less or greater than it is.' Cf. Austin, op. cit. 24: 'Superiority signifies might, the power of affecting others with evil or pain and of forcing them through fear of that evil to fashion their conduct to one's wishes.'

\(^6\) *Fragment* Chap. I, para. 12, n. o in *CW* 429.

\(^7\) *OLG* 1.
certain motives if the law which he makes is to produce the effects in terms of obedience at which he aims, and he frequently describes the sovereign as trusting both to what he calls the auxiliary sanction (popular opinion or divine displeasure) and the specifically legal sanctions which will be provided by the legislator himself. The position is complicated because although to modern ears the word 'sanction' suggests punishment, Bentham admits, as a class of possible laws declarative of the sovereign's volition, those which he calls 'praemiary' where the subject is not punished for disobedience but rewarded for obedience. Secondly, Bentham makes use as I have already explained in Chapters V and VI supra when he expounds his logic of the will, of a technical or, as he terms it, 'confined' sense of the word 'command' which merely describes the 'decided' aspect of legislator's will without regard to the motive or sanction relied upon for the accomplishment of that will.

I shall for the moment leave aside Bentham's account of sanctions and their part in motivating obedience and also what he has to say about the two forms of permission, and shall consider in the case of command the two elements of the legislator's volition and the declaration of that volition which enters into his analysis.

Bentham gives no explicit account of a volition; he refers to it sometimes as an 'internal state of the will' and contrasts it with belief which is 'a state of the understanding', will and understanding being both 'states of mind'. In the case of the 'decided' aspects of the will (commands and prohibitions) as distinct from the 'undecided' aspects (the two forms of permission) he frequently uses as synonyms for volition the expressions 'wish' or 'inclination of the mind' or 'will towards an act'. Nearly all the examples of the use of these varying expressions suggest that Bentham's meaning may be best rendered by the word 'wish', that is a wish that an act be done by another person.

So much, then, for the psychological component of
commands which Bentham calls ‘volition’. On this account it is a necessary condition of an utterance constituting a command that the utterer wishes the person to whom the command is directed to do the act commanded. Of course in the case of most commands this necessary condition is satisfied since commands are normally given only when the speaker wishes his hearer to do the act commanded and indeed are normally given to bring this about. But there are a variety of exceptions to this which would have to be taken into account in any full analysis of the notion of a command. Thus, to take a fictional but perhaps not unrealistic example from army life, a sadistic sergeant-major, finding an incompetent and absent-minded recruit whom he delighted in punishing, gave him command after command hoping, as was often the case, that the recruit would forget or fumble over what he was told to do and would thus provide the sergeant with the opportunity which he sought for inflicting punishment. Such cases of what might be called insincere commands include also not only commands given to the counter-suggestible to procure contrary behaviour to that commanded, but more impressive examples of commands given simply to test obedience, as in the case of God giving Abraham a command to sacrifice his son. Of course in such cases it is not true that the commander intended the subject to do the actions commanded (though it is true that he intended the subject to believe that he so intended): yet there seems little doubt that we must speak of him as giving a command or order. Such insincere commands where the speaker does not in fact intend the person to do as he commands him are parasitic on ‘normal’ commands where the speaker does so intend. For the speaker makes an insincere or deviant use of a distinctive conventional linguistic device such as the grammatical imperative mood which is used to give ‘normal’ commands. Bentham does not notice this case but on his descriptive analysis of commands explained below, the difference between a sincere and an insincere command would simply be the difference between a true and a false first-person descriptive statement.

I turn now to the second element in Bentham’s account of command: the words or other signs which constitute a ‘declaration’, as he terms it, of the commander’s volition.
Bentham gives no explicit definition of a declaration\(^{13}\) but he seems consistently to have thought of commands and prohibitions as assertions or statements of the fact that the speaker has the relevant volition. So command at least includes a statement that the speaker wishes an action to be done, and the form of permission which Bentham calls non-command is a negative statement asserting that it is not the case that the speaker wishes the action to be done. So, too, *mutatis mutandis*, for prohibition and non-prohibition, which last Bentham calls permission.

Though Bentham has much to say of interest on the difference between the indicative or, as he actually calls it, the assertive style of discourse and the imperative and the way in which the former may ‘mask’ the latter\(^{14}\) he did not succeed in identifying the radical difference of function in communication which they standardly perform. A command for Bentham was a kind of assertion differing from others only because it was specifically an assertion about the speaker’s volition concerning the conduct of others. He did not recognize it as a form of non-assertive discourse. That this is so is not only suggested by his calling the words used in giving a command a ‘declaration’ of volition, but is made clear by two other observations which he makes. First he quite generally held that to express anything in speech, whether it be the expression of one’s will or one’s belief, is to assert\(^{15}\) something about one’s will or belief. Secondly, he considered that the ordinary imperative forms of language used for giving commands are essentially elliptical and when expressed at full length would display the fact that they were assertions about the speaker’s will. Thus he says the imperative form ‘Kill that robber’ is an elliptical way of saying ‘My will is that you kill the robber’\(^{16}\) and a law expressed as ‘Export no corn’ is an elliptical form for the assertion ‘It is my pleasure that you do not export any corn’\(^{17}\).

If this doctrine, that commands and prohibitions because

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\(^{13}\) He uses as synonyms ‘manifestation’ in *PML*, Chap. XVI, para. 25, n. 2, in *CW* 206, and more frequently ‘expression’, e.g. *OLG* 94, 99, 298.

\(^{14}\) *OLG* 106, 178–9, 302, 303.

\(^{15}\) *PML* Chap. XVII, para. 29, n. b 2 in *CW* 299–300.

\(^{16}\) *PML* loc. cit.

\(^{17}\) *OLG* 154.
they are expressions of will are assertions seems a gross error, it is I think to be remembered that Bentham was not alone in failing to grasp the distinction between what is said or meant by the use of a sentence, whether imperative or indicative, and the state or attitude of mind or will which the utterance of a sentence may express and which accordingly may be implied though not stated by the use of the sentence. When I say ‘Shut the door’ I imply though I do not state that I wish it to be shut, just as when I say ‘The cat is on the mat’ I imply though I do not state that I believe this to be the case. Philosophers are no doubt now quite familiar with these distinctions which enable them for any proposition ‘p’, not mentioning the speaker’s belief, to explain the oddity of saying ‘p but I do not believe that p’ without maintaining that we have here a contradiction or that p means or entails that I believe p. The same is true of course of the relationship between ‘Shut the door’ and ‘I do not want you to shut the door’.

But Bentham, like Hume who seems not to have distinguished between reporting and expressing a ‘sentiment’, lacked these modern tools for making this kind of distinction, and his doctrine that commands are assertions about the speaker’s will was grotesquely paralleled by the doctrine which appears in his early writings that ordinary statements of fact in the indicative mood, like ‘The cat is on the mat’, are elliptical ways of asserting that the speaker has a certain belief. Bentham even says that the simplest form of proposition is complex. To quote again his own example,18 ‘if I say “Eurybiades struck Themistocles” all I assert and can assert is “It is my opinion that Eurybiades struck Themistocles”’.

I have sketched in the Introduction the paradoxes which would result if this view were taken and its refutation. Together with the doctrine that the ordinary forms of imperative and indicative sentences are elliptical it is plainly mistaken, and the differences between commands and statements must be sought elsewhere than in a difference between two kinds of statements, one asserting that the speaker believes something, and the other asserting that he wishes something to be done.

More interesting perhaps is the fact mentioned in Chapter V that Bentham's logic of the will as he calls his account of the compatibilities and incompatibilities between commands, prohibitions, and permissions seems to reflect a conception of these as statements about the will of the commander and not as forms of non-assertive discourse. Thus he speaks for example, of a prohibition and a permission as being contradictory so that it will always be the case of any action that it is either prohibited or permitted but not both. This could be maintained as an obvious truth if sentences expressing prohibitions and permissions are assimilated to indicatives, and a prohibition identified with the statement that the speaker wishes an action not to be done and a permission to act with a statement that it is not the case that the speaker wishes the act not to be done. So too all the other relationships which Bentham identifies (contraries, contradictories, etc.) could rest on the ordinary formal logic of propositions combined with the assumption that as a matter of the meaning of the verb 'to wish' it is impossible both to wish that an act be done and that it not be done by the same person at the same time. If we abandon this propositional account of commanding and this assumption concerning the meaning of the verb 'to wish', something which Bentham does not give us but which I have attempted to supply in Chapter V is required to show that commands, prohibitions, and permissions are related to each other in ways sufficiently analogous to the relationships of contrariety and contradiction between statements which have truth values to justify the use of these terms in their case.

However, it may be that something more creditable to Bentham may be said about his account of a command as an assertion. It may I think be taken as a mistaken or clumsy way of putting a point of quite central importance of which contemporary philosophical analysis of meaning has stressed: namely, that a command is a form of human communication and that the way in which its utterance is intended to get the hearer to whom it is addressed to act is very different from the way in which one who says 'Boo' intends his utterance to get a person to jump, and yet it is also very different from the way in which one who says 'Your house is on fire' may intend thereby to get his hearer to go home.
In some sense it is true that one who commands intends his hearer to take what he says as the expression of the speaker’s wish that he should do some action and the question is in what sense is this true? Bentham saw that commands as expressions of will belong to a large class of utterances which also include invitations, exhortations, requests, and certain forms of giving advice. He also said correctly that common language has no word for this broad class for which contemporary philosophers sometimes use the general classificatory term ‘imperatives’. Bentham also saw that in utterances of this kind the speaker says what he does in order to get his hearer to do an act for certain reasons: their use therefore is a form of communication between rational beings. These utterances have also in common the feature that they make use of a special linguistic device, namely the imperative mood, to discharge the function of communication which they have, though this also may be discharged by other linguistic forms.

Now Bentham’s insistence that a command is an assertion elliptically expressed that the speaker wishes the hearer to do an act may be regarded, perhaps somewhat charitably, as a way of putting the point that in such cases the speaker not only speaks with the intention of getting his hearer to act but also intends that the hearer shall recognize that this is the speaker’s intention and that this recognition should function as at least part of the hearer’s reason for acting. It is this latter feature which differentiates saying ‘Please jump’ in order to get a person to jump from saying ‘Boo’ with the same purpose, though this of course is only to give one necessary condition of an utterance being an imperative. What constitute sufficient conditions is still a matter of complex debate between philosophers who broadly accept what may be called the recognition-of-intention analysis of imperative meaning. Bentham was therefore right in thinking that it is part of commanding and the other imperative speech acts which characteristically make use of the imperative mood that the speaker intends his hearer in some way to recognize his wish that he should do the act. Where he went wrong was in not seeing or at any rate in not making clear

\[19 \text{ OLG 14, n. l; 298, n. a (299).}\]
two things. First that strictly what the commander intends his hearer to recognize is not that he, the commander, merely wishes the act to be done but more specifically that his intention in speaking is to get the hearer to do it through the latter’s recognition that the commander has spoken with that intention. In other words, the commander intends his hearer to recognize the giving of a command as a step intentionally taken towards furthering the commander’s intention to get his hearer to act. Secondly, the use of the imperative mood is not as Bentham said an elliptical form of assertion: it is not a way of stating that the speaker wishes something to be done, for, when the imperative mood is used, though the speaker mentions the content of his wish or intention, he does not state that he has that wish or intention. So the way in which the commander intends his hearer to recognize that he intends him to do the act is not, via a belief that something said by the commander is true but by way of an inference from the fact that he has said it irrespective of any question of truth or falsity of anything said. If a man says to another ‘Leave the room’ he intends the hearer to infer the speaker’s intention much as he might infer it from his starting to push the hearer towards the door. In both cases the hearer is intended to infer it because what the speaker does by words mentioning the content of the speaker’s wish in one case and by the act of pushing him in the other case is recognized as something which people do when they wish others to leave the room and as a step towards securing this. In one case the means used is a conventional linguistic means; in the other it is a natural means.

What I have said up to this point is far from a complete analysis of commands or other imperative speech acts. I have displayed only certain necessary conditions of an utterance constituting a command and I have carried the analysis only so far as is required to focus attention on the fact that where a command is sincere the commander intends the expression of his intention to function as at least part of the hearer’s reasons for doing the act in question. But in fact there is something quite distinctive in the case of a command in the way in which the expression of intention is intended to constitute a reason for action, and I shall turn now to Hobbes, who was I think the first to notice this distinctive feature,
for he said something, though all too briefly, which illuminates the point.

Hobbes, like Bentham, thought that all laws were commands of a Sovereign but, unlike Bentham, thought the commands were laws only if given to those who were under a prior obligation to obey, and his account of this prior obligation was that it arose from the subject’s covenant or contract to obey the commander. So on Hobbes’s view the Sovereign in giving his commands which are law is exercising a right arising from the subject’s contract. Bentham, however, would have none of this prior obligation to obey nor of the social contract alleged to generate it nor of the idea that in making laws the Sovereign was exercising a right or normative power, so, as shown in Chapter IX, he defined the Sovereign in flatly descriptive non-normative terms as one who is habitually obeyed by his subjects and himself habitually obeys no one. But Hobbes in discussing the general notion of a command and in differentiating it from the mere giving of advice or counsel in imperative form says something not said by Bentham. Hobbes in Chapter XXV of his *Leviathan* says ‘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’.\(^{20}\) By this Hobbes meant that the commander characteristically intends his hearer to take the commander’s will instead of his own as a guide to action and so to take it in place of any deliberation or reasoning of his own: the expression of a commander’s will that an act be done is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act. The commander’s expression of will therefore is not intended to function within the hearer’s deliberations as a reason for doing the act, not even as the strongest or dominant reason, for that would presuppose that independent deliberation was to go on, whereas the commander intends to cut off or exclude it. This I think is precisely what is meant by speaking of a command as ‘requiring’ action and calling a command a ‘peremptory’ form of address. Indeed the word ‘peremptory’ in fact just means cutting off deliberation, debate, or argument and the word with this meaning came into the English language from Roman law, where it

\(^{20}\) *Leviathan*, Chap. XXV.
was used to denote certain procedural steps which if taken precluded or ousted further argument. If we remember this we can call the reasons which the commander intends his hearer to have for action 'peremptory' reasons.

Of course the commander may not succeed in getting his hearer to accept the intended peremptory reason as such: the hearer may refuse or have no disposition at all to take the commander's will as a substitute for his own independent deliberation, and it is typical of commanding, therefore, to provide for this failure of the primary peremptory intention by adding further reasons for acting in the form of threats to do something unpleasant to the hearer in the event of disobedience. Now these further reasons are indeed intended to function within the hearer's deliberation as dominant reasons or reasons strong enough to overcome any contrary inclinations. But these secondary reasons are in a sense a *pis aller*: they are secondary provisions for a breakdown in case the primary intended peremptory reasons are not accepted as such. It is, however, important to observe that the concentration on the threats of sanctions which commonly attend the giving of a command obscures the most important feature differentiating commanding from most of the other speech acts which may be performed by use of the imperative mood.

So much then for the peremptory character of the reasons for action involved in the notion of a command. I turn now to pick out a second important feature of the reasons intended to be operative when a command is given. I shall call this feature the 'content-independent' character of such reasons. This is a term which I used many years ago in seeking to differentiate the notion of obligation from the general notion of what morally 'ought' to be done. Content-independence of commands lies in the fact that a commander may issue many different commands to the same or to different people and the actions commanded may have nothing in common, yet in the case of all of them the commander intends his expressions of intention to be taken as a reason for doing them. It is therefore intended to function as a reason independently of the nature or character of the actions to be done. In this of course it differs strikingly from the standard paradigmatic cases of reasons for action.

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where between the reason and the action there is a connection of content: there the reason may be some valued or desired consequence to which the action is a means, (my reason for shutting the window was to keep out the cold) or it may be some circumstance given which the action functions as a means to such a desired consequence (my reason for shutting the window was that I felt cold).

It is I think true that reasons with these two characteristics, which I have called peremptory or deliberation-excluding and content-independent are to be found involved in many interpersonal normative transactions besides commands. They are for example both involved in promising: for the giving of a promise is intended to be a reason not merely for the promisor doing the action when the time comes but for excluding normal free deliberation about the merits of doing it. This is I think what is meant by speaking of the promisor as committed in advance to doing the action and any full account of the way in which a promise creates an obligation must I think include the giving of a promise as such a peremptory or deliberation-excluding reason for action. Since we may promise to do very many different sorts of actions in no way related to each other, the giving of a promise regarded as a reason for doing the action promised has also the feature of content-independence. This is true even though the range of possible actions which one may validly promise to do is not unlimited and does not include grossly immoral actions or those intended to be harmful to the promisee.

II

The relevance of the two features of command which I have stressed, namely the peremptory and content-independent character of the reasons for action to legislation and lawmaking events is the following. It is of course true, as I have said, that a commander's primary peremptory intention may not be realized; the person commanded may not accept the command as a peremptory reason and either may not obey the command at all or if he obeys the command he may obey only out of fear of punishment after full deliberation of the pros and cons. On the other hand, the command may be taken just as the commander intended it to be taken: the
command may be accepted as such a peremptory reason so that the hearer obeys without deliberation on the merits from his point of view of what he is commanded to do. More than this, it may be that the commander, before he issues his command, has ample reason for believing that those to whom he addresses his command are generally disposed to recognize in his words (perhaps whatever he commands or perhaps only his commands within some limited field of conduct) as a peremptory reason for doing what is commanded. Such a standing recognition (which may be motivated by any of a variety of ultimate reasons) of a commander's words as generally constituting a content-independent peremptory reason for acting is a distinctive normative attitude not a mere 'habit' of obedience, and in my view this is the nucleus of a whole group of related normative phenomena, including not only the general notion of authority, legislation or law-making but many other cases where by words or deeds we are unable to bring into existence or to vary or to distinguish obligations of one sort or another.

If we consider as a model a commander, placed in the setting of a social group where the normative attitude to his commands which I have described is widely shared, that is where there is a general acceptance of the commander's expression of will as a peremptory reason for action or decision, there is room for four kinds of variation. First the commands may be addressed either to individuals and refer to single actions or may be addressed as general commands to classes of person and referring to action types. Secondly those who are disposed to recognize the commander's words as constituting such reasons for action may have very diverse ultimate reasons for being so disposed, though I do not exclude as absurd the possibility that some may have no reason for this attitude beyond a wish to please or a simple satisfaction they find in identifying their wills with that of the commander. Some may have a moral reason, or the well- or ill-founded belief that the commands to be issued would be likely to be in the best interests of all or would co-ordinate the actions of different persons in a generally beneficial way or would be just or fair. Others still may adopt this attitude as part of the tradition in which they have been reared or simply because they wish to do what others do. Others still may adopt this
attitude out of fear on the footing that the alternative of calculating each time afresh when the question of obedience comes up the chance of being punished for disobedience is too dangerous, or they may adopt this attitude in the hope of getting rewards.

Thirdly, the commander's words may be taken not only as a peremptory guide to action by those who are themselves commanded to act, but may be taken by them and others also as a standard of evaluation of the conduct of others as correct or incorrect right or wrong (though not necessarily morally right or wrong) and as rendering unobjectionable and permissible what would normally be resented, that is demands for conformity, or various forms of coercive pressure on others to conform, whether or not those others themselves recognize the commands as peremptory reasons for their own actions.

Fourthly, the normative attitude in question recognizing the commander's words as such reasons may be widely spread throughout the group: all or nearly all may share it though for different ulterior reasons. On the other hand it may be narrowly confined and at its narrowest may be shared only by a well organized or powerful minority able to coerce by threats the majority into acquiescence. Or the majority may conform to the commands given not because they look upon them as reasons for action but simply because the contents of those commands happens to coincide generally with what they are already disposed to do for moral or prudential reasons independently of the giving of the command.

This model of a normative command situation may be regarded as an embryonic form of a society in which a developed legal system is in force. It is merely embryonic because a feature of crucial importance in the development of a system is missing from it and the addition to the model of this feature would transform it in many ways. This missing feature is the existence of effective law-applying and law-enforcing agencies, that is of courts effectively directing the enforcement in particular cases of the commander's commands and applying them in the settlement of disputes. Where courts with these functions exist the normative attitude consisting in the recognition of the commands as content-independent peremptory reasons for action and as
standards for the assessment of conduct as right or wrong is itself institutionalized as defining public standards of correct adjudication, and a duty to conform to these standards is attached to the office of judge and assumed by individual judges when they take up that office. I shall discuss later one important way in which this institutionalization of the recognition of a commander’s words as peremptory reasons for action transforms the simple embryonic model; but here I wish to stress that even in this embryonic, pre-legal social situation there are present some of the essential elements which constitute practical authority: and show what it is for a person or persons to have authority as distinct from coercive power over others. For to have such authority is to have one’s expression of intention as to the actions of others accepted as peremptory content independent reasons for action. But this same embryonic model also indicates how some of the features of a developed legal system which Bentham’s analysis in terms of commands and habits of obedience distorts, are to be understood. Among these features are the idea that a legislator, even a supreme legislator, exercises a legal authority or legal power and not merely a coercive power, the idea that this legal power may be legally limited and not merely ineffective in respect of certain areas of conduct, and thirdly the idea that what a legislator attempts to do by way of legislating may be assessed as valid or invalid and not merely as permitted or prohibited or as successful or unsuccessful in causing men to behave in certain ways.

Thus the general recognition in a society of the commander’s words as peremptory reasons for action is equivalent to the existence of a social rule. Regarded in one way as providing a general guide and standard of evaluation for the conduct of the commander’s subjects, this rule might be formulated as the rule that the commander is to be obeyed and so would appear as a rule imposing obligations on the subject. Regarded in another way as conferring authority on the commander and providing him with a guide to the scope or manner of exercise it would be formulated as the rule that the commander may by issuing commands create obligations for his subjects and would be regarded as a rule conferring legal powers upon him. The legal limitation of a
commander's power to legislate would simply be a reflection of the fact that the sphere of conduct in relation to which his words are recognized as constituting peremptory reasons for action is limited. Thirdly, in this setting of a general recognition of the commander's words as peremptory reasons for action his words are more than commands which may or may not secure obedience or have other natural consequences; for in this setting the issue of a particular command within the scope of the commander's powers will have certain normative consequences, in addition to whatever natural consequences it has. That is, it will make certain actions right and obligatory, and others wrong, a violation of obligation and an offence. If on the other hand the command issued is not within the scope of the commander's powers it will fail to have such normative consequences whatever natural consequences it has, and success or failure in this respect will be shown by the assessment of the commander's words as valid or invalid.

However, as I have said, this model of a command situation is a merely embryonic version of a law-making situation and if it is to approximate to law-making in a developed legal system it must be amplified, but also modified, in a number of different ways, not all of which I can discuss here. However, the first and most important step would be to generalize the notion of a content-independent peremptory reason for action and to free it from any necessary or specific connection with the notion of a command which would then fall into place as one particular variant of the general idea. Indeed in the history of legal theory it has often been pointed out that, except in very simple societies, a simple command is an inappropriate model for legislation since, except in those societies, a definite law-making procedure must be complied with if the legislator's words or deeds are to make law, and if this procedure is complied with then a law is made. For this reason the enactment of a law is very unlike a simple command or expression by an individual of his wishes or intentions as to other persons' conduct, and the habit of speaking of the Sovereign as if he were a single individual is unfortunate just because it may encourage too close an assimilation of law-making to the giving of a command and conceal the need and importance of a recognized procedure
compliance with which is required for the making of the law. Given such a procedure which may include the voting and counting of votes, the reading of a bill, the issue of certificates, etc., law is created by compliance with it and the analogy of a simple command or order expressing the will of an individual is misleading. Perhaps indeed instead of words like 'imperative' or 'prescriptive' which are commonly used to characterize the act of legislation it would be better to use the technical word employed by conveyancing lawyers, namely, 'operative' or the word introduced by J. L. Austin, 'performative'. These do not carry with them any specific connections with a command but would stress illuminatingly the similarity between law-making and other rule or convention governed practices whereby new reasons or guides to action are created. I mean here to refer not only to the things that lawyers are accustomed to call legal transactions altering legal rights and duties such as wills, leases, contracts, and the like, but also to non-legal transactions like the taking of a vow or the giving of a promise where individuals create obligations for themselves and their words are recognized as content-independent peremptory reasons for their own action.

What is crucial for legislation is that certain things said or done by certain persons which can be construed as guiding actions should be recognized by the Courts as constituting just such peremptory reasons for actions, and so as law-making events. This generalization of the idea of content-independent peremptory reasons beyond the particular case of commands allows room for something of great importance which Bentham's imperative theory focused on the idea of a command fails to accommodate. This is the feature that in most legal systems there are radically different sources of law or ultimate criteria of legal validity recognized by the Courts, which are neither forms of legislative actions or derived from such an action, even if in some systems they may be subordinate to the latter in the sense that in case of conflict the requirements of legislative enactment may prevail over the requirements of law identified by reference to other sources. Thus the fact of customary practices of various sorts (local, commercial) may be recognized by the Courts (though no

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22 Austin, How to Do Things with Words (2nd edn. OUP 1975).
doubt subject to various limiting conditions as to lengths of time, reasonableness, etc.) as itself a peremptory content-independent reason for action falling within the scope of the customary practices and so as rendering them legally obligatory. Similarly, in a system where there is a strict theory of precedent the judge's decision in a particular case or a sufficient line of cases may be recognized as a fact constituting a peremptory reason for deciding similar cases in the same way and so though not itself a command, as creating a general legal rule.

This recognition of content-independent reasons as sources of law, though not derived from statute even if subordinate to statute, eliminates the need for the elaborate and unsuccessful explanation found in Bentham of the status of such sources of law as due to 'tacit' forms of legislative commands. What such sources of law all have in common is not that they are commands but they are recognized as different forms of content-independent peremptory reasons.

More important, it is clear that the notion of a content-independent peremptory reason for action or something closely analogous to it enter into the general notion of authority, that is not only authority over persons in matters of conduct, but also authority on scientific or other theoretical matters and so in one sense authority in matters of belief rather than conduct. For where some great scientist for example is regarded as an authority on some subject, say, astrophysics, then within that sphere his saying what he says—'Aristotle has said it'—is accepted as constituting a reason for believing what he says without an independent assessment of the arguments pro and con, that is without the theoretical deliberation within which the merits or strengths of reasons for believing what he says are considered and assessed. So though the statement of an authority on some subject is not regarded as creating an obligation to believe, the reason for belief constituted by a scientific authority's statement is in a sense peremptory since it is accepted as a reason for belief without independent investigation or assessment of the truth of what is stated. It is also content-independent since its status as a reason is not dependent on the meaning of what is asserted so long as it falls within the area of his special expertise.
I now want to use this last case of authority on theoretical matters to enter a *caveat* against a possible misinterpretation of what I have been saying. I certainly think that a shift from the notion of a command to the notion of a content-independent peremptory reason for action is needed to overcome the deficiencies of Bentham's account of law and law-making and generally to explain the 'normativity' of law. But I do not by any means think that, if we make this shift, we shall also have finally settled the issue concerning the relationship of law and morals raised by the denial that there is any conceptual or necessary connection between them. The point may be illustrated by reference to the concept of authority on theoretical matters in the following way. To be an authority on some subject matter a man must in fact have some superior knowledge, intelligence, or wisdom which makes it reasonable to believe that what he says on that subject is more likely to be true than the results reached by others through their independent investigations, so that it is reasonable for them to accept the authoritative statement without such independent investigation or evaluation of his reasoning. Hence a characterization of the person as being an authority on a certain subject entails that he has the requisite expertise and is not only a matter of how his statements are in fact regarded. Moreover, even to *regard* a person as a scientific authority however mistakenly is to believe that he really has the superior knowledge or qualifications which would make it reasonable to believe the statements he makes within the areas of his competence without independent investigation of them. So the idea that the authority is a suitably qualified expert and hence the reasonableness of treating his statements in this way enters into the ideas both of being such an authority and of being regarded (rightly or wrongly) as such an authority. The statement 'X is a scientific authority' commits the speaker to the belief that X is qualified in the appropriate way, whereas 'X is regarded as a scientific authority' only commits the speaker to the belief that some other persons believe that X is so qualified.

Now against the whole style of positivist jurisprudence, which like Bentham's and my own work denies that there is
any conceptual or necessary connection between law and morality, and so (as I have explained in Chapter V) attributes to expressions like legal right and legal duty meanings which are not laden with any such connection, it has been urged that there is in fact a strong parallel between being a theoretical authority and having practical, e.g. legislative authority over people which shows the positivist view to be mistaken. The parallel suggested is that just as in the case of a scientist, if he is to rank as an authority on his subject, there must be good reason for accepting his pronouncements as sufficient reason for believing what they state without independent investigation, so in the case of a legislative authority there must be good reason for accepting its enactments as peremptory reasons for action or, at least, it must be believed by some that there are such good reasons. In the case of the theoretical authority the good reasons are provided by his superior expertise and this is prior to the notion of theoretical authority which cannot be explained without reference to it; in the case of legislative authority as in any form of practical authority over people the good reasons must be moral reasons for accepting its enactment of laws as content-independent peremptory reasons for action. So the moral legitimacy of the legislature is prior to its authority over people which cannot be explained without reference to it. The moral legitimacy of a legislator may of course arise in many different ways: for example it may arise from the fact that the composition of the legislature, e.g. in a parliamentary democracy, conforms to morally acceptable principles of government; or it may arise from the fact that whatever the composition of the legislature or its defects, it secures order and co-ordination necessary for a tolerable social life and without it there would be greater evils than any which the government itself perpetrates.

The question whether there is in fact this suggested parallel between theoretical and legislature authority raises issues similar to those raised by the questions discussed in Chapter VI as to whether there is an essential moral component in the idea of legal obligation, so that statements of legal obligation (at least if they are 'committed' statements in the sense of commitment explained there) are a form of moral judgement. It will be recalled that in Chapter VI, I distinguished two
forms of the theory opposed to the positivist doctrine that legal and moral obligation are not conceptually connected. The first extreme form of this theory claims that a legal obligation actually is a species of moral obligation, while the second moderate form of the theory claims only that for legal obligations to exist there need only be the belief, true or false, that what is legally required is morally obligatory, and that only committed statements of legal obligation carried with them the implication of such a belief. There is a similar possibility (allowed for in my initial description of the suggested parallel) of an extreme and moderate form of the theory that there is a parallel between theoretical and legislative authority. On the extreme view, for a legislative authority to exist there actually must be good objective moral reasons for accepting its enactments as peremptory reasons for action, while on the moderate view there need be only the belief that there are such moral reasons or even, as in Raz’s version, only the pretence or show of such belief or readiness to avow it. I will not here discuss the extreme form of this theory since as I have attempted in Chapter V to demonstrate in the case of Dworkin’s account of the conceptual connection between legal and moral rights and obligations, it is clearly incapable of explaining what must be admitted, as Dworkin says, viz. that what is legally right is not always morally right, and there can be morally iniquitous legal systems where the clearly settled law none the less creates legal rights and obligations.

The moderate view, however, that for legislative authority to exist, there need only be belief in its moral legitimacy and in the limiting case such belief may be confined to the Courts and officials of the legal system presents a more formidable case for one form of conceptual connection between law and morality. Its main thrust, so far as my exposition in this chapter of the idea of a legal authoritative reason is concerned, is that it was a mistake on my part when speaking of the Courts as ‘accepting’ a legislative command as an authoritative legal reason, not to have included as a constituent of such acceptance belief in the moral legitimacy of the legislature or at least a disposition to avow such a belief. I think

*23 The Authorities of the Law 28.*
the strongest argument supporting this criticism is the one which insists that the notion of the acceptance of some consideration as an authoritative legal reason cannot stand alone. How can an artefact of the human will such as a command, or compliance with a legislative procedure, either in itself be or be believed to be a reason for action? Surely, the critic may urge, such products of the human will could only be such a reason if there were some non-artificial ulterior reason for taking the former as guides to action, and the only kind of ulterior reason which could satisfactorily explain what courts do and say involves their belief in the moral legitimacy of the legislature.

This argument, in my opinion, goes too far and fails at the last step. I agree that it would be extraordinary if judges could give no answer to the question why in their operations as judges they are disposed to accept enactments by the legislature as determining the standards of correct judicial behaviour and so as constituting reasons for applying and enforcing particular enactments. But if all that is required is that judges should have some comprehensible motives for behaving as they do in this respect, this can be easily satisfied by motives which have nothing to do with the belief in the moral legitimacy of the authority whose enactments they identify and apply as law. Thus individual judges may explain or justify their acceptance of the legislator’s enactments by saying that they simply wish to continue in an established practice or that they had sworn on taking office to continue it or that they had tacitly agreed to do so by accepting the office of judge. All this would be compatible with judges either having no belief at all concerning the moral legitimacy of the legislature or even with their believing that it had none. Raz, who has given more careful thought than any other writer to this matter, characterizes judicial acceptance of the legislator’s authority for such personal reasons as these as a ‘weak’ form of acceptance, and insists that what is required is either a ‘strong’ form of acceptance which involves their belief that there are moral reasons for conforming to and enforcing the enactment of the legislature or at least involve the pretence of such belief.

I have already considered in Chapter VI what I take to be the main argument for this view. In relation to the present issue it consists of two points. The first is that when judges accept the authority of a legislature this characteristically is manifested, in the course of applying and enforcing its laws, by their statements that the subjects to whom the laws are applied have a legal obligation or duty to do what such laws require. Secondly since this requirement may be to act in ways which are contrary to the subject’s personal interests, desires, or inclinations, such statements of legal duty must be a form of moral judgement. Such a judgement will be sincere if the judge believes in the moral legitimacy of the legislature; insincere or ‘pretence’, if he does not.

In Chapter VI, I rejected this argument and I do so here in its more general application to an account of legislative authority, because its factual implications seem to me open to question. Of course many judges, when they speak of the subject’s legal duties, may believe, as many ordinary citizens may do, in the moral legitimacy of the legislature, and may hold that there are moral reasons for complying with its enactments as such, independently of their specific content. But I do not agree that it must be the case that judges either believe this or pretend to do so, and I see no compelling reason for accepting an interpretation of ‘duty’ or ‘obligation’ that leads to this result. Surely, as far as the facts are concerned, there is a third possibility; that at least where the law is clearly settled and determinate, judges, in speaking of the subject’s legal duty, may mean to speak in a technically confined way. They speak as judges, from within a legal institution which they are committed as judges to maintain, in order to draw attention to what by way of action is ‘owed’ by the subject, that is, may legally be demanded or exacted from him. Judges may combine with this, moral judgment and exhortation especially when they approve of the content of specific laws, but this is not a necessary implication of their statements of the subject’s legal duty.

Of course if it were the case, as a cognitive account of duty would hold it to be, that the statement that the subject has a legal duty to act in a way contrary to his interests and inclinations entails the statement that there exist reasons which are ‘external’ or objective, in the sense that they exist
independently of his subjective motivation, it would be
difficult to deny that legal duty is a form of moral duty.
At least this would be so if it is assumed that ordinary non-
legal moral judgements of duty are also statements of such
objective reasons for action. For in that case, to hold that
legal and moral duties were conceptually independent would
involve the extravagant hypothesis that there were two
independent 'worlds' or sets of objective reasons, one legal
and the other moral.

Until the alternative interpretation which I have offered
of judicial statements of the subject's legal duty is shown to
be absurd or to distort the facts, I do not think it should be
excluded. But I am vividly aware that to many it will seem
paradoxical, or even a sign of confusion, that at the end of
a chapter, a central theme of which is the great importance
for the understanding of law of the idea of authoritative
reasons for action, I should argue that judicial statements of
the subject's legal duties need have nothing directly to do
with the subject's reasons for action. I can also see that it
may well be objected that if the judge's acceptance of the
legislature's authority means only that he accepts its enact-
ments as setting the standards of correct adjudication and law
enforcement so as providing the judge with peremptory
content-independent reasons, for their official action in apply-
ing and enforcing the law, this is to whittle down the notion
of acceptance of the legislator's enactments as reasons for
action to something very different from what I represented
it to be when I first introduced it in the model of a simple
society whose members accepted a commander's words as
content-independent peremptory reasons for doing what he
commands them to do.

I do not think I have at present a sufficient grasp of many
complexities which I suspect surround this issue to do more
than offer the following reply to this last objection. The
charge of 'whittling down' is in a sense well taken; but it is
something for which I expressly made provision when I said
on p. 257 that the introduction into the simple society of
specialized law-applying and law-enforcing agencies would
mean the institutionalization of the recognition of the
commander's authority as now defining public standards of
official adjudication and this would transform the situation
depicted in the model. Of course except in societies where only the Courts and officials accept the authority of the legislature, the rest by and large conforming to the law for other reasons, this institutionalized 'whittled down' form of acceptance will coexist with full-blooded acceptance by many others of enactment by the legislature as reasons for their conforming to what is enacted and for making upon others and accepting from others demands for conformity. But in neither case need there be, though there may often be, belief in the moral legitimacy of the legislature or the pretence of such belief.

I would however in conclusion stress the fact that whoever is right on this larger issue between the legal positivist and his critics, which needs much further discussion, this would not affect the point that the notion of a content-independent peremptory reason for action is required for the understanding of legal authority and law-making. So though it was a mistake and a large one on Bentham's part to attempt to explain legal authority and law-making in terms only of command and obedience to a commander, the mistake is none the less an illuminating one; for buried in the idea of command there are, as I have attempted to show, elements which are crucial to the understanding of law.