Table Annexed to Article: Bentham’s 1789 Footnote to The Introduction to the Principles of Morals and Legisation [Revised Edition, 1789]

Peter J. Aschenbrenner, Purdue University
BENTHAM’S 1789 FOOTNOTE TO
THE INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION
[REVISED EDITION, 1789]
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PETER J. ASCHENBRENNER
Department of History, Purdue University
paschenb@purdue.edu

TABLE 384A
{IN RECREATION TEXT}

10. Here ends the original work, in the state into which it was brought in 5 November, 1780. What follows is now added in January, 1789.

The third, fourth, and fifth sections intended, as expressed in the text, to have been added to this chapter, will not here, nor now be given; because to give them in a manner tolerably complete and satisfactory, might require a considerable volume. This volume will form a work of itself, closing the series of works mentioned in the preface.
What follows here may serve to give a slight intimation of the nature of the task, which such a work will have to achieve: it will at the same time furnish, not any thing like a satisfactory answer to the questions mentioned in the text, but a slight and general indication of the course to be taken for giving them such an answer.

II. What is a law? What the parts of a law? The subject of these questions it is to be observed, is the logical, the ideal, the intellectual whole not the physical one: the law, and not the statute. An enquiry, directed to the latter sort of object, could neither admit of difficulty nor afford instruction. In this sense whatever is given for law by the person or persons recognized as possessing the power of making laws, is law. The Metamorphoses of Ovid, if thus given, would be law. So much as was embraced by one and the same act of authentication, so much as received the touch of the sceptre at one stroke, is one law: a whole law, and nothing more. A statute of George II made to substitute an or instead of an and in a former statute is a complete law; a statute containing an entire body of laws, perfect in all its parts, would not be more so. By the word law then, as often as it occurs in the succeeding pages is meant that ideal object, of which the part, the whole, or the multiple, or an assemblage of parts, wholes, and multiples mixed together, is exhibited by a statute; not the statute which exhibits them.

III. Every law, when complete, is either of a coercive or an uncoercive
nature.

A coercive law is a command.

An uncoercive, or rather a discoercive, law is the revocation, in whole or in part, of a coercive law.

IV. What has been termed a declaratory law, so far as it stands distinguished from either a coercive or a discoercive law, is not properly speaking a law. It is not the expression of an act of the will exercised at the time: it is a mere notification of the existence of a law, either of the coercive or the discoercive kind, as already subsisting: of the existence of some document expressive of some act of the will, exercised, not at the time, but at some former period. If it does any thing more than give information of this fact, viz., of the prior existence of a law of either the coercive or the discoercive kind, it ceases pro tanto to be what is meant by a declaratory law, and assuming either the coercive or the discoercive quality.

V. Every coercive law creates an offence, that is, converts an act of some sort, or other into an offence. It is only by so doing that it can impose obligation, that it can produce coercion. 241

VI. A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws, not parts (as they seem to have been generally accounted hitherto) of one and the same law. The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, Let no man steal; and, Let the judge cause whoever is convicted of stealing to be hanged.

They might be styled, the former, a simply imperative law; the other a punitory: but the punitory, if it commands the punishment to be inflicted, and does not merely permit it, is as truly imperative as the other: only it is punitory besides, which the other is not.

VII. A law of the discoercive kind, considered in itself, can have no punitory law belonging to it: to receive the assistance and support of a punitory in law, it must first receive that of a simply imperative or coercive law, and it is to this latter that the punitory law will attach itself, and not to the discoercive one. Example, discoercive law. The sheriff has power to hang all such as the judge, proceeding in due course of law, shall order him to hang. Example of a coercive law, made in support of the above discoercive one. Let no man hinder the sheriff from hanging such as the judge, proceeding in due course of law, shall order him to hang. Example of a punitory law, made in support of the above coercive one. Let the judge cause to be imprisoned whosoever
attempts to hinder the sheriff from hanging one, whom the judge, proceeding in due course of law, has ordered him to hang.

VIII. But though a simply imperative law, and the punitory law attached to it, are so far distinct laws, that the former contains nothing of the latter, and the latter, in its direct tenor, contains nothing of the former; yet by implication, and that a necessary one, the punitory does involve and include the import of the simply imperative law to which it is appended. To say to the judge *Cause to be hanged whoever in due form of law is convicted of stealing*, is, though not a direct, yet as intelligible a way of intimating to men in general that they must not steal, as to say to them directly, *Do not steal*: and one sees, how much more likely to be efficacious.

IX. It should seem then, that, wherever a simply imperative law is to have a punitory one appended to it, the former might be spared altogether: in, which case, saving the exception (which naturally should seem not likely to be a frequent one) of a law capable of answering its purpose without such an appendage, there should be no occasion in the whole body of the law for any other than punitory, or in other words than penal, laws. And this, perhaps, would be the case, were it not for the necessity of a large quantity of matter of the *expository* kind, of which we come now to speak.

X. It will happen in the instance of many, probably of most, possibly of all commands endued with the force of a public law, that, in the expression, given to such a command it shall be necessary to have recourse to terms too complex in their signification to exhibit the requisite ideas, without the assistance of a greater or less quantity of matter of an expository nature. Such terms, like the symbols used in algebraical notation, are rather substitutes and indexes to the terms capable of themselves of exhibiting the ideas in question, than the real and immediate representatives of those ideas.

Take for instance the law, *Thou shalt not steal*. Such a command, were it to rest there, could never sufficiently answer the purpose of a law. A word of so vague and unexplicit a meaning cannot otherwise perform this office, than by giving a general intimation of a variety of propositions, each requiring, to convey it to the apprehension, a more particular and ample assemblage of terms. Stealing, for example (according to a definition not accurate enough for use, but sufficiently so
for the present purpose), is the **taking of a thing which is another’s, by one who has no title so to do, and is conscious of his having none.**

Even after this exposition, supposing it a correct one, can the law be regarded as completely expressed? Certainly not. For what is meant by a **man’s having a title to take a thing?** To be complete, the law must have exhibited, amongst a multitude of other things, two catalogues: the one of events to which it has given the quality of **conferring title** in such a case; the other of the events to which it has given the quality of **taking it away.** What follows? That for a man to have stolen, for a man to **have had no title to what he took,** either no one of the articles contained in the first of those lists must have happened in his favour, or if there has, some one of the number of those contained in the second must have happened to his prejudice.

XI. Such then is the nature of a general law, that while the imperative part of it, the **punctum saliens** as it may be termed, of this artificial body, shall not not take up above two or three words, its expository appendage, without which that imperative part could not rightly perform its office, may occupy a considerable volume.

But this may equally be the case with a private order given in a **family.** Take for instance one from a bookseller to his foreman. **Remove, from this shop to my new one, my whole stock, according to this printed catalogue.**—Remove, from this shop to my new one, my whole stock, is the imperative matter of this order; the catalogue referred to contains the expository appendage.

XII. The same mass of expository matter may serve in common for, may appertain in common to, many commands, many masses of imperative matter. Thus, amongst other things, the catalogue of **collative** and **ablative events, with respect to titles** above spoken of (see No. X of this note), will belong in common to all or most of the laws constitutive of the various offences against property. Thus, in mathematical diagrams, one and the same base shall serve for a whole cluster of triangles.

XIII. Such expository matter, being of a complexion so different from the imperative it would be no wonder if the connection of the former with the latter should escape the observation: which, indeed, is perhaps pretty generally the case. And so long as any mass of legislative matter presents itself, which is not itself imperative or the contrary, or of which the connection with matter of one of those two descriptions is not apprehended, so long and so far the truth of the proposition, **That every law is**
a command or its opposite, may remain unsuspected, or appear questionable; so long also may the incompleteness of the greater part of those masses of legislative matter, which wear the complexion of complete laws upon the face of them, also the method to be taken for rendering them really complete, remain undiscovered.

XIV. A circumstance, that will naturally contribute to increase the difficulty of the discovery, is the great variety of ways in which the imperation of a law maybe conveyed—the great variety of forms which the imperative part of a law may indiscriminately assume: some more directly, some less directly expressive of the imperative quality. *Thou shalt not steal. Let so man steal. Whoso stealeth shall be punished so and so. If any man steal, he shall be punished so and so. Stealing is where a man does so and so; the punishment for stealing is so and so. To judges so and so named, and so and so constituted, belong the cognizance of such and such offences; viz., stealing—and so on. These are but part of a multitude of forms of words, in any of which the command by which stealing is prohibited might equally be couched: and it is manifest to what a degree, in some of them, the imperative quality is clouded and concealed from ordinary apprehension.*  

XV. After this explanation, a general proposition or two, that may be laid down, may help to afford some little insight into the structure and contents of a complete body of laws.—So many different sorts of offences created, so many different laws of the coercive kind: so many exceptions taken out of the descriptions of those offences, so many laws of the discoercive kind.

To class *offences*, as hath been attempted to be done in the preceding chapter, is therefore to class *laws*: to exhibit a complete catalogue of all the offences created by law, including the whole mass of expository matter necessary for fixing and exhibiting the import of the terms contained in the several laws, by which those offences are respectively created, would be to exhibit a complete collection of the laws in force: in a word a complete body of law; a *pannomion*, if so it might be termed.

XVI. From the obscurity in which the limits of a *law*, and the distinction betwixt a law of the civil or simply imperative kind and a punitory law, of are naturally involved, results the obscurity of the limits betwixt a civil and a penal *code*, betwixt a civil branch of the law and the penal.

The question, What parts of the total mass of legislative matter belong to the civil branch, and what to the penal? supposes that divers
political states, or at least that some one such state, are to be found, having as well a civil code as a penal code, each of them complete in its kind, and marked out by certain limits. But no one such state has ever yet existed.

To put a question to which a true answer can be given, we must substitute to the foregoing question some such a one as that which follows:

Suppose two masses of legislative matter to be drawn up at this time of day, the one under the name of a civil code, the other of a penal code, each meant to be complete in its kind—in what general way, is it natural to suppose, that the different sorts of matter, as above distinguished, would be distributed between them?

To this question the following answer seems likely to come as near as any other to the truth.

The civil code would not consist of a collection of civil laws, each complete in itself, as well as clear of all penal ones:

Neither would the penal code (since we have seen that it could not) consist of a collection of punitive laws, each not only complete in itself, but clear of all civil ones. But {245}

XVII. The civil code would consist chiefly of mere masses of expository matter. The imperative matter, to which those masses of expository matter respectively appertained, would be found—not in that same code—not in the civil code—nor in a pure state, free from all admixture of punitory laws; but in the penal code—in a state of combination—involving, in manner as above explained, in so many correspondent punitory laws.

XVIII. The penal code then would consist principally of punitive laws, involving the imperative matter of the whole number of civil laws: along with which would probably also be found various masses of expository matter, appertaining not to the civil, but to the punitory laws. The body of penal law enacted by the Empress-Queen Maria Theresa, agrees pretty well with this account.

XIX. The mass of legislative matter published in French as well as German under the auspices of Frederic II. of Prussia, by the name of Code Frederic, but never established with force of law, appears, for example, to be almost wholly composed of masses of expository matter, pertaining not to the civil, but to the punitory laws. The body of penal law enacted by the Empress-Queen Maria Theresa, agrees pretty well with this account.

XX. In that enormous mass of confusion and inconsistency, the ancient Roman, or, as it is termed’by way of eminence, the civil law, the
imperative matter, and even all traces of the imperative character, seem at last to have been smothered in the expository. *Esto* had been the language of primaeval simplicity: *esto* had been the language of the twelve tables. By the time of Justinian (so thick was the darkness raised by clouds of commentators) the penal law had been crammed into an odd corner of the civil—the whole catalogue of offences, and even of crimes, lay buried under a heap of *obligations*—*will* was hid in *opinion*—and the original *esto* had transformed itself into *videtur*, in the mouths even of the most despotic sovereigns.

XXI. Among the barbarous nations that grew up out of the ruins of the Roman Empire, Law, emerging from under the mountain of expository rubbish, reassumed for a while the language of command: and then she had simplicity at least, if nothing else, to recommend her.

XXII. Besides the civil and the penal, every complete body of law must contain a third branch, the *constitutional*.

The constitutional branch is chiefly employed in conferring, on particular classes of persons, *powers*, to be exercised for the good of the whole society, or of considerable parts of it, and prescribing *duties* to the persons invested with those powers.

The powers are principally constituted, in the first instance, by discoercive or permissive laws operating as exceptions to certain laws of the coercive or imperative kind. Instance: A *tax-gatherer*, as such, may, on such and such an occasion, take such and such things, without any other *title*.

The duties are created by imperative laws, addressed to the persons on whom the powers are conferred. Instance: *On such and such an occasion, such and such a tax-gatherer shall take such and such things*. *Such and such a judge shall, in such and such a case, cause persons so and so offending to be hanged*.

The parts which perform the function of indicating who the individuals are, who, in every case, shall be considered as belonging to those classes, have neither a permissive complexion, nor an imperative.

They are so many masses of expository matter, appertaining in common to all laws, into the texture of which, the names of those classes of persons have occasion to be inserted. Instance; imperative matter:—*Let the judge cause whoever, in due course of law, is convicted of stealing, to be hanged*. Nature of the expository matter:—Who is the person meant by the word *judge*? He who has been *invested* with that office in such a manner: and in respect of whom no *event* has happened, of the number of those, to which the effect is given, of reducing him to the
condition of one *divested* of that office.

XXIII. Thus it is, that one and the same law, one and the same command, will have its matter divided, not only between two great codes, or main branches of the whole body of the laws, the civil and the penal; but amongst three such branches, the civil, the penal and the constitutional.

XXIV. In countries, where a great part of the law exists in no other shape, than that of which in England is called *common* law but might be more expressively termed *judiciary*, there must be a great multitude of laws, the import of which cannot be sufficiently made out for practice, without referring to this common law, for more or less of the expository matter belonging to them. Thus in England the exposition of the word *title*, that basis of the of whole fabric of the laws of property, is nowhere else to be found. And, as uncertainty is of the very essence of every particle of law so denominated (for the instant it is clothed in a certain authoritative form of words it changes its nature, and passes over to the other denomination) hence it is that a great part of the laws in being in such countries remain uncertain and incomplete. What are those countries? To this hour, every one on the surface of the globe.

XXV. Had the science of architecture no fixed nomenclature belonging to it—were there no settled names for distinguishing the different sorts of buildings nor the different parts of the same building from each other—what would it be? It would be what the science of legislation, considered with respect to its form, remains at present.

Were there no architects who could distinguish a dwelling-house from a barn, or a side-wall from a ceiling, what would architects be? They would be what all legislators are at present.

XXVI. From this very slight and imperfect sketch, may be collected not an answer to the questions in the text but an intimation, and that but an imperfect one, of the course to be taken for giving such an answer; and, at any rate, some idea of the difficulty, as well as of the necessity, of the task.

If it were thought necessary to recur to experience for proofs of this difficulty, and this necessity, they need not be long wanting.

Take, for instance, so many well-meant endeavours on the part of popular bodies, and so many well-meant recommendations in ingenious books, to restrain supreme representative assemblies from making laws in such and such cases, or to such and such an effect. Such laws, to answer the intended purpose, require a perfect mastery in the science of law considered in respect of its form—in the sort of anatomy spoken of.
in the preface to this work: but a perfect, or even a moderate insight into that science, would prevent their being couched in those loose and inadequate terms, in which they may be observed so frequently to be conceived; as a perfect acquaintance with the dictates of utility on that head would, in many, if not in most, of those instances, discourage the attempt. Keep to the letter, and in attempting to prevent the making of bad laws, you will find them prohibiting the making of the most necessary laws, perhaps even of all laws: quit the letter, and they express no more than if each man were to say, *Your laws shall become ipso facto void, as often as they contain any thing which is not to my mind.*

Of such unhappy attempts, examples may be met with in the legislation of many nations: but in none more frequently than in that newly-created nation, one of the most enlightened, if not the most enlightened, at this day on the globe.

XXVII. Take for instance the *Declaration of Rights*, enacted by the State of North Carolina, in convention, in or about the month of September, 1788, and said to be copied, with a small exception, from one in like manner enacted by the State of Virginia.

The following, to go no farther, is the first and fundamental article: “That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”

Not to dwell on the oversight of confining to posterity the benefit of the rights thus declared, what follows? That—as against those whom the protection, thus meant to be afforded, includes—every law, or other order, divesting a man of the enjoyment of life or liberty, as against those whom the protection, thus meant to be afforded, includes—every law, or other order, divesting a man of the enjoyment of life or liberty, is void.

Therefore this is the case, amongst others, with every coercive law. Therefore, as against the persons thus protected, every order, for example, to pay money on the score of taxation, or of debt from individual to, individual, or otherwise, is void: for the effect of it, if complied with, is to “deprive and divest him”, *pro tanto*, of the enjoyment of liberty, viz., the liberty of paying or not paying as he thinks proper: not to mention the species opposed to imprisonment, in the event of such a mode of coercion’s being resorted to: likewise of property, which is itself a “means of acquiring, possessing and protecting property, and of pursuing and obtaining happiness and safety.”
Therefore also, as against such persons, every order to attack an armed enemy, in time of war, is also void: for, the necessary effect of such an order is to “deprive some of them of the enjoyment of life.”

The above-mentioned consequences may suffice for examples, amongst an endless train of similar ones.

Leaning on his elbow, in an attitude of profound and solemn meditation, “What a multitude of things there are” (exclaimed the dæningmaster Marcel) “in a minuet!”—May we now add?—and in a law.


**Table 384B**

**Analysis of the Foregoing, Explaining the Trifold Division of Laws into Command, Prohibition and Permission**

*Selected Quotations*

A. Statute: Shouldness expressed in words that is authenticated.
B. Coercive law: a command
C. Uncoercive or discoercive law revokes a command.
D. Declaratory law: “mere notification of the existence of a law ... .”
E. Imperative Law: a law prohibiting conduct. “A law confining itself to the creation of an offence ... ”
F. [Prohibitory Law:] “Take for instance the law, *Thou shalt not steal*. Such a command, were it to rest there, could never sufficiently answer the purpose of a law. A word of so vague and unexplicit a meaning cannot otherwise perform this office, than by giving a general intimation of a variety of propositions, each requiring, to convey it to the apprehension, a more particular and ample assemblage of terms.”
G. [Command:] “That every law is a command or its opposite, may remain unsuspected, or appear questionable; so long also may the incompleteness of the greater part of those masses of legislative matter, which wear the complexion of complete laws upon the face of them, also the method to be taken for rendering them really complete, remain undiscovered.”
H. Civil Law: “The penal code then would consist principally of punitive
laws, involving the imperative matter of the whole number of civil laws: along with which would probably also be found various masses of expository matter, appertaining not to the civil, but to the punitory laws. The body of penal law enacted by the Empress-Queen Maria Theresa, agrees pretty well with this account.”

I. Constitutional Law: “The constitutional branch is chiefly employed in conferring, on particular classes of persons, powers, to be exercised for the good of the whole society, or of considerable parts of it, and prescribing duties to the persons invested with those powers.”

J. Permissive Law: “The powers are principally constituted, in the first instance, by discoercive or permissive laws operating as exceptions to certain laws of the coercive or imperative kind. Instance: A tax-gatherer, as such, may, on such and such an occasion, take such and such things, without any other title.”

K. “Main branches of the whole body of the laws”: Thus it is, that one and the same law, one and the same command, will have its matter divided, not only between two great codes, or main branches of the whole body of the laws, the civil and the penal; but amongst three such branches, the civil, the penal and the constitutional.