

REVIEW

Rights and the Authority of Law

John Deigh†

Essays on Bentham: Studies in Jurisprudence and Political Theory.
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No one could ever have seriously accused Jeremy Bentham of being a man of few words. His published work, by H.L.A. Hart's accounting, "run[s] to many millions of words and there is still more to come."¹ It is a truly impressive literary output. Even more impressive is the huge amount of reading Professor Hart has done in Bentham's corpus. Twenty years ago, when Hart estimated that what had then been published of Bentham's work came close to six million words, he also estimated that he had read nearly half.² Now he does not even hazard a guess as to the amount he has read, though many millions of words would not, I suspect, misrepresent the total. This quantity alone is of course impressive, but when one reminds oneself of the plodding character of so much of Bentham's prose, the many pages spent on elaborate and tedious detail shaped by countless divisions and subdivisions of whatever topic is under discussion, Professor Hart's accomplishment takes on heroic proportions. That one cannot read very far into one of Bentham's theoretical works without becoming weary and distracted has meant that those with a serious interest in his theories have had to depend on the few expositors and commentators who have persevered. Professor Hart is one of the few, and in this collection of eleven essays he expounds and criticizes, with the clarity and acuity of thought for which he is widely admired, Bentham's legal and political philosophy. For these essays, each of us who once had the

† Assistant Professor of Philosophy, Northwestern University.

¹ H.L.A. HART, *ESSAYS ON BENTHAM* 1 (1982).

² *Id.* at 40, 41, *reprinting in substantially similar form* Hart, *Bentham and Beccaria*, in *ATTI DEL CONVEGNO INTERNAZIONALE SU CESARE BECCARIA* 20 (1966).

inclination to read Bentham but who lacked the time, patience, and powers of concentration necessary to do so at length should be very grateful.

Only one of the essays is wholly new. The others either contain substantial parts of previously published articles or are revised or expanded versions of such articles, the revisions in all cases being inconsequential. Hart has arranged the essays so that the reader receives, from the early ones, a general introduction to Bentham's thought and is then presented, in the later ones, with critical studies of positions Bentham held on central issues in analytical jurisprudence. In the early essays Hart explains Bentham's aims and methods as an expositor and critic of the law, surveys the range of questions Bentham addressed in carrying out these aims, discusses the early influence of Beccaria on Bentham and the similarities and differences in their views, and recounts the change in Bentham's opinion of the United States and her democratic institutions from hostility to admiration. In the later essays Hart first explains Bentham's conception of the structure of law, including its conformity to a logic of imperatives (a valuable analytical tool which Bentham's theory of law as a species of command led him to invent), and then expounds and criticizes Bentham's analyses of the fundamental legal concepts of duty (or obligation), right, power, sovereignty, and command. The fifth essay, which concerns Bentham's attack on the political doctrine, so important in his time, that men possess natural, inalienable rights to, *inter alia*, life and liberty, and which also considers John Stuart Mill's later attempt to incorporate a notion of natural rights into utilitarianism, marks the transition from the early, introductory essays to the later, theoretical ones.

Hart's main objectives in the later essays are to dig out, usually from several different works, Bentham's analyses of the above-listed concepts, to come, where necessary, to interpretive conclusions about Bentham's considered views on questions related to those analyses (e.g., does every ascription of a legal duty imply that the bearer is liable to some sanction should he disobey?), and to hold these analyses up to critical light. At the same time, in several of these essays Hart goes beyond critical reflection on Bentham's views to defend, modify, and develop further ideas which he has expounded elsewhere and for which he is himself well known. These excursions into contemporary debates and discussions suggest a larger purpose to his essays than providing critical exegeses of the works of a major historical figure.

Hart sees Bentham as a much abler exponent of classical legal

positivism than Bentham's disciple, John Austin,³ from the criticism of whose work Hart developed his own positivist theory. Hence, it is fair to suppose, Hart has taken Bentham's deeper and subtler statement of the classical theory as a challenge inviting renewal of that criticism and so an opportunity for testing, extending, and strengthening the theory he developed in *The Concept of Law*.⁴ Guided by this larger purpose, Hart then naturally takes up recent works that present theories opposed to legal positivism, specifically to its central thesis that law is separate from morality. Thus, in his essay on legal duty Hart briefly examines, and finds unsatisfactory, the views of Ronald Dworkin and Joseph Raz, according to which the concept of a legal duty has moral import; and in the last essay, which shows Raz's influence, Hart gives an account of law as a source of authoritative reasons for action, on the basis of which he means to show how the central positivist thesis is consistent with what he calls the normativity of law: how law is separate from morality and yet has reason giving force in the lives of those on whom it imposes duties and confers powers. Similarly, in his essay on legal rights, Hart uses exposition and criticism of Bentham's analysis of the concept of a legal right to clarify and reinforce the opposing analysis for which Hart has argued for over thirty years.⁵ Then, at the essay's end, Hart considers examples that pose difficulties for his analysis, examples of the kind to which contemporary moral and political philosophers who share an understanding of rights more akin to Bentham's than to Hart's have attended in working out their theories, and concedes, in view of these examples, that his analysis does not have universal application.

What Hart has to say on these two topics, the relation of law to morality and the character of legal and moral rights, stands out from his other discussions, partly because one can recognize in his discussion of these topics substantial developments and changes in his views, and partly because current debates on these topics are so widespread and lively. Thus, even a reader who lacks abiding interest in Bentham's theories will find plenty of ideas and arguments to wrestle with in these essays, the later ones in particular. My own wrestling with Hart's ideas and arguments has led me to conclude,

³ *Id.* at 59, 108-09.

⁴ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

⁵ See, e.g., H.L.A. HART, *DEFINITION AND THEORY IN JURISPRUDENCE* (1953); Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175 (1955); Hart, *Bentham*, 48 *PROC. OF THE BRIT. ACAD.* 297 (1962).

on the one hand, that Hart need not have conceded as much as he did to moral and political philosophers whose theories of rights clash with his own and, on the other, that he may have to concede more than he appears willing to to the opponents of legal positivism. The reasons why will take some explaining.

I

That we now readily consider the relation of law to morality and the character of legal and moral rights as distinct topics testifies to Bentham's great influence on our discussion of the issues they involve. Political theory in the seventeenth and eighteenth centuries recognized no important distinction between them. To the contrary, the key question its authors addressed concerned the legitimacy of sovereign power, and to answer it they constructed theories about how rulers and magistrates came into possession of the right to govern, that is, the rights to make and execute laws and, in particular, to inflict punishment on those who disobeyed. Accordingly, the positive laws of a political society were the products of exercises of those rights, and the rights themselves had clear moral pedigrees. A political theorist of that age might have described these rights as powers granted directly by God to those who possessed them or to their ancestors. Alternatively, the theorist might have described them as powers conferred on certain rulers through the exercise and transfer of rights that some or all of their subjects, or their subjects' ancestors, originally possessed, rights that either were given to some or all men by God or were possessed by all moral agents in virtue of their rational faculties and knowledge of good and evil. These alternatives, and the variations on them that were advanced, thus explained the sovereign authority that rulers and magistrates had as moral authority, and they did so by grounding a sovereign's rights to govern in the actions of God or in the exercise by men of their God-given or natural rights. Consequently, under any of these alternatives or their variations, laws, being products of the exercise of sovereign authority, were invested with moral authority, and talk of laws having authority distinct from their moral authority would have been dismissed as nonsense.

Bentham of course introduced such talk and made sense of it.⁶

⁶ J. BENTHAM, *A Fragment on Government*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 428 (J.H. Burns & H.L.A. Hart eds. 1977) [hereinafter cited as J. BENTHAM, *A Fragment*]; see also J. BENTHAM, *OF LAWS IN GENERAL* 18-19, 109 (H.L.A. Hart ed. 1970) [hereinafter cited as J. BENTHAM, *OF LAWS*]. I have used Hart's essays and

He held that to ascribe sovereign authority to some person was to say that that person habitually issued orders and rules to a people who, in turn, habitually obeyed him, and similarly for ascription of sovereign authority to some body of persons.⁷ And since the people were taken to constitute a political society and since the orders and rules the sovereign addressed to them, and certain orders and rules of his deputies, to constitute that society's law, one could ascribe authority to its law as well. These were orders and rules that expressed the will of the sovereign and that the people were therefore in the habit of obeying. In this way Bentham explained sovereign authority and the authority of law without reference to rights and so made unnecessary the connection political theorists of his day commonly drew between law and morality.

Bentham, however, though he largely left the religious side of the matter alone, went further and denied that there were any nonlegal, natural rights through the exercise of which the office of the sovereign became invested with moral authority.⁸ His intention, with regard to the secular side of political theory, was, one might say, to sever entirely this common connection between law and morality by getting rid of its essential connecting link, and he carried out this intention through a harsh attack on the doctrine of the natural rights of man.⁹ This doctrine, spelled out in a way that captures its use from the seventeenth century to the present, holds

citations as a guide to the relevant passages in Bentham's works. I am, of course, fully responsible for whatever mistakes are to be found in my interpretation of Bentham's views.

⁷ I follow Bentham's formulation in *Of Laws in General*. J. BENTHAM, *OF LAWS*, *supra* note 6, at 109 ("[T]he authority of the sovereign is founded . . . by custom and disposition: of habit of commanding on one side, accompanied by a habit of obeying on the other . . ."). Where he there acknowledges that in rare cases sovereign authority is founded on a contract, but presumably he accepted Hume's view that even if a political society were founded on a contract, the sovereign authority of its governors would soon enough be grounded elsewhere. See D. HUME, *A TREATISE OF HUMAN NATURE* 539-549 (L. Selby-Bigge ed. 1964) (1st ed. London 1788). For Bentham's debt to Hume, see J. BENTHAM, *A Fragment*, *supra* note 6, at 439-41, 439 n.v.

⁸ The main texts for Bentham's attack on the doctrine of the natural rights of man are J. BENTHAM, *Anarchical Fallacies*, in 2 *THE WORKS OF JEREMY BENTHAM* 489 (J. Bowring ed. Edinburgh 1843) [hereinafter cited as J. BENTHAM, *Anarchical Fallacies*]; J. BENTHAM, *Pannomial Fragments*, in 3 *THE WORKS OF JEREMY BENTHAM*, *supra*, at 211, 217-21 [hereinafter cited as J. BENTHAM, *Pannomial Fragments*]; J. BENTHAM, *Supply Without Burden*, in 1 *JEREMY BENTHAM'S ECONOMIC WRITINGS* 279, 332-337 (W. Stark ed. 1952) [hereinafter cited as J. BENTHAM, *Supply Without Burden I*]. Note that a shorter version of *Supply Without Burden*, which omits the discussion of natural rights, appears in 2 *THE WORKS OF JEREMY BENTHAM*, *supra*, at 585. For Bentham's attitude toward divine rights and his reason for treating them as separate from natural rights, see J. BENTHAM, *Supply Without Burden I*, *supra*, at 334 n.*.

⁹ See, e.g., J. BENTHAM, *Supply Without Burden I*, *supra* note 8, at 334 n.*.

that (1) all human beings, or at least all who have fully developed and undefective rational faculties, originally (that is, before any rights are transferred) possess rights in virtue of certain natural traits and powers they have; (2) each man originally possesses rights of this kind equal to those that any other man originally possesses; and (3) these rights are not granted by any human being or conferred by the rules of any man-made institution. Against this doctrine, as it was formulated and advocated in his time, Bentham argued, pontificated, and even railed.

At that time, it is important to note, there were two different theories in which the doctrine had a central place. One was distinctly newer than the other and had by then achieved prominence as a theory in the natural rights tradition equal to if not greater than that of the older.¹⁰ It held that the basic natural rights of man, including especially those to life and liberty, were inalienable, whereas on the older theory men could, and in fact did, alienate all their natural rights. Thus the older theory explained how one, several, or many persons in a political society had sovereign authority by supposing a complete transfer of all natural rights by their possessors to the person or assembly of persons who had that authority. The newer theory, by contrast, held that men, in establishing a political society or in consenting to be governed by the rulers and magistrates of an already existing political society, relinquished some but not all of their natural rights, particularly not those to life and liberty. Claims to the contrary made by rulers, their subordinates, or other advocates of absolute and unlimited sovereign authority were then denied on the grounds that men lacked the power to alienate these basic rights. These rights were, in this sense at least, inalienable.¹¹ Bentham's chief objection applied to either theory, but he directed his salvos particularly at the newer one, whose postulation of inalienable rights and the kind of limit on sovereign authority this entailed especially infuriated him.

Bentham's chief objection was that to talk of natural rights

¹⁰ For an account of what I call the older theory, see R. TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT passim* (1979). For an account of what I call the newer theory, see M. WHITE, *PHILOSOPHY OF THE AMERICAN REVOLUTION* ch. 4, 5, 6 (1978).

¹¹ The major proponents of the newer theory took the term "inalienable right" to mean a right the possessor of which lacked the power to transfer. They did not think that a right's being inalienable precluded its being forfeitable. Rather, the term "imprescriptible right" was used to denote a right that could not be forfeited or lost by its possessor. See M. WHITE, *supra* note 10, at 196; Richards, *Inalienable Rights: Recent Criticism and Old Doctrine*, 29 *PHIL. & PHENOMENOLOGICAL RESEARCH* 391, 397-99 (1969); Simmons, *Inalienable Rights and Locke's Treatises*, 12 *PHIL. & PUB. AFFAIRS* 175, 176-84 (1983).

was to talk of rights that men possessed prior to or independently of the laws enacted in the political societies to which they belonged, and such talk was irreparably confused.¹² The confusion, he held, lay in the failure to understand that rights were the products of positive law and not vice versa.¹³ The notion of a natural right implied that of a nonlegal right, and this, to Bentham's way of thinking, was, like round square or dry moisture, a self-contradictory notion, a notion beyond repair.¹⁴ Plainly, though, this objection comes to no more than an advertisement for Bentham's own approach; by itself it provides no reason for rejecting theories of natural rights. Bentham did try to support the objection by pointing to "the savages of New South Wales," who lived without aid of government or law.¹⁵ Here were examples, Bentham asserted, of men who had no rights, and since champions of natural rights typically ascribed them to all men regardless of their race or nationality, these examples, so Bentham thought, refuted standard theories of natural rights. Yet Bentham's reading of these examples is as tendentious as the objection he intended them to support. While the social practices of a primitive society may reflect a people's ignorance of their natural rights, this is no more reason to suppose that these people have no natural rights than their ignorance of bacteria as reflected by their society's medical or healing practices is reason to suppose that their bodies have no bacteria within them. One must conclude, then, that this line of objection begs too many questions in moral and political philosophy to advance Bentham's attack on the doctrine he so vehemently opposed.

Hart, who is also unimpressed with Bentham's chief objection, notes that Bentham raised, in connection with it, a second objection.¹⁶ Bentham sometimes argued that because natural rights were supposedly uncreated and so undefined by laws, ascriptions of them were completely arbitrary. Such ascriptions, according to Bentham, were unlike the ascriptions of legal rights; while the latter were governed by criteria that the laws that created those rights supplied, the former were governed by no criteria whatsoever. Consequently, disputes about natural rights were essentially irresolvable. They were purely verbal disputes of no value to politi-

¹² J. BENTHAM, *Anarchical Fallacies*, *supra* note 8, at 500; J. BENTHAM, *Pannomial Fragments*, *supra* note 8, at 221.

¹³ J. BENTHAM, *Anarchical Fallacies*, *supra* note 8, at 523; J. BENTHAM, *Pannomial Fragments*, *supra* note 8, at 321.

¹⁴ J. BENTHAM, *Supply Without Burden I*, *supra* note 8, at 334.

¹⁵ J. BENTHAM, *Anarchical Fallacies*, *supra* note 8, at 500-01.

¹⁶ H.L.A. HART, *supra* note 1, at 82-83.

cal theory and positively harmful to political life. Hart sees this objection as presenting a genuine problem for any supporter of a theory of natural rights, the problem of supplying criteria for the ascription of such rights. It is, he says, the most serious objection Bentham raised and one that still awaits a satisfactory reply.¹⁷ I shall consider it at greater length after I mention what I believe is the most powerful objection Bentham advanced against the theories of natural rights of his day.

This third objection was Bentham's argument—more exactly, his version of Hume's argument—against the twin theses that (1) every political society was founded on a contract the parties to which were the original adult members of the society and through which those whom the parties selected to rule were given authority over their subjects; and (2) the ruler or rulers in any political society, however many generations old, continued to have authority over each adult subject by virtue of the latter's having consented to obey the former.¹⁸ These propositions or their appropriate variants figured prominently in the explanations that theories of natural rights gave of how men, each of whom had the full complement of rights necessary to govern his own life, came either collectively to institute a government (i.e., establish a political society) or individually to submit themselves to an already existing government and, in either case, to relinquish some or all of their rights to those persons in their society who were or had been selected to rule. For to effect this transfer of rights something like the making of a contract or the giving of consent had to occur. Only by such acts could rulers acquire the rights to govern and so come to have moral authority over those whom they governed. And consequently, a refutation of these two propositions would put the doctrine of the natural rights of man in serious jeopardy of being pointless.

Now for our purposes, we need not consider whether Bentham's argument, or Hume's for that matter, refuted these propositions, since whatever faults one might find in their arguments have been rectified by subsequent philosophers.¹⁹ Rather, of greater interest is the question whether the refutation in fact makes the doctrine of the natural rights of man pointless. With

¹⁷ *Id.* at 90.

¹⁸ J. BENTHAM, *Anarchical Fallacies*, *supra* note 8, at 501-02; see also J. BENTHAM, *A Fragment*, *supra* note 6, at 439-41, 478-79. For Hume's argument, see D. HUME, *supra* note 7, at 539-549.

¹⁹ See e.g., A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATION* ch. 3, 4 (1979).

respect to the older of the two theories I distinguished earlier,²⁰ the refutation does have this effect, since the controlling purpose its proponents had for ascribing natural rights to man was to explain how rulers and magistrates came to have moral authority over their subjects. With respect to the newer theory, however, one can, despite the refutation, find some point to the doctrine that is sufficiently important to justify attempts at preserving it or something like it. For the purposes this theory's proponents had for ascribing natural rights to man included marking off the authority that each man rightfully retained over the conduct of his life after he had, through contract or consent, given to some ruler or rulers a *limited authority* to govern his life. These retained rights then established grounds for complaints, protests, and acts of resistance made or engaged in when these rulers exceeded their authority. It was to accomplish these purposes that the newer theory's proponents characterized the basic natural rights they ascribed as inalienable. Their point in ascribing these inalienable natural rights to man was to place limits on sovereign authority disregard of which by those who possessed that authority constituted wrongful interference with their subjects' lives. The rights were thus understood to secure for each man who possessed them freedom, with respect to certain areas of his life, to act as he chose in that neither the possessors of sovereign authority nor anyone else could impose on him duties that would limit this freedom. And unjustifiable attempts to impose such duties would then qualify as injustices or indignities that no man should have to suffer. Of course, on the newer theory this bilateral distribution of authority among rulers and their subjects came about through the contract or consent that the latter made or gave, and therefore the refutation of the two propositions adverted to above²¹ removes the grounds for holding that this distribution necessarily obtains in a political society. But while this result allowed Bentham, once he had his own definition of sovereign authority in hand, to dismiss the idea that natural rights placed limits on sovereign authority, it left unaffected the idea that natural rights provided grounds both for criticizing, as wrongful or unjust, certain exercises of sovereign authority and for taking the appropriate action in response to such wrongs and injustices. In other words, nothing in this refutation argues against preserving the doctrine of the natural rights of man for use in making critical judgments about the moral quality of our rulers' actions and our

²⁰ See *supra* text accompanying note 10.

²¹ See *supra* text accompanying note 19.

own. And if such a use of the doctrine should prove attractive, we should then have reason for incorporating it into moral theory.

In preserving the doctrine for this reason, we would be preserving certain standards of justice and rightful conduct toward men that the ascription of inalienable, natural rights to man was intended to capture. Bentham, to be sure, had no use whatsoever for such standards. As a legal positivist he denied that they played any part in the exposition of law. As a utilitarian he denied that there were any such standards independent of the Greatest Happiness Principle. These separate denials mark the sharp distinction he drew between the projects of the Expositor of law and those of the Critic,²² and one must heed this distinction in order to understand the import of his arguments. His argument against the propositions adverted to above provides reason for retiring the concept of a natural right from analytical jurisprudence, that is, for ending its use by the Expositor of law; but the argument gives no support to his denying that the ascription of inalienable, natural rights serves to indicate distinct standards of right and wrong. The issue then concerns the standards of right and wrong available to the Critic of law, and to resolve it in Bentham's favor, that is, to exclude as spurious standards that the doctrine of the natural rights of man implies, requires a different argument. This brings us back to the objection Hart regards as Bentham's most serious, the objection that no criteria govern ascriptions of natural rights to man.

Admittedly, insofar as Bentham understood this objection to be part of his campaign to rid law and jurisprudence of false and mystifying concepts, it concerns more the projects of the Expositor than those of the Critic; and that behind the objection lay his conviction that the concept of a right was essentially a legal concept strongly suggests that this is how he understood it. Nevertheless, its import clearly carries over to the issue concerning the standards of right and wrong available to the Critic. Indeed, the objection fits in well with Bentham's general attack on all standards of right and wrong alleged to be independent of the Greatest Happiness Principle. With one ignorable exception, Bentham brought all such standards under the name "The Principle of Sympathy and Antipathy" because, as far as he could tell, all applications of them by their exponents and champions that were not disguised applica-

²² J. BENTHAM, *A Fragment*, *supra* note 6, at 397-98. I have used 'Critic' where Bentham used 'Censor.' The latter no longer has the sense that Bentham used it to express (*viz.*, judge or critic). See OXFORD ENGLISH DICTIONARY, s.v. 'censor.'

tions of the Greatest Happiness Principle were mere expressions of feeling, of likes and dislikes.²³ One applied this principle of sympathy and antipathy, Bentham maintained, without regard to any "external consideration" or "external standard."²⁴ It was, in other words, no real principle; it yielded no criteria for making judgments of right and wrong.²⁵ And one can easily imagine Bentham asserting the same points about ascriptions of natural rights made by those who expounded or championed the doctrine of the natural rights of man.

In considering this objection I shall not try to defend the doctrine. My aim is different and more modest. I want to compare what I have been calling the newer theory of natural rights with the theory that Hart, when considering Bentham's objection, offers as a candidate, and indeed the only candidate, for a defensible theory of natural rights.²⁶ Accordingly, I shall bring out elements in the newer theory to which a defender could appeal, and then briefly sketch the theory Hart offers. The latter, which Hart abstracts from Mill's discussion of rights in chapter V of *Utilitarianism*,²⁷ differs significantly from the "newer" theory (hereafter "the Traditional Theory"); and in light of these differences there arise large unanswered questions about Hart's own analyses of concepts of natural and legal rights.

For purposes of reference I shall use Locke's *Second Treatise of Government* as a guide to the Traditional Theory.²⁸ No other work, I believe, has a greater claim to representing systematically the general ideas that constitute the theory. I shall use it, however, as a guide to these general ideas only, that is, without regard to the specific details of Locke's exposition of them. On the Traditional Theory, all and only men who have developed and retained their rational faculties possess natural rights, including especially the rights to life, liberty, and property.²⁹ Such men possess these rights

²³ J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 17-33 (J.H. Burns & H.L.A. Hart eds. 1970). The one exception is what Bentham calls the principle of asceticism, though he might have called it the Greatest Misery Principle. *Id.* at 17-18 (defining the principle of asceticism as "approving of actions in so far as they tend to diminish happiness; disapproving of them in as far as they tend to augment it").

²⁴ *Id.* at 25.

²⁵ *Id.*

²⁶ H.L.A. HART, *supra* note 1, at 104.

²⁷ J.S. MILL, *Utilitarianism* ch. 5, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 38 (A.D. Lindsay ed. 1910).

²⁸ J. LOCKE, THE SECOND TREATISE OF GOVERNMENT (T. Peardon ed. 1952) (1st ed. n.p. 1690).

²⁹ *Id.* at chap. II.

because each is capable of governing his own life, that is, each is capable of deliberating about and choosing how best to conduct his life, how best to protect himself from life's dangers, and how best to make his life comfortable and rewarding. Self-government is the proper condition of fully rational human beings, and their possession of the rights to life, liberty, and property places them in a position to act as self-governing individuals, for these rights both secure for and confer on each of their possessors freedom and authority to conduct his life.³⁰ Each is free in that, unless he consents, he is subject to the authority of no other man, and each has authority over his life in that, because he is competent to assume obligations, acquire property, incur debts, and release others from obligations and debts they owe him, he can set limits to his freedom and in other ways alter his moral relations with others. He has, in other words, certain *powers* of self-government. Moreover, he has these powers independently of his society's laws, for he exercises them in the context of the moral relations he has with other members of the society. No laws, after all, are necessary for promises and borrowings to be generative of obligations. Indeed, in a world without political societies, in the state of nature as modern political theorists typically imagined it, all men who possessed natural rights would, at least originally, be equally free, and each would have, to use Locke's term, jurisdiction over his own life.³¹ In such a world each would be a sovereign.³²

By contrast, madmen, idiots, infants, and, indeed, all children before they reach the age of reason do not possess the rights to life, liberty, and property and would not possess them even in the state of nature. Such human beings are incapable of deliberating about and choosing how best to conduct their lives and therefore are incapable of governing themselves. Accordingly, possession of these natural rights, because of the freedom and the powers they secure and confer, would leave those who are incapable of governing themselves helpless and prey to life's dangers. Such individuals are, for this reason, properly governed by others, typically parents or closest kin, who assume the responsibilities of nourishing and protecting them and, in the case of children, of educating them to

³⁰ *Id.* at 4.

³¹ *Id.*

³² "If Man in the state of nature be so free, as has been said, if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody . . . for all being kings as much as he, every man his equal . . ." *Id.* at 70.

lead independent lives when they become adults.³³ In other words, being incapable of self-government, they must be placed under the guardianship of others, who thus assume authority over their lives, which means they must be denied the freedom and authority that the rights to life, liberty, and property secure for and confer on their possessors.

Plainly then, one can find in the Traditional Theory a general criterion for determining who among human beings possesses natural rights. Moreover, this criterion also allows one to answer certain questions about the forfeiture and loss of natural rights.³⁴ To be sure, the criterion's constitutive concepts, those of reason and of a rational creature, are vague, and this means that in many cases determining whether an individual has and retains fully developed rational faculties is open to dispute. Hence, the application of these concepts may sometimes be arbitrary. But such arbitrariness is an ever-present feature of concepts of natural phenomena and should not be mistaken for the kind of arbitrariness Bentham alleged was to be found in ascriptions of natural rights. Bentham's allegation was that these ascriptions were completely arbitrary. He maintained, not that they were made according to vague criteria, but that they were made according to no criteria whatsoever. To him the phrase *natural right* was merely "a sound to dispute about."³⁵ Hence, the way in which one determines who possesses natural rights does not sustain his allegation, since the Traditional Theory offers a criterion for making this determination.

Furthermore, because the theory is predicated on the idea that the proper condition of fully rational human beings is self-government, it also offers a criterion for determining what specific natural rights such human beings possess. On the Traditional Theory, to be in a position to govern a human life, whether one's own or another's, is to have the responsibilities of preserving that life and, where possible, of improving it. Accordingly, a position of self-government includes the responsibilities of protecting and nourishing oneself and, where possible, of raising oneself above a brutish existence.³⁶ But then such a position must also include and guarantee the powers and freedom the occupier of that position needs to fulfill these responsibilities. Rights as well as responsibilities inhere in

³³ *Id.* at 36.

³⁴ *Id.* at 6-7, 98.

³⁵ 8 THE WORKS OF JEREMY BENTHAM, *supra* note 8, at 557, cited in H.L.A. HART, *supra* note 1, at 83.

³⁶ J. LOCKE, *supra* note 28, para. 6, at 5-6, para. 26, at 17.

this position of self-government, and the concept of such a position thus yields the criterion for determining what specific natural rights fully rational human beings possess. In short, they are the rights that confer on and secure for each of their possessors the power and freedom necessary for governing his life.

Among these rights the right to life is of course uppermost. But because the right to life secures too little freedom for self-government, others must be specified.³⁷ Accordingly, the rights to liberty and property come next, and the reason for including them is not hard to discern. Self-preservation requires not only the freedom to affect directly one's vital processes but also the freedom to act as one chooses, the power to assume obligations so as to make cooperative engagements with others possible, and the freedom and power to appropriate and make use of material goods. These three rights, to be sure, do not necessarily exhaust the list of natural rights that, according to this criterion, fully rational human beings possess. Some writers in this tradition certainly added to and deviated from this list.³⁸ But for our limited aim, seeing that this criterion can be used to determine specific rights fully rational human beings possess suffices to bring out one promising reply to Bentham's objection.

Yet Bentham would not have let the matter rest here. He would have declared this so much loose talk about rights and argued that this criterion supported no bona fide rights because one could not use it to determine the bounds to their exercise. Indeed, he would continue, these so-called rights to liberty and property seemed to have no bounds, and unbounded rights to liberty and property, whatever that might mean, entailed that their possessors could do as they pleased and take what they wanted: kill, maim, and assault each other; destroy, damage, and seize each other's possessions. Awarding these "rights" to human beings, he would conclude, was a prescription for no liberty and no property, more evidence of the confusion endemic to this theory.³⁹

This retort brings us to the heart of Bentham's objection. Its key assumption is that all bona fide rights have bounds, and this assumption reflects Bentham's conviction that the concept of a right is essentially a legal concept.⁴⁰ In Bentham's view, one can

³⁷ *Id.* para. 17, at 11-12, para. 23, at 15-16.

³⁸ Notably Thomas Jefferson. For commentary see M. WHITE, *supra* note 10, at 222-25.

³⁹ J. BENTHAM, *Anarchical Fallacies*, *supra* note 8, at 502.

⁴⁰ "To me a right and a legal right are the same thing, for I know no other." J. BENTHAM, *Supply Without Burden I*, *supra* note 8, at 334; see J. BENTHAM, *Pannomial Frag-*

meaningfully ascribe a right to some person, or class of persons, only in the context of a system of law, for an ascription of a right is meaningful only if one can determine what actions the right-holder is permitted or entitled to perform or what goods or services he is entitled to receive, and to determine the answers to these questions one must examine the law to see what *duties* the right holder and others have. If the right holder has neither the duty to forbear from a certain action nor the duty to perform it, then he is permitted to perform it; or if he is permitted to perform a certain action and others have the duty to forbear interfering with his performing it, then he is entitled to perform it. Likewise, if others have a duty to provide him with a certain good or service, then he is entitled to receive that good or service. Bentham thought these general categories of permission and entitlement comprehended all rights,⁴¹ and he took the duties that, by their presence or absence in a system of law, defined a specific right, whether an entitlement or a permission, to represent directly or indicate indirectly (by their absence in the context of a whole set of duties the right holder bore) the bounds to that right. Hence, his assumption that all bona fide rights have bounds follows from his general analysis of all rights as definable in relation to the duties that a system of law imposes.

It should be clear that the concept of a natural right that I have abstracted from the Traditional Theory resists Bentham's general analysis, not simply because it does not entail the existence of a legal system but also because it does not entail that natural rights have bounds. For natural rights, so conceived, are not defined in relation to any duties, or at least are not defined by the relations to duties on which Bentham based his analysis. The rights to life and liberty, for instance, are defined in relation to powers. A person has these rights if two conditions obtain: first, that all others lack the power to impose duties on him, especially duties to do or forbear from actions that directly affect his vital processes, and second, that he has the power to assume obligations

ments, *supra* note 8, at 221; J. BENTHAM, *A General View of a Complete Code of Laws*, in 3 THE WORKS OF JEREMY BENTHAM, *supra* note 8, at 155, 157-60 [hereinafter cited as J. BENTHAM, *Complete Code of Laws*]. *But cf.* J. BENTHAM, *Pannomial Fragments*, *supra* note 8, at 218 (acknowledging the concept of a moral or natural right but denying that these have any determinate or intelligible meaning).

⁴¹ I use the terms "permission" and "entitlement" as convenient labels to mark Bentham's basic division of rights into two classes: "rights resulting from the absence of obligation, [which] have for their base *permissive* laws" and "rights resulting from obligations imposed by the laws, [which] have for their base *coercive* laws." J. BENTHAM, *Complete Code of Laws*, *supra* note 40, at 181.

that restrict his liberty. This definition corresponds to the more general definition of an individual sovereign or self-governing agent as a person who is subject to the authority of no other person and has himself authority over the conduct of his life, and in saying that these rights, as rights of self-government, secure for and confer on their possessors freedom and authority to conduct their lives, one refers respectively to the first and second conditions of the definition.

Nor does the right to property, despite what one might naturally think, conform to Bentham's analysis. Here one must distinguish between the natural right to property that the Traditional Theory characterized and whatever rights, entitlements, or protections that being the owner of something entails. Ascribing this natural right to someone presupposes such rights, entitlements, or protections as define some, presumably weak, notion of ownership, but the natural right is not identical with any one or combination of them. A person could possess the natural right to property yet, owing say to a vow of poverty, own nothing, in which case he would not possess or benefit directly from any of the rights, entitlements, or protections that define ownership. Conversely, a person could own many things yet, owing to extremely rigid institutions in his society, be blocked in his attempts to acquire ownership of more things and in his attempts to divest himself of ownership of things he has, in which case his society would deny him his natural right to property. The adolescent whose parents buy all his clothes and decide when those clothes are to be discarded or handed down to younger siblings receives no education in the exercise of this right, while the adolescent whose parents give him a clothing allowance and then leave the choice of wardrobe to him is given opportunity to learn. Thus we may define the natural right to property in a way that matches the above definition of the rights to life and liberty. A person has the right to property if two conditions obtain: first, that all others lack both the power to make him the owner of something and the power to divest him of ownership of something, and second, that he has both the power to acquire ownership of things (through appropriation or recipience) and the power to divest himself of ownership of things (through abandonment or transfer).⁴² Unlike the concept of the right to life and the right to

⁴² The definition should make clear how the right to property can be inalienable while property (i.e. ownership rights) is alienable. At least one commentator on *The Declaration of Independence* has suggested, without questioning Jefferson's judgment, that Jefferson substituted the right to pursue happiness for the right to property in the standard triad of

liberty, however, the concept of the right to property entails the notion that the right has bounds. Ascriptions of the rights to property presuppose some notion of ownership and consequently they presuppose duties consequent to or constitutive of whatever rights, entitlements, or protections define that notion. These duties then set bounds to the right. Plainly, though, the relation between these duties and the right to property differs from the relations to which Bentham appealed in arguing that rights necessarily have bounds. The right to property has bounds, not because it is a right, but because it concerns ownership. Hence, the right to property is consistent with the proposition that the concept of a natural right does not entail the notion that natural rights have bounds.

The immediate point to emphasize is not that Bentham failed to include powers along with permissions and entitlements as a category or rights. To the contrary, as we learn from Hart,⁴³ Bentham recognized powers as an important kind of right and achieved a far-reaching understanding of them in attempting to bring them under his general analysis. Rather, the point to emphasize is that powers are not in all cases products of a system of law. Bentham was simply mistaken in thinking otherwise.⁴⁴ Powers therefore provide a basis for reconstructing from the main tenets of the Traditional Theory an intelligible concept of a natural right.

life, liberty, and property because he recognized that the right to property was preeminently alienable. Perhaps this was Jefferson's reason, in which case he was confused. Alternatively, Jefferson had other reasons, in which case the confusion is the commentator's. See M. WHITE, *supra* note 10, at 213-15; see also Simmons, *supra* note 11, at 182 n.28 (similarly confusing the right to property with ownership rights).

⁴³ H.L.A. HART, *supra* note 1, ch. 8.

⁴⁴ See *supra* text accompanying notes 29-32; see also H.L.A. HART, *supra* note 1, at 84, 194 n.1 (attributing Bentham's refusal to recognize non-legal powers and rights to his antipathy towards the notion of natural rights). To be sure, Bentham would not have recognized as a central issue between himself and the champions of natural rights whether powers definitive of rights could exist outside of a system of law, for he would have assumed that the latter, if they had any theoretical perspective, regarded natural rights, and so the powers they imply, as the offspring of natural law. Accordingly, he would have and did attack statements about natural rights as having a completely false foundation, viz., as imaginary laws. See J. BENTHAM, *Anarchical Fallacies*, *supra* note 8, at 523; J. BENTHAM, *Pannomial Fragments*, *supra* note 8, at 220.

Although the major architects of the Traditional Theory developed it within the context of a theory of natural law, I have deliberately avoided discussing this context because, for our purposes, it would be a distraction. Natural rights defined in relation to powers cannot be the products of natural laws understood as laws imposing duties on men. The general thesis, of course, is Hart's: to account for legal powers, power-conferring rules that are independent of duty-imposing rules must be recognized. And this applies to systems of natural law as well as to systems of positive law. Thus one can abstract the Traditional Theory from the general context in which it was classically presented. For Hart's thesis, see H.L.A. HART, *supra* note 4, at 27-41; *infra* text accompanying notes 74-75.

Nonetheless, we can not dismiss Bentham's objection entirely. The question of bounds is still pertinent. The concept of a natural right we have reconstructed may be intelligible and yet unusable. If the right to liberty, to take the most obvious example, has no bounds, then how the Critic of law can use it as a standard of justice would seem a mystery. Bentham's point, that to ascribe this right to men is to make every legal imposition of a duty a wrong that the state does to those upon whom it imposes this duty, an infringement of their right to liberty, must be regarded as a serious *reductio ad absurdum* of ascriptions of this right.⁴⁵ The Critic must have some way of distinguishing those duties the state justifiably imposes on its subjects for the purpose of maintaining peace among them and promoting their collective welfare from those duties whose imposition is an infringement or denial of their right to liberty. And the concept of the right as defined above clearly does not provide it.

Now if the objection is put in this way and so is uncoupled from Bentham's attack on the conceptual coherence of talk about natural rights, then to answer it one must look beyond the concept of a natural right to other elements of the Traditional Theory, the most promising of which is the ideal the theory offers of a political society as a cooperative association of equals who have consented to those limits on their liberty and sacrifices of their material possessions that are necessary for a greater enjoyment of their natural rights than they would have had in the state of nature. I shall not, however, try to determine whether one can give a satisfactory answer along these lines, for the objection is no less easily answered when raised against using natural rights defined from elements of the Traditional Theory as standards of justice than when raised against so using them when they are defined as Mill proposed. The objection applies to either conception with equal force, and hence one must ground one's choice between them on other considerations.

A brief description of Mill's conception will help us to see how all this bears on Hart's own analyses of concepts of natural and legal rights. Mill's conception reflects what I shall call the Welfare Theory of Natural Rights.⁴⁶ At the foundation of this theory are two propositions. First, with respect to each basic, human good, every human being has a right to that good. Second, if someone lacks or is threatened with the loss of some basic, human good, he

⁴⁵ J. BENTHAM, *Anarchical Fallacies*, *supra* note 9, at 502-04.

⁴⁶ J.S. MILL, *supra* note 27, at 38-60.

has a right, within the limits defined by the rights of others, to the means necessary to secure or safeguard that good. From the statement of these two propositions the Welfare Theory's criterion for determining who possesses natural rights is obvious: being human. Moreover, the central concept of a basic, human good, once it is explained, yields a criterion for determining what specific natural rights human beings possess. The general idea is that basic, human goods are things that a human being must have to live tolerably well and to fulfill his distinctively human endowment. They are, to use Mill's description, "the essentials of human well-being."⁴⁷ To give a complete list of these rights, the Welfare Theorist must further explain this idea and present some facts about human life. Clearly, though, he will include on his list the rights to liberty, security of one's person and property, food, clothing, and shelter. Above all he will include the right to life, since life obviously comes under the concept of a basic, human good. Finally, it is implicit in the second proposition that possession of a natural right sets limits on others' conduct toward the right-holder. That is, on the Welfare Theory, a natural right is taken to be the ground for duties that others individually or collectively bear in regard to their treatment of the right-holder. Accordingly, to have a natural right to something is to have a claim on other individuals and on society to protect one against its loss, damage, or diminution or, if one lacks it and it can be provided without infringement of the natural rights of others, to provide one with it or at least make it available.⁴⁸ The right, in other words, grounds both duties of forbearance and duties of positive service. In a sense, then, the Welfare Theory agrees with Bentham's general analysis of rights, for on the conception of natural rights it offers, rights are to be understood in relation to the duties they ground. Thus, if we ignore Bentham's view that duties definitive of rights are necessarily legal duties, these rights will come under the general category I have labeled "entitlements." Indeed, as Hart points out, Mill's account is strikingly similar in its formulation to certain passages of Bentham's in which Bentham offers "a half-mocking suggestion . . . as to what those who talk loosely about natural or nonlegal rights might conceivably mean by asserting their existence,"⁴⁹ though Hart later adds that he has no evidence of Mill's having consciously followed

⁴⁷ *Id.* at 55.

⁴⁸ *Id.* at 49.

⁴⁹ H.L.A. HART, *supra* note 1, at 16.

Bentham's suggestion in seriously working out his own account of natural rights.⁵⁰

These connections between the Welfare Theory and Bentham's work, particularly the conceptual connection, make Hart's remark that he believes the Welfare Theory to be the only theory of natural rights that offers hope of satisfactorily answering Bentham's objection surprising and ultimately puzzling. It represents both a deviation from the earlier analysis of natural rights that he gave in his highly influential article *Are There Any Natural Rights?*⁵¹ and a deviation from the general analysis of legal rights to which, in a qualified form, he still adheres.⁵² Both analyses exhibit Hart's keen understanding of rights as essentially exercisable rather than as essentially beneficial positions or protected interests.⁵³ Legal rights, Hart likes to say, are legally respected choices;⁵⁴ and to make and act on those choices, he might continue, is to exercise one's rights. Thus, in the above-mentioned article on natural rights, Hart points out, as one way to distinguish his choice-centered analysis from the opposing benefit-centered analysis, that if one followed his analysis, one would not ascribe rights to animals and babies despite our having duties not to ill-treat them.⁵⁵ Such creatures are incapable of exercising rights. They do not have or have not yet developed capacities for making rational choices. On the Welfare Theory, by contrast, the distinction between human beings who are capable of making rational choices and human beings who are not has no general relevance to ascriptions of natural rights, though presumably one would make exceptions where the possession of a natural right by a rationally immature or mentally defective person would seriously threaten his well-being. Likewise in his critical essay on Bentham's analysis of legal rights, which also contains expositions of his own general analysis, Hart, to capture vividly the notion of a right-holder that inspires his analysis and distances it from Bentham's, invokes the figure of a small-scale sovereign, a person who has supreme control over a certain area of his life and consequently makes choices within that area that the law respects.⁵⁶ On the Welfare Theory, by contrast, natural rights are not conceived of as giv-

⁵⁰ *Id.* at 89.

⁵¹ *See supra* note 5.

⁵² H.L.A. HART, *supra* note 1, ch. 7, reprinting in substantially similar form Hart, *Bentham on Legal Rights*, in *OXFORD ESSAYS ON JURISPRUDENCE* 171 (A.W.B. Simpson ed. 1973).

⁵³ *Id.* at 184.

⁵⁴ *Id.* at 188-89.

⁵⁵ *Id.* at 180-82; *cf. id.* at 184 n.86, 185 n.88.

⁵⁶ H.L.A. HART, *supra* note 1, at 183.

ing their possessors sovereignty or authority over certain areas of their lives. To be sure, each right-holder, in virtue of possessing natural rights, is warranted in making demands on others should they disregard or deny him his rights. But this is not to say that he has power over them. Rather, it means that he would be justified in making himself obnoxious to them should they treat him or threaten to treat him unjustly and would be justified in resisting the interferences and threats their injustice involves. On the evidence, then, of Hart's past account of natural rights and his continued vigorous, though qualified, support of a choice-centered analysis of legal rights, one would expect Hart to favor the Traditional Theory or some derivative of it over the Welfare Theory. And if I am right in thinking that Bentham's most serious objection to the doctrine of the natural rights of man applies with equal force to the Traditional Theory and the Welfare Theory, then Hart need not have turned to the latter as offering the only prospect of a viable theory of natural rights.

One might here wonder whether I have made too much of Hart's concluding remark in his essay comparing Bentham's and Mill's views on natural rights, for it is not the conclusion of any argument in that essay but only an observation on the current state of philosophical debate on the subject. But the incongruity is not confined to this one remark. It reappears at the end of Hart's essay on legal rights. There, after criticizing Bentham's analysis and expounding his own, Hart takes up a kind of right that he had not previously considered, a kind exemplified by fundamental rights such as those that are incorporated into the constitutional law of many nations through a bill of rights. Rights of this kind, Hart acknowledges, fail to fit his analysis because their import is to secure for their possessors certain freedoms and benefits necessary for a decent human life and because they secure these freedoms and benefits by limiting certain exercises of legislative power.⁵⁷ And having acknowledged these as rights his own analysis cannot accommodate, he acknowledges as well their moral analogues: rights commonly invoked by social theorists and critics of law.⁵⁸ Such rights are, in effect, the natural rights the Welfare Theory specifies, and, in a gesture toward interests beyond the everyday interests of the practicing lawyer and the special interests of the jurist, Hart notes that the work of such theorists and critics is no less significant than that of lawyers and jurists and that the rights

⁵⁷ *Id.* at 189.

⁵⁸ *Id.*

the former use to interpret and criticize the law lie outside the reach of his general analysis.

This last concession may reflect Hart's belief that only the Welfare Theory offers hope for a viable theory of natural rights, but it need not. Hart, while affirming, as he does, the importance of certain perspectives on the law that differ from his own, could still criticize from his perspective, that of analytical jurisprudence, the notion of rights that those adopting different perspectives apply. Ecumenism, after all, does not mean that one must accept all the central doctrines of those with whom one unites in common cause. Hart could press against the Welfare Theory the same general criticism he makes of the benefit-centered analysis of legal rights, that the concept of a right at work in the Welfare Theory is superfluous since it is parasitic on the concept of a duty, or, in other words, that on the Welfare Theory's conceptual scheme, ascribing a right to someone adds nothing to the ascription of the correlative duty.⁵⁹ Hart could make this criticism and at the same time recognize its irrelevance to those for whom the concept serves important rhetorical and programmatic purposes. But, as I said, Hart's concession may actually reflect his belief that the Welfare Theory is the only theory to be considered as viable, and he would not, I believe, press the criticism strongly if he thought he could not present a constructive alternative.⁶⁰

The incongruity appears most striking in Hart's explanation of why his general analysis cannot accommodate constitutional rights such as those granted in bills of rights. As I understand the explanation, on the one hand, these are rights that represent legally secured benefits or legally protected interests but, on the other, the concept of a right that applies to them does not fit Bentham's analysis nor other standard benefit-centered analyses. This means that the concept is not parasitic on the concept of a duty and therefore cannot be resolved or made to disappear in the way that those legally secured benefits that Bentham regarded as rights but that fall outside Hart's analysis can. Being legally secured benefits, according to Hart, these rights also fall outside his analysis; and so Hart concludes that his analysis is not completely general. Clearly, the crucial question is whether one must regard such rights as legally secured benefits, and specifically, whether one must interpret them as analogues of natural rights conceived of according to the Welfare Theory. It would surely be surprising, given the history of

⁵⁹ *Id.* at 181-82.

⁶⁰ *Id.* at 182.

the institution of a bill of rights, to discover that one could not interpret them as analogues of natural rights conceived of according to the Traditional Theory. That such rights place limits on legislative power, which is to say on sovereign authority, strongly suggests that such an interpretation can be found. On this interpretation, one would construe these rights not as essentially protecting their possessors in their enjoyment of basic, human goods but as essentially securing for them freedom in areas of their lives over which they are the proper authorities or as protecting them from abuses of sovereign power that no self-governing agent, concerned to preserve and improve his life, would, in consenting to the establishment of a government as part of the cooperative association he forms with others for the purpose of greater enjoyment of his natural rights, put himself at risk of suffering. My point, of course, is not that this is a better interpretation of these rights, but only that it is a plausible one. For if it is plausible, then, while it does not save Hart from having to qualify his general analysis in acknowledgment of these constitutional rights, it does allow him to avoid the disharmony in his views that the qualification produces. Perhaps not every legal right is a legally respected choice, but every legal right holder can still be regarded as or as having once been a small-scale sovereign.

II

When we speak of one person as having authority over another, of Smith, say, as having authority over Jones, we typically have in mind that Smith, by exercising this authority, can impose some duty on Jones. This is not, of course, the only way one person can exercise authority over another, but it is paradigmatic. Smith, in having this authority, has a power that he exercises when he imposes a duty on Jones. The power is a right of a certain kind, and thus we can say that Smith has a right that he exercises when he imposes the duty, and can add that he could also exercise this right, or some distinct but associated right, for the purpose of enforcing compliance. Finally, Smith has this authority in virtue of possessing the right, or some greater and encompassing right, and not vice versa, for if Smith's authority were challenged, he could invoke the right in reply, whereas if his possessing this right were challenged, citing his authority could not be a satisfactory reply. I ask the reader to forgive this tedious description of certain relations among the concepts of authority, power, and right. While not strictly necessary, it should help to make clear a certain quirk in the conceptual scheme on which Bentham constructed his positivist theory of law.

Let us recur to Bentham's definition of sovereign authority, the definition on which, as I remarked, his separation of law and morality depends.⁶¹ In this definition no mention is to be found of a right that the person or persons who have sovereign authority possess. Nor could Bentham have allowed, given his views about rights, that one could correctly describe the sovereign as possessing such rights as a right to govern or a right to legislate. Rights, on Bentham's conceptual scheme, were derived at one remove from laws, duties being the immediate derivatives.⁶² Permissions and entitlements exhausted the class of rights, and these were all defined in relation to duties. Duties in turn were defined in relation to laws that prohibited or required some type of conduct. Thus, one could ascribe a right to govern to the sovereign only if some law required that the subjects submit to the sovereign's will, and plainly Bentham could not acknowledge the existence of such a law without either falling into an infinite regress or affirming what he would surely never affirm, natural law.⁶³ Given, then, that Bentham must deny that one can correctly describe the sovereign as possessing such rights as the right to govern and given also his thesis that every legal power is a legal right,⁶⁴ it follows that Bentham must hold that one cannot correctly describe the sovereign as possessing such powers as a power to govern. Yet Bentham certainly held that the sovereign possessed such powers.⁶⁵ It would appear then that Bentham's conceptual scheme contains, not merely a quirk, but an outright contradiction.

Bentham's only way out of this contradiction, if there is a way out, would seem to lie in his excepting some powers, namely sovereign powers, from the class of rights. And he appears to have laid the ground for so regarding sovereign powers when, in discussing how a divided sovereignty is possible, he described sovereign power as arising out of the disposition of the subjects to obey.⁶⁶ This description, however, simply raises the question whether Bentham

⁶¹ See *supra* notes 6-7 and accompanying text.

⁶² J. BENTHAM, *OF LAWS*, *supra* note 6, at 293-94.

⁶³ The right to govern clearly could not, on Bentham's analysis, be a permission, since a right of this sort assumes that the right holder is subject to some laws that impose duties on him. See *supra* notes 40-41 and accompanying text. *But cf. infra* text following note 65.

⁶⁴ J. BENTHAM, *OF LAWS*, *supra* note 6, at 84, 220 n.a.; *cf. J. BENTHAM*, *supra* note 23, at 205 n.e2.

⁶⁵ J. BENTHAM, *supra* note 23, at 200.

⁶⁶ "[T]he efficient cause then of the power of the sovereign is neither more nor less than the disposition to obedience on the part of the people." J. BENTHAM, *OF LAWS*, *supra* note 6, at 18 n.b; see also J. BENTHAM, *Complete Code of Laws*, *supra* note 40, at 196.

conceived of sovereign power as a legal power comparable to other legal powers except for not being a right or alternatively as a natural phenomenon like fire, which one might describe as arising out of the disposition of combustible materials to burn. Bentham cannot, I think, have it both ways, and if he opted for the latter, he would have made his position irrelevant to legal theory. "Sovereign power" as he understood the term and "sovereign power" understood as a term that means a power to govern or a supreme power to legislate would merely be homonyms. The sovereign, according to this latter reading of Bentham's position, would in making a law, not be *exercising* sovereign power but rather, once the subjects had obeyed, *demonstrating* or *manifesting* it. On the other hand, if Bentham opted for the former, he would have invited the charge of having repaired his conceptual scheme ad hoc, and thereby thrown his entire conception of rights into doubt.

In fact, a certain change in his conception of rights could obviate this charge. One could, without overturning Bentham's conception, ascribe rights to the sovereign on the ground that the person or persons who have sovereign authority are not, when acting in their capacity as sovereign authorities, subject to any duties. In doing this one would then bring the rights of a sovereign under Bentham's general concept of a right resulting from the absence of a duty. But to accept this change Bentham would have had to replace his thesis that laws and only laws create rights with the weaker thesis that a system of law is a necessary condition for the ascription of rights, and he would have had to allow that one could ascribe a right, in the sense of a permission, to a person who had no duties, who was indeed subject to no laws. He would, in other words, have had to accept rights that had no bounds.

This change in Bentham's conception of rights would thus allow sovereign powers to count as rights and would not itself invite the charge of having been made ad hoc. The contradiction can then be avoided, but a quirk in Bentham's conceptual scheme is the result. For on this scheme, the sovereign's rights have no conceptual relation to sovereign authority. In ascribing rights to the sovereign one indicates the freedom the sovereign has, but nothing about sovereign authority, which is determined by the subjects' dispositions to obey, thereby follows. Sovereign rights and powers are therefore conceptually independent of sovereign authority, and this fact about Bentham's revised conceptual scheme puts it at odds with our ordinary understanding of the relations among the concepts of right, power, and authority. This result would not, perhaps, have disturbed Bentham, but it should stir misgivings in

those not already firmly committed to the classical positivist theory.

The quirk I have described gives an indication of a more pervasive defect in Bentham's theory, a defect that Hart exposes in the essays on legal powers and limited sovereignty.⁶⁷ Thus, Hart writes concerning the powers of subordinate legislators:

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 offence must be distinguished from the invalidity of such orders even if these two features are commonly found together.⁶⁸

And Hart shows, in a masterly critique of Bentham's position, that Bentham's conceptual scheme cannot ground an adequate understanding of what makes laws, orders, and exercises of legal powers generally valid or invalid because it provides no way of distinguishing between a legal nullity and a legal offense.⁶⁹ This inadequacy makes clear why even on the revision of Bentham's scheme I have suggested sovereign rights and powers cannot be tied conceptually to sovereign authority. The flaw this quirk represents is fatal to Bentham's definition of sovereign authority, and this means that his conception of the authority of law succumbs as well.

Hart too is concerned with articulating a conception of the authority of law, and in the last essay he sketches a conception that is consistent with his own theory of legal positivism.⁷⁰ His chief aim in this essay is to explicate and incorporate into his theory the concept of an authoritative legal reason, for he believes that such a concept is indispensable to understanding those features of law and legal systems that he showed to be beyond the explanatory power of Bentham's theory.⁷¹ Moreover, Hart recognizes that the most serious recent challenges to the positivist's thesis that law is separate from morality focus on the reasons that the officials of a legal system, its judges in particular, act on or at least cite to jus-

⁶⁷ H.L.A. HART, *supra* note 1, chs. 8 & 9.

⁶⁸ *Id.* at 214.

⁶⁹ *Id.* at 210-14, 239-42.

⁷⁰ *Id.* ch. 10.

⁷¹ *Id.* at 243.

tify the legal actions they perform and the statements of law they make. Therefore, Hart acknowledges, to answer these challenges the legal positivist must develop as part of his theory an account of these authoritative legal reasons.⁷² This, in effect, is an account of the authority of law.

Rather than enter directly into this debate between Hart and his opponents, let us first consider whether Hart's account of the authority of law satisfactorily shows that the law has authority apart from any moral authority it may have. The opponent of legal positivism of course denies this proposition. He holds that the law's authority is a species of moral authority, just as he holds that the duties and rights the law imposes and confers are species of moral duty and moral right. But against such an opponent Hart has drawn successfully on the conceptual resources of his positivist theory in presenting cogent analyses of the concepts of legal duty and legal right that make problematic any inference from an ascription of a legal duty or a legal right to an ascription of a moral duty or a moral right.⁷³ Specifically, his theory explains legal phenomena, including the bearing of legal duties and the possession of legal rights, as constituted and regulated by social rules, and such rules, as Hart has pointed out, need not be moral rules or have moral force in the lives of those who accept them.⁷⁴ Rules of games and etiquette are clear examples. Accordingly, one can characterize the kind of rules constitutive of a legal system (i.e., legal rules) without making use of any moral concepts, and the same then holds for characterizing the kinds of duties and rights the law imposes and confers (i.e., legal duties and legal rights). It is interesting, though, that Hart cannot follow the same strategy in arguing that legal authority is not a species of moral authority. The strategy will not work because legal authority is a feature of legal rules and thus is not definable in terms of them. Any legal rule used in proposing such a definition would itself have legal authority or confer legal authority, and consequently such a definition would presuppose that which it was intended to explain.⁷⁵ Analyzing the

⁷² *Id.* at 262-65.

⁷³ See *id.* chs. 6 & 7; Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82-107 (A.I. Melden ed. 1958).

⁷⁴ Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958), reprinted in *PHILOSOPHY OF LAW* 40 (J. Feinberg & H. Gross eds. 1975).

⁷⁵ This point suggests that the relations among the concepts of authority, power, and right that I sketched in this section's opening paragraph are not completely general. If the authority of law is a species of authority over persons, then since one cannot cite some legal rule to explain or ground that authority, it follows that no right backs it up. Thus we may

concept of legal authority serves, therefore, to test the power of Hart's theory to explain an aspect of legal systems he had not previously considered.

Hart does not approach the problem exactly in this way. Rather, as I indicated above, he attempts to construct a concept of an authoritative legal reason that fits his positivist theory of law. But if by invoking such a concept he can explain how legal rules provide officials of a legal system and others who accept the law's authority with what we would intuitively regard as authoritative reasons for taking certain actions and issuing certain decisions, namely legal or lawful actions and decisions of law, then he can explain how legal rules have or confer authority that is distinct from any moral authority they may have; and hence, he can explain the authority of law consistently with the positivist thesis that law is separate from morality.

Hart proceeds by constructing, on the basis of reflections about Bentham's account of what a command is, a general concept, which he takes to be the concept of an authoritative reason,⁷⁶ and from this construction it is clear how one can derive the specific concept that he takes to be that of an authoritative legal reason. A reason for action is, according to Hart's construction, an *authoritative reason* if it meets two conditions: it must be what Hart calls content-independent and it must be what he calls peremptory. First, content-independence. Hart does not give a precise account of this condition,⁷⁷ but his general idea can be grasped from an example.⁷⁸ If one is advised to do some act because it would be humane or would reduce the suffering of farm animals, then the advice, if true, is a reason for doing the act because of something about the act's character or consequences. By contrast, if one is reminded that one has promised to do some act, the reminder con-

regard the law's authority as an instance of supreme authority and accordingly conclude that the conceptual relations I sketched do not apply to supreme authority. This conclusion certainly squares with other instances of supreme authority such as the authority that a believer understands God to have and the authority that a young child sees his parents as having. One would not, after all, expect God to invoke a right if His authority as ruler of the universe were challenged, and a child's moral development must be fairly far advanced before questions of legitimacy would occur to him. A child's early concept of authority does not lend itself to such questions. See J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 18, 67 (M. Gabain trans. 1950) (Piaget discusses the stage of child development where "rules are regarded a sacred and untouchable, emanating from adults and lasting forever.").

⁷⁶ H.L.A. HART, *supra* note 1, at 252-61.

⁷⁷ *Id.* at 254-55.

⁷⁸ See Hart, *supra* note 73, at 102, where Hart first introduces the notion of content-independence.

veys a reason for doing the act without reference to the act's character or consequences. Rather, it calls one's attention to one's having uttered or written certain words in circumstances in which uttering or writing those words constituted a promise to do the act. For the act of promising generates independently of the promised act's character or consequences a reason for doing what one promised. After all, within limits, one can promise to do any of indefinitely many kinds of acts and thereby generate a reason for doing what one promised, and this should make clear that one's having promised is a reason for doing the promised act regardless of the kind of act it is, as determined by its character or consequences. It is in this sense that having promised is a content-independent reason.

The second condition concerns the role an authoritative reason is supposed to have in deliberation.⁷⁹ As Hart puts it, the reason, being a preemptory reason, is supposed to "cut off any independent deliberation."⁸⁰ Thus, that I owe ten dollars to a friend is a reason that should, if I understand and accept how it is supposed to function in deliberation, stop me from weighing the advantages and disadvantages of spending on this or that diversion the ten dollars I have just earned. It is not, then, a reason that I am supposed to weigh against these other reasons in reaching a decision on what to do with the money I have earned and accordingly I would not, in taking it as determinative of what I should do, regard it as weightier than these other reasons. Rather, I would regard it as having ruled them out of consideration. It is in this sense that owing ten dollars is a preemptory reason.

Now the reasons for action that the rules that constitute a legal system provide to its officials and others who accept its authority clearly satisfy these two conditions. What Hart considers to be the fundamental rules of a legal system, its rules of recognition, are paramount examples.⁸¹ That a legislature has enacted certain measures or that a court has handed down a certain decision is both a content-independent and a preemptory reason for conforming one's behavior to, or rendering a decision in accordance with, these measures or that prior decision. These then are authoritative reasons, and since they originate from legal rules, they are authoritative legal reasons. From this result it is a short step to conclude

⁷⁹ H.L.A. HART, *supra* note 1, at 253-54.

⁸⁰ *Id.* at 253.

⁸¹ *Id.* at 260-61. For Hart's allowance for speaking of rules of recognition instead of a single, complex rule of recognition, see *id.* at 155 n.77.

that legal rules, in being the source of authoritative reasons, confer authority on the legislative enactments and judicial decisions they identify as law, the offices they define, and the orders and injunctions they ground. The inference is immediate, though it is important to recognize that in making it one presupposes general acceptance of these rules as providing content-independent, peremptory reasons for action by the people subject to them or at least by "a well organized or powerful minority able to coerce by threats the majority into acquiescence."⁸² In this way Hart explains the authority of law consistently with his positivist theory.

Hart's general account of authority fits nicely the standard cases that are likely to come to mind: the authority of military commanders, of parents, of religious leaders, and even of sacred texts (anyone who has puzzled over the whys and wherefores of religious ritual should appreciate immediately the content-independent character of the reasons that quoting scripture provides to believers). As an account of an essential feature of authority then, Hart's exposition is persuasive. I am not, however, persuaded that Hart has gotten at the whole essence of authority. There is, I think, something more to having authority over persons than being for them the source of content-independent, peremptory reasons for action. And if Hart's account leaves out something essential, then it falls short of being a satisfactory answer to the opponents of positivism.

Consider for example the relation of a host to his guests. We would not characterize this relation by saying that a host had authority over his guests. He does not. Perhaps there is a temptation to think otherwise owing to his being at the same time thought of as the proprietor of the premises on which the party he is giving is held. But his position as proprietor and his role as host are easily distinguished. And in the latter he does not have or exercise authority. Yet the instructions he gives and the requests he makes convey to his guests content-independent, peremptory reasons for action. To be sure, the limits within which his instructions and requests convey such reasons are very much narrower than those within which making a promise generates such a reason. But this difference is not grounds for denying their content-independence.⁸³

⁸² *Id.* at 257. See also *id.* at 256, where Hart stresses the importance of this acceptance as "a distinctive *normative* attitude not a mere 'habit' of obedience . . . [which] is the nucleus of a whole group of normative phenomena, including . . . the general notion of authority."

⁸³ *Id.* at 255-56.

Nor can the peremptory character of his reasons be denied. Of course a guest might, upon hearing from his host that his place at the dinner table is between the Browns, weigh the pros and cons of compliance and sitting between the boring Browns against those of noncompliance and sitting between the far more entertaining Greens, but a promisor too can treat the reason his promise generates in this way, that is, as not peremptory. The point is that he is not supposed to treat it in this way; and the same holds for reasons the host conveys. To sit between the Greens when the host has indicated that one's place is between the Browns is simply not done.

Having authority over others, therefore, entails more than being the source for them of content-independent, peremptory reasons for action. Hence Hart's account of such authority is at best incomplete. Whether he can complete it in a way that is consistent with legal positivism is an open question. But surely to the opponents of positivism the account's deficiency will represent an opportunity for a forceful reply to the effect that authority over persons is essentially a moral concept and that consequently the deficiency can be removed only by construing the law's authority as having moral force in the lives of those who accept it. The two opponents Hart considers, Dworkin and Raz,⁸⁴ both have advanced highly cognitivist views of the internal relation between law and morality. On such views the deficiency is to be removed either by recognizing that the law's authority, in a given legal system, derives from the moral principles that are at the foundations of that system or by recognizing that the law's authority derives from the normative force of statements of law, and that those who make sincere statements of law are committed to holding that those statements are grounded on objective, moral reasons.⁸⁵ A third alternative, a noncognitivist alternative, is worth noting. To adapt for this purpose a remark of Hume's, authority, more exactly supreme authority, "is more properly felt than judg'd of."⁸⁶ On this view, the deficiency is to be removed by recognizing the emotional bond that officials of a legal system and others subject to it form to the institution, which bond gives to the law a felt authority, and then arguing that, because the emotions in question are moral emotions, the law's authority is a species of moral authority. Judging from a re-

⁸⁴ *Id.* at 147-161.

⁸⁵ *Id.* at 148-61, 264-65.

⁸⁶ D. HUME, *supra* note 7, at 470. See *supra* note 75 for the reason Hume's remark is best adapted to supreme authority.

mark Hart makes in discussing Raz's view,⁸⁷ I believe he would be more sympathetic to the third alternative. But regardless of which alternative is more congenial to his views or more theoretically sound, unless Hart can find a way to revise his account of authority without abandoning legal positivism, he will have to accept the authority of law as a point of intersection between law and morality the existence of which he has long denied.

⁸⁷ H.L.A. HART, *supra* note 1, at 159.