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## Bentham on Legal Powers\*

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### I. Introductory

The expression "legal power" is not very familiar in our jurisprudence. Yet we need it or some equivalent expression to refer to a range of situations, familiar in the ordinary working of a modern legal system, where persons are enabled by the law either to do actions physically affecting other persons or things, or to bring about changes in the legal positions of others or of themselves, or of both themselves and others. Some of the cases that fall within this wide characterization of legal powers are in fact quite commonly referred to in the terminology of "powers" by judges, lawyers, legal writers and others. Thus we speak of a policeman's powers of arrest, of the legislative powers of a Parliament, of a Minister's powers to make rules, regulations or orders, of a Corporation's powers to make by-laws, of a Judge's power to make an order or to sentence a convicted person or to vary a settlement, or of the Lord Chancellor's power to appoint County Court Judges. These are all cases where the powers mentioned are held by officials or public bodies. It is somewhat less common to speak of private citizens who are enabled by law to change the legal positions of others or of themselves or to do actions physically affecting things or persons as having "powers" to make such changes or to do such actions. Some of these latter cases are so described; we speak of a private individual as having a power of appointment over trust property or a power to appoint new trustees, or of a tenant for life's

\* The following abbreviations are used in footnote references to Bentham's Works: PML for AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION; OLG for OF LAWS IN GENERAL; WORKS for THE WORKS OF JEREMY BENTHAM (Bowring ed. 1838-43). All references to PML and OLG are to the volumes in the COLLECTED WORKS OF JEREMY BENTHAM published in 1970 by the University of London: The Athlone Press. An earlier version of OLG edited by C.E. Everett was published in 1945 by the Columbia University Press under the title of THE LIMITS OF JURISPRUDENCE DEFINED. The new edition, besides restoring Bentham's chosen title for the work and some important passages omitted from the earlier edition, separates from the work a number of passages included in the earlier edition which do not in fact belong to the work or which represent superseded drafts. These are presented in appendices in the new edition, which is critically annotated and explains the evolution of the work.

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powers of sale, a landowner's powers of alienation. It is, however, more usual to use words like "right"<sup>1</sup> or "capacity" or "competence" rather than "power" to refer to the fact that an owner of a property can (that is, can legally) walk over it or lease it, or that a person can make a will or a contract or marry.

Analytical jurisprudence is often said to be concerned with the analysis of fundamental legal concepts, but the limelight of Anglo-American jurisprudential attention has been mostly directed onto duties, obligations and rights and has been very little concerned with the concept of legal power. Yet, as I have said elsewhere,<sup>2</sup> the structure of a modern legal system, and indeed some most important aspects of law, cannot be understood unless the notion of legal powers and of the rules which confer them are understood. Bentham alone among analytical jurists has attempted a detailed analysis of this notion, but the work in which he did this was not accessible to the world in any form until 1945 when a version of it was published under the title of *The Limits of Jurisprudence Defined* by an American professor of English Literature, Professor Charles Everett, of Columbia University, who had correctly identified it as a continuation of Bentham's famous *Introduction to the Principles of Morals and Legislation*. The full version of this work, which is, I think, without doubt the greatest of Bentham's contributions to analytical jurisprudence, and contains much else of importance besides the analysis of legal powers, has recently been published under its proper title *Of Laws in General*,<sup>3</sup> and this article is in part an exposition of the main features of the analysis of legal powers provided by this work.

Before I begin this exposition I should mention that the idea of a legal power does figure in the work of one well-known and relatively modern analytical jurist and is reproduced in most modern textbooks on jurisprudence. I refer of course to W. N. Hohfeld, who identifies under the name of "power"<sup>4</sup> one of the four fundamental legal conceptions which, according to him, the word "right" is loosely used to express. For Hohfeld, a man has a legal power whenever he is able by some voluntary act of his to vary the legal position of another

1. Legal powers are for Bentham a species of right. See OLG, ch. IX, para. 13, at 84; ch. XI, para. 11, at 137 n. h (139); ch. XVIII, para. 1, at 220 n. a. *But cf.* for a qualification PML, ch. XVI, para. 25, at 205 n. e2. Hence Bentham speaks indifferently of a "power of conveyance" (OLG ch. IX, para. 6, at 78 n. c (79), and "a right of alienation" (§ WORKS 183).

2. THE CONCEPT OF LAW 32 *et seq.* (1961).

3. Edited by H.L.A. Hart in THE COLLECTED WORKS OF JEREMY BENTHAM.

4. FUNDAMENTAL LEGAL CONCEPTIONS 51-57 (1919). Hohfeld considers that the term "right," though frequently and loosely used for, *inter alia*, powers, is an unfortunate term for the purpose. *Id.* at 51.

person, who is in this case said by Hohfeld to have a corresponding "liability" to have his legal position varied by the other. A simple example is the power of a man to alienate his property to another. As I have said, such a power in private hands is often referred to as a right; and Bentham indeed regarded a power as one species of right but not all rights as powers. It was of course an achievement on Hohfeld's part to have got so far, though in fact much of his work was anticipated by Bentham's analysis of rights and powers. But much more than Hohfeld gives us is needed to display the notion fully and to analyze legal powers in their variant forms, and to exhibit the character of the laws which create or confer them.

In my own previous inadequate approach to the subject I touched it only sufficiently to emphasize how important an element in a legal system powers are, and how great a need there is to provide an analysis of rules which confer powers before venturing upon any general definition or analysis of law. I suggested a division between public powers, such as powers of legislation and adjudication, and private powers, where my main examples were powers to make wills or contracts.<sup>5</sup> This account therefore left out many of the powers listed above. Furthermore, I attempted no close analysis either of the notion of a power or of the structure of the rules by which they were conferred, save to insist that they were different from rules which imposed obligations or duties, and to reject theories such as those of Kelsen who refused to recognize in a rule conferring a legal power anything more than a fragment of a rule imposing a duty and directing an official to apply a sanction under certain conditions.<sup>6</sup> Hence, so far as I was concerned, there was much unfinished business concerned with legal powers, and I was astonished when I subsequently came to study in detail Bentham's *Of Laws in General* to find how much of it had already been attempted by Bentham.

## II. Powers of Contractation

Bentham starts his analysis with the reduction of all legal powers to two main kinds,<sup>7</sup> the second of which, though different from the first,

5. THE CONCEPT OF LAW 28 *et seq.* (1961).

6. See H. Kelsen, *GENERAL THEORY OF LAW AND STATE* (1945), especially *id.* at 143-45, where laws conferring power to legislate are described as "not independent complete norms" and as "intrinsic parts" of norms made on their basis. It is not clear to me whether or not Kelsen's later recognition in *THE PURE THEORY OF LAW* (Knight trans. 1967) of a class of "dependent authorizing norms" (*id.* at 56-57) modifies his earlier doctrine.

7. OLG, ch. IX, para. 9, at 81.

is dependent upon it. These two kinds at first sight seem only to reflect the notion that there may be power over inanimate things as well as power over persons.<sup>8</sup> But Bentham is too perceptive to make what would, in this context, be a misleading distinction, because he sees that persons up to a point *are* like inanimate things: they have after all physical bodies which can be handled or interfered with, moved or confined like things. The power to interfere physically in this way either with things or with persons' bodies Bentham subsumes under a general notion of a power of *handling* or, as he calls it most frequently, "power of contrectation."<sup>9</sup> His other variants for this power are "impressive" power or "autocheiristic" power which convey the idea of physically affecting bodies with one's own hands. It is, so far as human beings are concerned, a power over what Bentham calls their "passive faculties," which means their capacity to be affected by physical handling or "contrectation."<sup>10</sup>

Legal examples of this first kind of power are a policeman's or an ordinary citizen's power of arrest, or an owner's power to handle and use the things which he owns, or to walk over and cultivate the land he owns. In these cases the power is legal because it is provided or conferred by the law and Bentham's account of the way in which this is done is simple and, I think, fundamentally correct, though it is at points vague and incomplete. The central idea in Bentham's explanation of such powers is that of a legal permission to do acts of the kind which fall under the general head of "contrectation." A permission is simply the absence of legal prohibition and hence the absence of a legal duty not to do a certain act. For Bentham such permissions constitute a species of legal *right* which he terms "rights arising from absence of obligation" or sometimes more simply "liberties." But not all such liberty-rights, as we may call them, even when the acts which the right holder has liberty to do are acts of contrectation, are regarded by Bentham as legal powers. Sometimes he contrasts "liberty" with "power,"<sup>11</sup> and sometimes he makes the same contrast by distinguishing those powers of contrectation which are "properly speaking . . . the work of the law" from those that are not.<sup>12</sup> Unfortunately Bentham nowhere clearly or exhaustively explains what it is that dis-

8. *Id.*, ch. IX, para. 9, at 81; ch. XI, para. 11, at 137-39 n. h.

9. *Id.*, ch. VI, para. 7, at 57 n. e; ch. IX, para. 17, at 87.

10. The above is an account of what Bentham calls "the power of physical contrectation" or "power of contrectation properly so called." But he also recognizes the power to affect sensation ("the passive faculty" of the mind) and calls it the power of "hyper-physical contrectation." *Id.*, ch. XI, para. 11, at 137-39 n. h.

11. *Id.*, Appendix B, para. 7, at 255.

12. *Id.*, ch. VI, para. 7, at 57 n. e. See also Appendix B, para. 11, at 256-57.

tinguishes a mere liberty of this sort, or a power which is not “the work of the law,” from a legal power, but the general character of this distinction may be gathered from his illustrative examples and his rather vague observations.<sup>13</sup> The distinction seems to be as follows: a legal permission only constitutes a *legal* power if it is in some way an exception to or contrasts with general duties imposed by law and so can be regarded as a kind of legal favor or advantage and not merely as an absence of duty. Bentham’s simplest example is again the power of an owner to use the thing or land which he owns; he is at liberty to do this while persons generally are under a duty not to do it. Hence in relation to the particular thing or piece of land owned he enjoys an advantage as compared with those subject to the general duties, though of course owners of other property enjoy similar advantages and hence have a similar legal power over their property.

In the example just given the power is said to be “exclusive.”<sup>14</sup> It is so in the sense that a particular person is permitted to do acts in relation to a particular thing or piece of land which others are generally prohibited from doing. Bentham, however, recognizes that this does not exhaust the notion of legal favor or advantage, which for him differentiates a legal power from a mere liberty. Not all legal powers are exclusive; for there are legal powers which are enjoyed by everyone and so are “inexclusive.” One example is illuminatingly discussed by Bentham<sup>15</sup> and contrasted with an owner’s exclusive powers: this is the ordinary citizen’s power of arrest, which is regarded as an *exception* to a general rule prohibiting “meddling” with the persons of others. It is important that this is regarded as an exception to such a general rule, and not as a mere boundary condition or limitation of a more narrowly framed rule prohibiting interference with the persons of non-criminals and non-suspects. Bentham insists that an owner’s powers to use his property are not to be regarded as exceptions to a similar general rule prohibiting meddling with property: for in his view there is no such general rule, the rule in the case of property being that there is always some person who is at liberty to meddle. In the case of property therefore the liberty to meddle is not an *exception* but a *limitation* or boundary condition of a rule prohibiting non-owners from meddling. What then is the difference between exceptions and limitations? As Bentham was well aware the

13. The principal passages are *id.*, ch. II, para. 8, at 27; ch. VI, para. 7, at 56-57; Appendix B, paras. 7-8, at 255-56.

14. *Id.*, Appendix B, paras. 7-8, at 255-56.

15. *Id.*, ch. XVI, para. 10, at 200-01.

criterion is not a formal one<sup>16</sup> but depends on what are taken to be the reasons for having a rule and on the scope of such reasons. He argues very persuasively,<sup>17</sup> in the case of powers of arrest or "meddling" with the persons of others, that it is because we think that the general reasons for prohibiting interference with the persons of others apply also to the cases where arrest is permitted, but are in such cases outweighed by other reasons, that we look upon the power as an *exception* to a general rule prohibiting interference. We do not look upon an owner's powers in this light; for we do not think that there are reasons for having a general rule prohibiting all "meddling" which are outweighed in the owner's case. So the owner's powers appear as merely the boundary conditions or limitations of a more narrowly framed rule prohibiting non-owners from meddling, for which rule of course there are good reasons.

Bentham's examples of inexclusive powers include the powers of members of a community over land which is the common property of all.<sup>18</sup> Here everyone has the same liberty to use the land, but Bentham recognizes this liberty as a *legal* power because it is an exception to the general rule restricting the use of land in the community and so is a "favor" or advantage conferred by law. "Considering that [the law] might have commanded us all, you and me and others not to exercise any act upon that land and that such are the commands which to you, to me and to everyone but one or few it actually does give with respect to by far the greatest part of the land under its dominion, it is on that account frequently spoken of as if it had done something in favor of those whom it has thus left at liberty: it is spoken of as having given them or rather left them a *power over* the land...."<sup>19</sup>

Bentham's concept of a legal power of contrectation naturally invites comparison with what Hohfeld terms "a liberty." A legal power of contrectation is in fact more specific than Hohfeld's liberty in two respects. First, it is characterized as an exclusive or exceptional liberty to do something generally prohibited, and this feature does not enter into Hohfeld's definition of liberty, which is defined as a mere absence of a duty of opposite tenor, though it is rather vaguely and confusingly suggested by the synonym of "privilege" which Hohfeld offers for liberty. Secondly, the kind of act which can constitute an exercise of the power of contrectation "strictly so called" is restricted

16. Bentham discusses the logical equivalence of exceptions and limitations at *id.*, ch. X, paras. 10-14, at 114-16.

17. *Id.*, ch. XVI, paras. 10-11, at 200-02.

18. *Id.*, Appendix B, paras. 7-8, at 255-56.

19. *Id.* at 255.

by Bentham to acts involving physically handling or affecting things or animate bodies. It should, however, be observed that, though exclusive or exceptional permissions constitute, according to Bentham, the minimum step which the law takes to confer powers of contractation, very often the law goes further and strengthens or, as Bentham says, "corroborates"<sup>20</sup> the mere permission in various ways. Thus the law corroborates a legal power of arrest by making it an offense to resist arrest or for third parties to interfere with the arrest or even to withhold their assistance if it is called for. The power to inflict punishment<sup>21</sup> or to seize goods in execution and, of course, an owner's power to use his property are other examples of powers of contractation which are normally corroborated in such ways.

### III. Powers of Imperation

So much then for the first of the two kinds of powers to which according to Bentham all legal powers are in the last analysis reducible. The second kind Bentham calls the "power of imperation." This is distinguished from the power of contractation not because it is a power only over persons (for as we have seen the power of contractation can be that) but because it is a power over the active as distinct from the passive faculties of persons.<sup>22</sup> This means that it is a power to procure persons to act in conformity with a command or prohibition by providing motives influencing their will, and it does so in either of two main ways: by threatening punishment if the act is not done or by offering reward if it is done. These two forms of motivation or influence, the stick and the carrot, Bentham calls, in his quaint terminology, "coercive" and "alluring" influence.<sup>23</sup> Obviously for the law the stick is more important than the carrot as a method of securing conformity, though among Bentham's lesser known works there are some important contributions to jurisprudence and indeed to social science advocating and studying various forms of carrot or reward as a method of social control.<sup>24</sup> Here, however, I shall confine attention to the form of the power of imperation which relies upon the stick, that is, coercive influence. The first thing to observe is that it is dependent upon the power of contractation for its efficacy; it is no good telling people to do things and threatening pain or punishment

20. *Id.*, Appendix B, paras. 20-29, at 261-64.

21. *Id.*, ch. XI, para. 11, at 137 n. h (139).

22. *Id.*, ch. II, para. 1, at 18 n. b; ch. XI, para. 11, at 137 n. h.

23. Appendix B, para. 17, at 259-60, and paras. 23-25, at 262.

24. *See also* 1 *WORKS* 533 *et seq.*

for disobedience unless there is power actually to inflict punishment.<sup>25</sup> This in the last resort will involve physical interference with the body of the disobedient person or his property, though it is not, of course, necessary or even usual that these two interdependent powers be exercised by the same persons.

If we accept the general imperative theory of law which Bentham held (though in a far subtler and more plausible form than Austin did), it is plain that the power of imperation as defined by Bentham is an apt description of legislative powers, both of the sovereign law-making body and of subordinate lawmaking agencies, at least where the legislation creates legal duties backed by sanctions. Bentham, however, thinks that the same notion also explains the whole range of legal powers which enable a person to vary the legal position of himself or others. This, I shall argue, is a mistake, though there are some simple cases besides general legislative powers which yield quite easily to this analysis. Thus a parent's or guardian's powers over a child include powers to give orders, to threaten punishment and himself to inflict it for disobedience. The law, according to Bentham, provides this power essentially by permitting a parent or guardian to do these things in the case of the child, though they are generally forbidden. Like the policeman's power of arrest such private powers of imperation as the parent or guardian has over the child may be strengthened or corroborated in various ways by the law: it may, for example, prohibit third parties from interfering. A slightly more complex variant of the power of imperation is to be seen in the power of a military officer to give orders to his men. It is more complex only because, though the officer gives the orders and may threaten punishment, the punishment would normally be inflicted by other persons, who are either ordered to inflict it specifically by the officer or are under standing orders to inflict punishments directed by some other person or body. Such cases are fairly obvious applications of the notions of imperation and cointeraction. The person having a power in these cases issues commands or prohibitions, but it is not obvious how, as Bentham thought, the notion of imperation also explains the general run of cases where a person is enabled by law to vary his own or other persons' legal position, as he does when he makes a contract or conveys property or, to take an example from public life, where he exercises a power to appoint a judge. What a man does when he exercises such powers seems at first sight very un-

25. OLG, ch. XI, para. 11, at 137 n. h.



like issuing commands or prohibitions or threatening punishment for disobedience. How does Bentham's notion of a power of imperation explain these various and important transactions whereby individuals can, by saying or writing or doing certain things, change legal rights and duties of themselves or others?

To understand Bentham's theory here we must turn to what I think is one of his greatest insights into the structure of a legal system. This is his distinctive doctrine that in a modern legal system the power of imperation must be divided or, as he puts it, "broken into shares."<sup>26</sup> He does not mean by this merely that, as well as a supreme legislative authority with power to make general laws, there must also be subordinate legislative authorities with delegated powers to make general laws in restricted fields, but rather that there must be a division of legislative power in respect of scope or extent, that is in respect of generality and particularity, and general powers and particular powers must be as a practical matter assigned to different persons. Bentham devotes a whole chapter<sup>27</sup> to this topic, which he calls "The Generality of a Law," and he thinks, rightly in my view, that a grasp of the distinction and interconnection between what he calls general and particular laws or "mandates" and the corresponding powers to make such laws is vital for the understanding of many features of law. It is, he says, "a clue without which it would be scarce possible for us to find our way through the labyrinth . . ."<sup>28</sup>

In Bentham's terminology there must be not only powers to make general laws applicable to classes of persons, powers, as he calls it, to legislate *de classibus*, but there must be also powers to legislate *de singulis*, that is, concerning identifiable individual persons, or identifiable individual things, times or places. He does not mean by this that we must on occasion find it necessary to give individuals an order, as the policeman does when he says "move on," but, and this is a more fundamental point, that the legislature must frequently leave it in some cases to others (who may be officials or private persons) to settle the membership of those general classes of persons on whom the legislator imposes duties (or confers rights) when legislating *de classibus*. To illustrate this necessity I take, as a very simple example, a legislative provision for the appointment of an official, say a judge.<sup>29</sup> The legislature, by general legislation, may settle the rights, duties

26. *Id.*, ch. II, para. 7, at 26 n. h.

27. *Id.*, ch. IX.

28. *Id.*, ch. IX, para. 8, at 80.

29. Bentham gives this as an example. *Id.*, ch. IX, para. 18, at 87.

and powers which judges are to have, and the penalties if any which may be imposed upon them for violation of their duties. But the membership of the class of judges must be left to others who will make appointments of individuals as occasion requires. When someone has such a power to appoint individuals to a class upon which the law has imposed duties or conferred rights he has according to Bentham a *share* in the entire power of imperation.

To grasp Bentham's point fully, we must, as he tells us, appreciate a difference between two kinds of classes<sup>30</sup> with which general legislation may deal. The membership of some classes (let us call them *natural* classes) is determined by natural events, not by human choice nominating or appointing its members. The class of pigs, or men aged twenty-one, are plain instances of this type of class. Other classes may be called *artificial* because their membership is determined by human choice nominating individuals as members of that class.<sup>31</sup> Examples of such artificial classes are the class of Judges of the High Court, or the class of Prime Ministers. Plainly an act of choice referring to an individual is required to constitute him a member of the class. No complex civilization could dispense with the need to make general arrangements (and hence also general laws) concerning classes of both these kinds. But since there must be artificial classes as well as natural classes, there will naturally be a division of the total legislative power into shares. The legislature legislating *de classibus* will settle what the rights and duties of the class of judges are to be, while some other individual or body of persons will nominate individual judges from time to time and so will have power to appoint judges. Similarly, the general law may settle what the rights and duties of an owner of land are to be; but it will be for individuals, by doing certain acts, including such things as executing conveyances or transfers or by entering into various transactions, to settle who from time to time is to be the owner.

Bentham shows how the two kinds of power, general powers of legislation *de classibus* and particular powers of legislation *de singulis*, are complementary and that however extensive one of them was it could not do the work of the other. Thus, if a man was given power to legislate concerning any identifiable individual but only concerning such individuals and not classes he could not, as Bentham points out,<sup>32</sup> address himself to "posterity" since this could only be done by the

30. *Id.*, ch. IX, para. 10, at 82-83.

31. *Id.*, ch. IX, para. 10, at 82-83.

32. *Id.*, ch. IX, para. 25, at 91.

use of general terms. Conversely, a legislator even with the most extensive powers of legislating about classes could not with such powers make the appointments required for maintaining artificial classes.<sup>33</sup>

With this outline account of Bentham's distinction between legislation *de classibus* and legislation *de singulis* in mind, let us look a little more closely at some of the simpler cases which Bentham treats as falling under the general head of the power of imperation although, at first sight, the person exercising the power does not himself appear to be issuing commands or prohibitions, still less to be making threats of punishment either at his own hands or at the hands of others. Take again the case of the power to appoint judges. When someone is given this power, certain formalities may be required by law for its exercise; generally a warrant or document must be signed of which the central operative clause would be something like "Y is hereby appointed to be one of Her Majesty's Judges." When the document is signed the person becomes one of the judges and thenceforth has certain specific duties, rights and powers which constitute what Bentham calls the legal "condition," or as we might say, the *status*, of a judge. I shall for simplicity's sake focus attention only on the duties of a judge and suppose that there are sanctions for neglect of them. The appointor by his act may be said to "aggregate" the new judge to an existing recognized class who have certain distinctive duties, and he may also be said to "invest" the new judge with those duties. So this kind of power, considered as a power to include an individual in a recognized or established class is called by Bentham "a power of aggregation," or "accensive power,"<sup>34</sup> and considered as a power to invest individuals with rights or duties as "a power of investment."<sup>35</sup> But—and this is our problem—Bentham insists that such powers are shares in the power of imperation and even calls them "powers of imperation."<sup>36</sup> Why does he say this in spite of the fact that the appointor does not issue any commands or prohibitions? Bentham's reason is as follows. The general law *de classibus* made by the legislator settling the rights, powers, duties of judges is in a sense indeterminate or incomplete in a very important respect, for though it tells us *what* judges are to do or not to do (their duties) it does not tell us which individuals have these duties. This we can learn only by reference to the declared choice made by the person given by the law power to appoint judges.

33. *Id.*, ch. IX, para. 10, at 82-83.

34. *Id.*, ch. IX, paras. 10-13, at 82-84.

35. *Id.*, ch. IX, para. 12, at 83.

36. Powers of aggregation are "powers of imperation in particular terms" or "powers of imperating *de singulis*." *Id.*, ch. IX, para. 25, at 91.

Since this uncompleted aspect or gap in the general law is left to the appointor to complete when he eventually exercises his power by signing the required document or complying with any other formality required, he completes *pro tanto* or fills in the gap left open in the general law. "[T]he legislator," says Bentham, "sketch[es] out a sort of imperfect mandate which he leaves it to the subordinate power holder to fill up."<sup>37</sup> Now so far as the legislator in such imperfect mandates imposes duties and sanctions on persons left to the appointor to identify, this is a direct exercise on the part of the legislator of the power of imperation though it is incomplete in the sense explained. Hence when the appointor completes or, in Bentham's language, "fills up" the general law by identifying the individuals who are to have the duties and be liable to punishment, he participates in or shares in an exercise of the power of imperation by rendering it determinate. The appointor does not issue orders or threats himself but he does something which is recognized as bringing an individual (the new judge) within the scope of the legislator's existing orders and threats. These two activities, though different, are sufficiently closely related to make it possible to conceive of them as respectively direct and indirect forms of a single activity, *viz.*, of securing that individuals are subjected to duties supported by sanctions, and so as direct and indirect variants of "imperation." But such terminology is dangerous since it obscures certain important distinctions, attention to which is necessary if we are to understand the ways in which the law creates such powers. But I shall defer consideration of these in order first to introduce some further features of Bentham's analysis which seem to throw light on some important legal phenomena.

#### IV. Powers of Alienation and Contracts

It is to be noted that general provisions made by laws may be incomplete in many quite different ways besides merely leaving open the identity of the individuals who are to belong to the class with which the law is concerned. Laws may obviously leave open for others

37. *Id.*, ch. II, para. 7, at 26. Bentham adds that "[t]his is one way among innumerable others in which . . . the complete power of imperation or de-imperation may be broken into shares." *Id.* n. h. In 3 WORKS 187, he says that a "legal disposition" (*e.g.*, nomination to an office or the making of a gift or a contract) "may be considered under two aspects, either as serving to modify a general law, or as making by itself, under the authority of the sovereign, a particular law. In the first point of view, the sovereign is represented as making a general law, and leaving certain words blank, that they may be supplied by the individual to whom he grants the right to do so. In the second point of view, the individual makes the law, and causes it to be sanctioned by the public force."

to settle such matters as the particular place or time, or other circumstances under which acts of a certain sort are to be done or, to take one of Bentham's examples, the law may leave open for variation by some subordinate authority the amount of precious metal to be contained by coins constituting legal tender. Bentham includes all these under powers of aggregation with suitable sub-heads such as "*in personam*," "*in actum*," "*in locum*,"<sup>38</sup> etc. I shall not enter into these complexities, but in order to illustrate the power of Bentham's analysis I shall consider his treatment of powers to alienate property or, as he calls it, "conveyance," and of contractual powers or, as he calls it, "powers to make covenants."

In considering powers of alienation of property a sophisticated element in Bentham's general imperative theory of law to which I have only indirectly referred must now be taken into account. Bentham does not consider that the Sovereign makes law only when he commands. Commands (and prohibitions, which are of course merely commands *not* to do certain actions) are no doubt for Bentham the fundamental and most important type of law. They are, as he says, "coercive laws," but he also admits what he terms "discoercive" or "deobligative"<sup>39</sup> laws which the lawgiver issues when it undoes a command or revokes wholly or in part some existing coercive law. Such discoercive laws grant permission to do some act previously prohibited or to abstain from doing some act previously commanded to be done. "Command," "prohibition," "permission" to do and permission to abstain ("non-command") are for Bentham the four possible forms or "aspects" of legislative will and he refers to them all as "mandates." The logical relations between these "aspects of the will" are according to Bentham the concern of a special branch of logic which he terms "the logic of the will,"<sup>40</sup> and in his doctrine of the aspects of the will he anticipated by more than a century the modern logicians' imperative and deontic logic. This very important contribution to logic will not concern us further here: we need only bear in mind that the grant of a permission to do something previously forbidden is an important lawmaking act and that there are for Bentham discoercive or deobligative as well as coercive laws. This means that

38. OLG, ch. IX, para. 11, at 83 *et seq.*

39. PML, ch. XVII, concluding notes III and XV, at 302. In OLG, ch. X, § iv, para. 3, at 110, and Appendix D, para. 4, at 300, Bentham distinguishes permission to do something previously prohibited as a "superventitious active permission" or "repermission" from "original" or "inactive permission" of conduct not previously prohibited in OLG *passim*. Bentham uses the expression "deobligative" for laws permitting acts forbidden by other laws.

40. PML, ch. XVII, at 299 n. b2; OLG, ch. I, para. 7, at 15 n. h, and ch. X *passim*.

we must extend the idea of powers of imperation to include powers of "deimperation," and this is, in fact, a phrase Bentham frequently uses to describe laws granting permissions. Further it is clear that the power of deimperation as much as that of imperation may be shared and conferred upon subordinate power holders. If you have a power of deimperation you are enabled by the law to change the legal position of persons by exempting them to a greater or lesser extent from some existing law, thus relieving them of the duties which it imposes. So corresponding to the powers of aggregation and investment which are, as we have seen, shares in the power of imperation there will be powers of disaggregation and divestment which are shares in the power of deimperation.

The relevance of all this to the analysis of powers of alienation of property is as follows. Bentham thought, with good justification, that in the last resort the legal institution of property rested on laws prohibiting persons generally from interfering with things or land, but this prohibition does not extend to the person whom certain facts or events specified by the law constitute the owner of the property. The facts or events which secure for a given person this position and thus bring him within the exception to the general prohibition against interference constitute, as we say, his *title*.<sup>41</sup> Such title-constituting or "investitive" events will, in a system which allows for the alienation of property, include the acts of previous owners signifying in more or less formal ways their intention to transfer the property to a new owner. A conveyance is therefore in many respects analogous to the appointment of the new judge which we have already discussed. The old owner, we might say, appoints the transferee to the "office" of owner of the property. The differences are of course great. Not only does the transferor substitute the new owner for himself, but a large part of what he does requires for its explanation the idea of deimperation or permission rather than imperation. For the execution of the conveyance takes the new owner out of the scope of the general prohibition on interference with the property to which he was previously subject; it lifts the duty not to interfere from him and grants him permission to do things previously prohibited to him. It thus gives him a power of contrectation over the property which consists, as we have seen, essentially in a liberty denied to others to handle the property. But of course this is only one of the effects of a transfer of

41. OLG, ch. XIV, paras. 33-34, at 180-81, ch. XVI, para. 11, at 201-02; PML, ch. XVII, concluding note X, at 303. In 3 WORKS 189-90 Bentham uses the terminology of "dispositive" or "collative" and "ablative" events to explain the notion of title.

property. It also subjects the old owner to the duty not to interfere with the property from which, as owner, he was formerly exempt, and it confers rights on the new owner in the minimal sense that he is legally protected by or is a beneficiary of the general duty not to interfere. Even this is of course far from a full account of the complex operation of a conveyance or transfer of property in a modern system of law. But it is, I hope, enough to show at least in principle how powers of alienation yield to Bentham's analysis as a share in the powers of imperation and deimperation.

Bentham's explanation of contractual powers brings out some further points. The general law underlying the institution of contract is the law imposing a duty on persons to do those acts which they agree to do (by whatever form of agreement the law stipulates) and to pay damages if they do not do what they so agree to do.<sup>42</sup> Such a general law is "incomplete" in a more radical way than the law underlying the institution of property, for it not only leaves the identity of the persons who are to do certain acts for determination by reference to the voluntary transactions of individuals; it also leaves open the determination of what acts are to be done, though of course this open area may be restricted in a greater or lesser degree by the law's insertion of compulsory clauses into contracts, or by its refusal to recognize the validity of certain types of agreement. But notwithstanding this great difference a contracting party, though he does not issue commands either to himself or to others, may be said to share in the exercise of the power of imperation, because by entering into the contract he brings himself and specific conduct on his part within the scope of the highly unspecific duty created by the general law which requires him to do what he agrees to do. He thus imposes a legal duty or obligation on himself to do an act the identity of which was left open by the general law for contracting parties to settle. His act is an "investitive" act imposing obligations on himself and conferring corresponding rights on the other party. This it seems to me is a good account of contractual power which shows it to have the general character of a share in the power of imperation.

42. In PML, ch. XVI, para. 35, at 228 n. g3, and OLG, ch. II, para. 8, at 27 n. i, the fundamental law by which covenants are adopted is said to be the law prohibiting the wrongful withholding of services. A promise or covenant is for Bentham an "expression of will" (OLG, ch. II, para. 7, at 24 n. g, and ch. VI, para. 16, at 65 n. k) but not a command or countermand and so not a "mandate" (*id.*, ch. I, para. 8, at 16). Yet it is "converted into a mandate" by the Sovereign's adoption (*id.*, ch. II, para. 7, at 25, and ch. IX, para. 6, at 79 n. c). "[T]he expression of will . . . may, without any alteration . . . in the import of it, be translated into the form and language of a mandate: of a mandate issuing from the mouth of the lawgiver himself" (*id.*, ch. II, para. 7, at 26-27).

## V. Power-Conferring Laws

What sort of laws or legal provisions confer legal powers? In the case of powers of contractation Bentham's answer is tolerably clear. According to Bentham the law confers powers of contractation simply by permitting a man to do something which, if done by others or in other circumstances, would be a breach of legal duty or an offense. Though this is all that is required to create legal powers, or powers that are "the work of the law," such powers may, as noticed above, be corroborated by further laws imposing duties on others not to obstruct or interfere with the exercise of such powers. Sometimes, when the law's permission is granted by an enactment subsequent to and partially repealing an earlier law imposing duties, it will be natural to regard the later law as a distinct "discoercive," "deobligative" or "permissive" law and to regard the legal powers as conferred by it alone. In other cases, such as that of the owner's exclusive power to make use of his property, the owner's liberty to do what others are forbidden to do appears from the start as a condition limiting the scope of a single coercive law prohibiting what Bentham calls "meddling" with property. In this and many similar cases the power may be said to be conferred not by a distinct discoercive or permissive law, but simply by that part of a coercive law which contains the limiting conditions. Very frequently in the exposition and formulation of rules of law we may have a choice: we may, as it were, consolidate an original coercive enactment and a later discoercive law making exceptions to it and treat them as a single law with different parts made at different times, or we may treat them as distinct laws. Conversely, we may have a choice between treating a single coercive enactment containing exceptions as a single law or as a coercive law together with a discoercive law introducing the exceptions.<sup>43</sup> Some of the considerations which may incline us one way or the other are discussed by Bentham in *Of Laws in General*, much of which is devoted to the complex problem of the individuation of laws,<sup>44</sup> that is, the criteria for deciding what should be treated as merely part of a law and what as a single complete law. Fortunately these issues are not here relevant,

43. *Id.*, ch. VI, para. 8, at 57.

44. Bentham considers that for some purposes the law should be represented as consisting only of obligative or coercive rules (*id.*, ch. XIX, para. 2, at 233), and in one passage appears to deny that "exceptive provisions" enacted at the same time as the law which they qualify could constitute an "independent law" (*see* ch. XIV, para. 3, at 157). For a powerful criticism of Bentham's theory of individuation of laws and of his treatment of permissions, see J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1970), especially at 50-60, 70-77, and 170-75.



but it is important to realize that there are these two alternative ways of representing the law which grants permission to some person or persons to do something generally forbidden.

Bentham's account of the way in which the law confers legal powers, other than those of contractation, raises rather more fundamental issues, though it also makes use, and indeed an excessive use, of the same idea of a permission to do what is generally forbidden which enters into his analysis of powers of contractation. His initial account of the way in which the law confers powers of "imperation" and "de-imperation" is to be found in Chapter II of *Of Laws in General*, where it forms part of his explanation of two different ways in which "mandates" may belong to the sovereign.<sup>45</sup> When the sovereign himself issues mandates they are said to belong to him by way of "original conception"; when they are issued by a subordinate or by a past sovereign they belong to him by "adoption." Adoption has different forms and degrees which Bentham explains but these need not be noticed here. It is, however, central to Bentham's account of legal powers of imperation that what invests the subordinate with power to issue a mandate and so makes it a legal power is the fact that the sovereign "allows" the mandate to be issued;<sup>46</sup> if he does not allow it, it is an illegal mandate and to issue it is an offense.<sup>47</sup> Such allowance by the sovereign consists either in permission given by him (explicitly or tacitly) to the subordinate to issue mandates or in the sovereign's command that those to whom the subordinate's mandates are directed must obey him. Bentham regards these alternative forms of "allowing" as virtually equivalent, and he says that in both cases alike in order to be effective the subordinate's mandates will need to be supplemented in various ways, notably by provisions of sanctions for disobedience.<sup>48</sup>

It is important to observe that in this first account, according to which powers of imperation are conferred by the sovereign's "allowing" mandates to be issued, Bentham includes not only a subordinate's powers to issue commands or prohibitions, but also powers to make contracts and to alienate property, and he expressly claims that the validity of covenants and conveyances is to be explained by reference to the same idea of "adoption,"<sup>49</sup> consisting in the sovereign's grant

45. OLG, ch. II, paras. 3-9, at 21-27.

46. *Id.*, ch. II, para. 6, at 22, and paras. 8-9, at 27-28.

47. *Id.*, ch. II, para. 1, at 19. *See also* PML, ch. XVI, para. 54, at 263 n. 14, § ix.

48. OLG, ch. II, para. 8, at 27.

49. *Id.*, ch. II, para. 7, at 23-27.

of permission to issue what would be otherwise an illegal mandate or in the sovereign's command that the subordinate be obeyed. But the use of these ideas to explain powers to enter into legal transactions such as contracts or transfers of property is a mistake, and an important one, from which Bentham perhaps never quite shook himself free. The mistake springs from two connected faults. The first of these is the failure to disentangle the very different ideas of legal validity and invalidity on the one hand from legality (or what is legally permitted) and illegality (or what is legally prohibited) on the other. That this is a fault is evident from some very familiar facts which show that though a person who makes a valid contract or conveyance is usually permitted to do those acts or say or write those things which are required to effect such transactions, their legal operation in changing the parties' rights and duties does not spring from that permission. In most legal systems even a thief is able in certain circumstances to make a valid transfer of the stolen property by the standard forms of sale, even though in doing this he commits an offense. Conversely, if a person who has no legal power to dispose of property or enter into a contract purports to do these things by executing the standard forms, the purported disposition or contract will be invalid or "void" though his acts may constitute neither a criminal nor a civil offense, and so may be legally permitted.

Bentham's second fault is his failure to mark sufficiently clearly and consistently an important distinction between two types of subordinate powers: on the one hand a power to issue legal commands and prohibitions, and on the other a power to enter into legally effective transactions which cannot be construed as commands or prohibitions, though their effect is to bring individuals within the scope of existing commands or prohibitions or exceptions to them.<sup>50</sup> The upshot of these two faults is that Bentham misrepresents as a mere legal permission to issue commands or prohibitions which it would be otherwise illegal to issue, something conceptually quite distinct from this and of great importance: namely the recognition by the law that certain acts of individuals in certain circumstances suffice to bring themselves or others within the scope of existing laws (or of exceptions to them) and so control their incidence.

So far I have assumed in Bentham's favor that, though his account of the creation of powers to enter into legally effective transactions

50. Bentham seems to recognize this distinction in his reference (*see note 42 supra*) to expressions of will which, though not themselves "mandates," may be translated into mandates and become mandates when adopted by the Sovereign.

such as a contract or conveyance is defective, his account is still an acceptable one of the creation of subordinate powers to issue commands and prohibitions or, as we should term them, subordinate powers of legislation. But in fact this account is acceptable only in very simple and comparatively unimportant cases where the courts would take no hand in enforcing the subordinate's orders or punishing those who disobeyed them, but would be concerned only with the question whether the subordinate's act in issuing or in enforcing orders was permitted by the law or was an offense because, *e.g.*, it had exceeded permitted limits. A parent's power to give orders to a young child and to administer moderate punishment for disobedience may be of this kind, and in such cases the notions of "has legal power to issue and enforce" and "is legally permitted to issue and enforce" are indistinguishable. But where questions of the validity of the subordinate's orders arise, as they will when the orders which the subordinate has power to issue are enforceable by the courts, then the mere fact that the subordinate is permitted to issue the orders, even if it is true, is not in itself the important consideration. What is important is that the subordinate's act in issuing the orders is recognized by the law as a criterion distinguishing orders which the courts are to enforce, and so as a criterion of their validity. In such cases the orders issued by the subordinate have a double aspect: on the one hand, they are indeed orders addressed by the subordinate to others requiring them to do or not to do certain acts and in this respect are unlike legal transactions such as the making of contracts; on the other hand, the issuing of such orders by the subordinate is recognized by the law as bringing certain persons within the scope of existing laws requiring obedience to the subordinate, just as the making of a contract brings the parties within the scope of existing laws requiring performance of contracts from the parties to them.

What most needs to be stressed as a corrective to Bentham's account is that the fact that a person or body of persons is legally permitted, *i.e.*, not prohibited by law, to issue orders is not equivalent to the recognition of the issue by such person or persons of such orders as a criterion of their validity or enforceability. Conversely, the fact that the issue of such orders is not permitted but is an offense must be distinguished from the invalidity of such orders even if these two features are commonly found together. Thus, even if members of a legislature were punishable (as usually they are not) for issuing orders which are *ultra vires* and void, the fact that in issuing such orders they have done what is not permitted, because legally prohibited, must be

distinguished from the fact that they have produced orders which are legally invalid. In such a case the would-be legislators have broken an existing law because what they have done is legally prohibited by it, but they have failed to make a new law because what they have done is not recognized as a criterion of legal validity.

A better account of the way in which powers to effect legal transactions are conferred by law is at least implicit in Bentham's discussion of powers of aggregation and investitive powers, and it is an account which provides within the framework of his general imperative theory an analysis of the idea of legal recognition of the validity of a transaction which does not confuse it with the largely irrelevant idea of legal permission to do what is generally prohibited. Bentham's problem is the necessity of reconciling his general imperative theory of law with a realistic account of legal powers and the laws on which they rest. For his form of imperative theory recognizes only two types of laws: coercive laws imposing duties to act or to abstain from acting (commands and prohibitions), and discoercive laws permitting acts or abstentions previously forbidden. There is no further type of law, conferring powers as distinct from imposing or removing duties. To believe that there is would be inconsistent with the doctrine or dogma that laws are essentially commands or exemptions from commands.

Accordingly Bentham's solution to his problem is to treat legal powers as resting not on a type of law distinct from duty imposing laws but on certain parts of laws which impose duties. Thus, to revert to our well-worn example of the power to appoint judges, perhaps most lawyers would find acceptable the common view that here there are two relevant types of law, *viz.* (i) a general law settling the duties (and also rights, etc.) of judges, and (ii) a law conferring power on some person, *e.g.*, the Lord Chancellor, to appoint judges. Bentham rejects this view and holds that the provisions conferring the power to appoint are limitations or conditions forming part of the general law, and these determine who is to be included among judges and hence who is subject to the duties which the law imposes on them. This can be made apparent if we simply rephrase the general law in such terms as "If the Lord Chancellor nominates a person as a judge then any person so nominated shall . . ." or "All persons nominated by the Lord Chancellor as judges shall . . ." Similarly (though in more complicated ways) powers of alienation of property rest merely on certain qualifications, limitations or exceptions contained in general laws imposing duties not to interfere with property and these are in effect

a catalogue of the conditions under which a man is said to have a title to property.

For Bentham the view that there are separate laws which confer powers is an illusion, and he plainly thinks it is fostered by the important fact that lawyers can and indeed constantly need to consider separately, in abstraction from the rest, those parts of duty-imposing laws which provide for legal powers. For all sorts of purposes, and not only when some exercise of a power is contemplated, lawyers need to have available detailed and comprehensive formulations or “expositions,” as Bentham terms it, of those events and circumstances which provide powers because they condition or limit the operation of coercive duty-imposing laws.<sup>51</sup> In relation to the law of property we have such an “exposition” when the various kinds of “investitive” events constituting a title (including those events which constitute voluntary transfers) are collected and explained in the general part of a civil code or in treatises or books on property and conveyancing.<sup>52</sup> But we must not mistake them for a special class of laws: what look like separate laws of a non-imperative kind are in fact only expositions of parts of imperative laws and legal powers to control the incidence of laws rest on such parts of laws. This is Bentham’s doctrine and, though I disagree with it, it contains much that is illuminating.

Because it throws light on the structure of a legal system Bentham stresses the fact that many different duty-imposing laws will be found to share many common conditions providing for powers. The conditions which constitute a title to property, on which powers of alienation rest, are common to whole groups of laws creating offenses against property. Other sets of conditions, for example those conferring powers of arrest will (through the medium of discoercive laws) be common conditions limiting the scope of duties imposed by many laws creating offenses against the person.<sup>53</sup> In a striking image Bentham compares such groups of laws sharing common conditions to a cluster of pyramids with a common base.<sup>54</sup> “[M]any laws, any two laws almost, will have a vast portion of their substance in common: they will be like contiguous triangles, like the diagrams of pyramids represented as standing upon the same basis: but the matter of each will be separately describable: as in pyramids so represented the parts of each are separately assignable.”<sup>55</sup>

51. *Id.*, ch. XVI *passim*.

52. *Id.*, ch. XIV, paras. 33-38, at 179-82; ch. XVI, para. 11, at 201-02.

53. *Id.*, ch. XVI, para. 10, at 200-01.

54. *See also* PML, ch. XVII, concluding note, para. xii, at 304.

55. OLG, ch. XIX, para. 2, at 234.

## VI. Powers of Imperation or Normative Powers

There remains the question whether what is valuable in Bentham's analysis of powers can be detached from his general theory of law, which insists that laws are commands or prohibitions or permissions issued or adopted by the Sovereign. I think it can, and this is best seen if it is appreciated how Bentham's analysis of powers makes contact with certain important themes of modern linguistic philosophy.<sup>56</sup> When an act which constitutes the exercise of a power is the saying or writing of certain words, as it will usually be in the case of the appointment of a judge or a transfer of property or the making of a contract, then whatever meaning such words may have independently of the law they also, because of the law, have a special dimension of meaning or a special "force," since the law provides that their utterance shall effect legal changes. They are, as conveyancers call them, "operative" words. "I hereby appoint X to be one of His Majesty's Judges" or "A hereby conveys unto B etc., etc." are not, or not merely, statements giving information about or self-descriptions of the appointor or transferor; they are formulae the use of which by the appropriate person on the appropriate occasions has certain legal consequences. But these are legal *normative* effects or consequences, not *natural* effects. The point is not that the use of such words *causes* later acts or events to be done or to happen, but rather that if certain acts are later done or not done they will because of the prior use of such words be legally speaking "in order" or "out of order," right or wrong, a performance of a duty or a breach of it. Now what is true in the legal case is also true of many non-legal cases where there is no background of imperative laws to explain how it is that the use of words can have normative effects and so constitute an exercise of informal non-legal powers. When we promise to do something or when a baby is given a name at a christening ceremony, the words used to make the promise or give the name ("I hereby promise . . ." or "I hereby name this child . . .") have the normative effect that a later failure to do the promised act is evaluated as "wrong" or calling the baby by some other name is "incorrect," and various forms of censure or criticism are rendered "in order," or appropriate. These informal non-legal cases which

56. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962), *passim*, and discussions of the distinction between the meaning and the "illocutionary force" of utterances in Cohen, *Do Illocutionary Forces Exist?*, 14 *PHIL. Q.* 118 (1964), and Strawson, *Intention and Convention in Speech Acts*, 73 *PHIL. REV.* 439 (1964).

parallel legal powers—and there are hosts of them of varying degrees of informality and stringency—suggest that powers to change normative situations need not rest on a Sovereign's commands or on commands at all. Where they do rest on commands, that will be a special case. For social rules which are not commands may, like Bentham's general laws or "imperfect mandates," have gaps left open for others to fill up. There is no command (unless all social rules are to be attributed to Divine Command) that we must do what we promise to do or that a child is to be called by the name assigned to it by a certain person at a certain type of ceremony. There are, however, as a background to these operations certain accepted rules or procedures, more or less precise, under which if certain things are said or done this changes the normative situation. Hence anyone who thinks the notion of an accepted rule rather than a Sovereign's commands is central to the analysis of a legal system could still use the substance of Bentham's analysis of legal powers. Moreover there is at least one legal phenomenon which the shift to rules could explain but for which Bentham's imperative theory of law cannot provide a place. For since all legal powers according to Bentham are conferred by the Sovereign's legislation, express or tacit, the Sovereign's own powers to make law are not legal powers. The supreme legislator's powers cannot be conferred by law. All we can say of them according to Bentham<sup>57</sup> is that their *cause* is the general habit of obedience which is a constituent of Sovereignty. But in many legal systems the supreme legislator's powers *are* conferred by law and indeed limited by law and, as I have tried to demonstrate elsewhere, for the explanation of this feature of law the notion of a rule, not that of a command, is required.

There remains for discussion the question whether the mere substitution of conditional rules imposing duties for conditional commands imposing duties would be enough. The full investigation of this cannot be attempted here but my own view is that, on any reasonable criterion of what constitutes separate laws as distinct from "parts of a law," legal provisions which are intended to guide those who exercise powers to bring about changes in the legal situation of themselves or others and which supply criteria for the assessment of the validity of such changes should rank as separate laws<sup>58</sup> and not merely as parts

57. OLG, ch. II, para. 1, at 18 n. b; ch. XI, para. 11, at 137 n. h (139).

58. See the discussion of criteria of individuation for laws in J. RAZ, *supra* note 44, especially at 140-47, and his application of these criteria in his article *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

of laws imposing duties. Legal provisions of this kind guide those who exercise powers in ways strikingly different from the way in which rules imposing duties guide behavior: they are more like *instructions* how to bring about certain results than mandatory impositions of duty.<sup>59</sup> Hence power-conferring rules are distinct from duty-imposing rules in their normative function though they are, of course, also intimately connected with them. To represent them as fragments of duty-imposing rules is to obscure their distinct normative character.

59. For the distinctions between the way in which laws conferring powers guide those who exercise powers and the way in which laws imposing duties guide the conduct of those subject to them, see H.L.A. HART, *THE CONCEPT OF LAW* 27-28, 31-33 (1961), and J. RAZ, *supra* note 44, at 161, 162-64.