

A Conversation with Professor Gerald J. Postema

by

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This is the seventh interview for the Eminent Scholars Archive with an incumbent of the Arthur Goodhart Visiting Professor of Legal Science.

Professor Gerald Postema is the Cary C. Boshamer Professor of Philosophy, and also Professor of Law, at the University of North Carolina.

This interview was recorded, and the audio version is available on this website.

Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle, her questions are **in bold type**.

Professor Postema's answers are in normal type.

Comments added by LD, [*in italics*]. Footnotes added by LD.

1. Professor Postema, this is the sixth year that we have interviewed the Goodhart Professor for the archive and you have been chair for the academic year 2013/14. So I hope that in this interview we can perhaps talk about your academic career, your professional career and there will be time as well for you to give us some of your observations about the Goodhart professorship during your tenure. So, could we start with your early life? You were born in Chicago in 1948.

Right. I was born on the south side of Chicago into a close knit community of Dutch immigrants. It was a small, close knit community in a large city, so we found ourselves very much integrated and looking in towards each other. I went to a high school that was closely associated with the church that was in the centre of this community, a kind of Dutch Reformed Church, and then went on to college, again at a church-related school, Calvin College³. Calvin⁴ being the inspirer of that denomination of the Protestant tradition.

2. You began at in 1967 at the Calvin College in Grand Rapids. I wonder what subjects you studied at Calvin?

My major was philosophy. I started out thinking I might actually go into the ministry but philosophy captured my heart and mind, and so by the end of two or three years, I was thoroughly committed to doing philosophy. Calvin was a small school, small liberal art college, but it had a stellar Philosophy Department, probably the best department in the whole school, and it was nationally known. So while I was at a small school, I got really a first grade philosophy education there.

3. You then went on to Cornell where you did an MA.

And PhD, together, yes.

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³ Grand Rapids, Michigan. <http://www.calvin.edu/admin/president/>

⁴ John Calvin (1509-64). French theologian and Protestant reformer.



4. Did you like the rural New York setting?

Yes, right, rural and hilly and cold. There is an interesting story about this. I went to Cornell thinking I would study Philosophy of Religion and perhaps pursue a career in that. When I arrived on campus in August of 1970, having enrolled, I discovered that the one and only man that had been doing Philosophy of Religion at Cornell left seven years before that, so there was suddenly nothing for me to do. So I looked around a bit and during the summer, for some reason or other, I had read the classic 20th Century work in Philosophy of Law by H. L. A. Hart ⁵ called “*Concept of Law*” ⁶, that’s in 1970. It was written in 1961, so it was still new and very much discussed. I thought, well, that seems interesting and then I also discovered that one of the most beloved and esteemed directors of PhDs was David Lyons⁷. So I decided that what I would do is I would take up Philosophy of Law and I would study with David Lyons. David Lyons was on leave. So I looked to the Law School and I found a man there called Robert Summers ⁸ who was himself a Goodhart Professor some years ago [LD: 1991-92], and Bob Summers welcomed me with open arms and helped me plot out a programme in study of law alongside my work in philosophy for my PhD.

5. Very interesting. You spent a year in England, 1973-1974, at University College, Oxford, where you were a Recognised Scholar. What specifically is that category?

I think it is for graduate students, the equivalent of a visiting post. It was not... it’s not a degree granting position, so there was no D Phil, no M Phil, nothing like that, but I was able to work closely with, at that point, Ronald Dworkin⁹. Oxford in 1973/4 was a very lively place for philosophy of law. Herbert Hart had stepped down. Ronald Dworkin took up his chair. Joseph Raz¹⁰ was a very strong presence at Balliol. John Finnis ¹¹ also at Univ was a very strong presence, and each of them were doing their most influential work at that point. The books were published some time in various years after that, but they were all in gestation during that time. It was a very exciting time to be there and, while Cornell was important for shaping my general philosophical education and perspective, Oxford was extremely important in focusing my attention on law and on analytic legal philosophy, which then I pursued.

6. At this point you were also a tutor in jurisprudence, but at Queen’s College.

At Queen’s, yes.

7. I wonder how this came about?

Well, it was just because I was familiar with... had studied a good bit of jurisprudence by that time and Queen’s was desperately in need of a tutor. I was available and willing to

⁵ Herbert Lionel Adolphus Hart (1907-92), Professor of Jurisprudence, Oxford University (1952-69)

⁶ 1961, Clarendon Law Series, Oxford.

⁷ <http://www.lawschool.cornell.edu/faculty/bio.cfm?id=178>

Professor of Law and Susan Linn Sage Professor of Philosophy, Cornell. Began teaching philosophy at Cornell in 1964, Chairman of Cornell University Philosophy Department 1978-1984, began teaching Law 1979. Retired 1995.

⁸ <http://www.lawschool.cornell.edu/faculty/bio.cfm?id=78> Robert S. Summer, William G. McRoberts Research Professor in Administration of the Law, Emeritus: contracts, commercial law, jurisprudence and legal theory.

⁹ Ronald Myles Dworkin, QC, FBA (1931- 2013). Frank Henry Sommer Professor of Law and Philosophy, New York University, Emeritus Professor of Jurisprudence, University College, Oxford (1969-98), Quain Professor of Jurisprudence, University College London.

¹⁰ (1939-) Professor, Philosophy of Law, Balliol College.

¹¹ John Mitchell Finnis, (1940 -), Professor of Law Law & Legal Philosophy, University College, Oxford (1989-).



step in. It's also an interesting connection because at that time I was working on Bentham¹² and subsequent to that I worked a lot on Bentham and Queen's was Bentham's college, though the connection wasn't clear to me at that time, but there was a kind of an interesting coincidence.

8. Just jumping from your past to late last year - on Thursday 21st November 2013, you gave a lecture at Oxford, "Law's Rule: Reflexivity, Mutual Accountability and the Rule of Law", at a Jurisprudence Discussion Group in the Oxford Faculty of Law Senior Common Room. I wonder whether this provided a happy meeting of old acquaintances and friends?

There were some students that I had actually taught in North Carolina who had gone on to do work at Oxford whom I met and a few of my colleagues, but not very many of them actually. It was a happy time to return. It was exactly 40 years from the time I had spent in Oxford and I couldn't imagine that 40 years had actually passed. Univ College wasn't particularly familiar to me. The Law Faculty at Oxford was very familiar to me and the lively discussion that we were able to have that day did remind me of the wonderful time I had in Oxford.

9. Going back to your past again, after Oxford you went to Cornell and you did your PhD in three years. What was the topic?

Yes, well, what actually I did was I started Cornell in 1970. I took a year away in 1973 and 1974 and then returned to finish my PhD, so I already begun work on the PhD dissertation when I went to Oxford and then studied lots of things there and some law, some legal philosophy, some political philosophy and then came back and applied myself to the writing of the dissertation. The dissertation was in the philosophy of criminal law on theories of punishment, but I was especially interested in the relationship between theories of punishment and theories of justice or fairness in criminal procedure. I was exploring the relationship between them. To do that I focused on two main figures: one was Kant¹³, he represented one very important strain in the theory of punishment, a kind of retributivist theory of punishment, and the other being Jeremy Bentham who was perhaps best known for his work in a kind of utilitarian theory of punishment. It was because of that that I began studying Bentham's work more generally because Bentham, unlike Kant, Bentham spent a lot of his time over the years writing on issues about judicial procedure and evidence and just about everything else in law. When I finished up the dissertation on the theory of punishment I put that aside, and started working on Bentham for quite a bit after that. That really got me launched into the study of Bentham's theory in general.

10. Your first academic post was a part-time lectureship at Johns Hopkins. This seems to have overlapped with your PhD.

That was a full time position for five years. That was my first official post. I was assistant professor there for five years. During that time, I started work on Bentham's legal theory more generally and it's curious that... I had looked at Bentham's published work which was at that time, mid to late seventies, very little and very obscurely published. There was a 19th century edition of his works that was badly edited and badly produced but available and I was working with that. On the basis of that I hit upon a kind of conundrum in trying to figure out what Bentham's theory is all about. He seemed to be a utilitarian and yet

¹² Jeremy Bentham (1748-1832), legal and moral philosopher.

¹³ Immanuel Kant, (1724-1804). Professor of philosophy at Königsberg, Prussia. Philosopher and anthropologist



his views about law and especially the necessity for codification of law didn't fit with his background, in my view, his background moral and political views. And I wanted to reconcile them. I wrote a short paper on that, on Bentham's theory of adjudication, and I thought, well, someone told me that there are a few manuscripts in London that perhaps I should look at. So I got a fellowship towards the end of the seventies to spend six or eight months or so in London at the University College London and there I discovered there was not just a few manuscripts, but an enormous volume of manuscripts. That launched me into a long study of some of the early manuscripts in particular and some of the later things in a more selective fashion and that resulted ultimately in a book in 1986, my first book, "Bentham and the Common Law Tradition"¹⁴. So it was this little thought that there might be something that would help me resolve this conundrum, this puzzle, blossomed into a very large project on which I'm in a certain sense still working.

11. I see. Tracing the trajectory of your career. In 1980 you joined the University of North Carolina (one of the oldest public universities, in existence since 1795), and you are still there, Professor Postema. You became the Boshamer Distinguished Professor of Philosophy in 1997 and recently, simultaneously, Professor of Law in 2002. I wonder how these two roles combine?

Well, I regard myself and have been trained as a philosopher, not as a lawyer, so I never did acquire the American law degree, called a Juris Doctor, JD. I did the equivalent of a first year programme at Cornell and I studied more law while I was at Oxford, but my decision early on was that I'm a philosopher, not a lawyer. I have no interest in practice and at that time one could study seriously law from a philosophical perspective, philosophical techniques, without actually having practiced. That's no longer true for my students. They need to practice, they need to have a law degree, but I didn't. So, when I got to North Carolina, I was hired in the Philosophy Department and that has been since 1980 my home. As time went on, I got more and more involved in the Law School at the University of North Carolina and in 2002 they appointed me as Professor of Law there, though I still do just one quarter of my teaching time for them and most of my time is in the Philosophy Department. So I'm still primarily a philosopher though I focus my philosophical attention on law, not exclusively on law, but mainly on law.

12. I notice that there is also a Boshamer¹⁵ Chair in Law and I wonder whether there is any requirement in the bequest for yourself and Professor Tom Hazen¹⁶ to collaborate in your fields of study.

No. That's interesting, but I think it's sheer coincidence that the two of us happen to have this endowed chair, both of us being, in some respects, in law. That's just simply coincidence.

13. During your time at the University of North Carolina, you visited Berkeley in 1979, Michigan 1982 and Yale in 1993. Were these sabbaticals?

No, they were visiting posts. Berkeley had at that point, in 1979, a PhD granting programme in the law school that was, I think, unique for American law schools at that time. It's now a bit more common but it was a PhD granting programme which was highly

¹⁴ Clarendon Press, 1986.

¹⁵ Cary C. Boshamer Professorships at University of North Carolina were established in 1969 by Cary Carlisle Boshamer, a member of the Class of 1917. Boshamer was the owner and operator of a number of textile mills.

¹⁶ Thomas Lee Hazen, Cary C. Boshamer Distinguished Professor of Law, University of North Carolina (1980-).



interdisciplinary, bringing together people in criminology and sociology and statistics and history and philosophy. I was their resident philosopher for the term. And the same, in Michigan I was visiting and in Yale I was visiting again in the Philosophy Department, in both cases.

14. Currently, you are the Goodhart Professor and I want to ask what courses you are teaching while you are here?

Right. I'm involved in two Legal Philosophical courses. One in conjunction with Nigel Simmonds¹⁷ and Trevor Allan¹⁸ in Jurisprudence and the other in conjunction with Matthew Kramer¹⁹, a course called Topics in Legal and Political Philosophy. I lectured in both of those pretty much full time in the Michaelmas term.

15. Although you are familiar with the Oxbridge teaching system, how do you find the system of supervisions in contrast to what you are accustomed to?

Well, the interesting thing here is that I was teaching LLM students and unlike undergraduate instruction in law, the instruction of LLM students is not by way of supervision but by way of lecture. So there was not a major transition from the kind of teaching that I do back home in North Carolina and the kind of instruction that was going on here. So it was primarily lecture. I was surprised. I expected it to be more seminar-like but the courses were heavily enrolled. We had about 25, I think, in the Jurisprudence course and well over 30, maybe 35 or more, in the topics course, so I was forced to do more directive lecturing than I normally would have... than I planned to do, actually, but that was okay. My style, even when I'm lecturing, is not sort of monological; it's rather more engaged and I think it may have been atypical for teaching here at Cambridge, at least lecturing. The students seem to tell me that anyway. I regard philosophy in general, as my colleague once said, I regard philosophy as a contact sport and so I have contact with my students, and that's where the interesting intellectual engagement comes. I need to feel their response and their interaction if I'm going to be able to address them and educate them and make them feel the importance of the kind of ideas and arguments that I'm looking at. So [*it was a*] much more engaged activity, and in that respect it was great fun. The students very much responded to that. Each time I had great fun. Different kinds of people would participate, so it was not as unlike my ordinary experience back home, although I think in some respects it was more engaged.

16. Thank you. Professor Postema, how do you view the college-based system here, in contrast with those faculties who are strongly centralised?

Well, I was familiar with it of course because of my experience in Oxford and it is very different indeed. What is, I suppose, the most palpable difference is that within the college one has intellectual contact with colleagues across disciplines, widely across disciplines. When I'm back in my own institution, I rarely see people in the natural sciences. I sometimes see people in the social sciences, sometimes people in other humanities departments, but my colleagues with whom I interact on a daily basis are strictly my philosophy colleagues or law colleagues. Of course in the college system it's very different that way. The same thing with the students; they're much more diverse in their interests and so I find the smallness of it and the autonomy of these various kind of things brings different people together in a way that I find really energising.

¹⁷ Dr N Simmonds, Reader in Jurisprudence, Corpus Christi College.

¹⁸ T R S Allan, Professor of Jurisprudence & Public Law, Pembroke College.

¹⁹ M Kramer, Professor of Legal and Political Philosophy, Churchill College.



17. And your research focus while you're here?

Right, it's hard to count them; two, maybe three projects. The one project is to continue work that I've been doing, articulating a view about the nature and underlying foundations of the idea of rule of law. I've now written two or three papers and I will soon be giving the Boutwood Lecture at Corpus Christi College in late February and the topic will be on the Rule of Law and what I take to be... I call it the ethos or the culture that we need if rule of law is to be vibrant and robust in a political community. I argue, therefore, that an essential feature of the rule of law is a kind of mutual accountability across all the parties and all the institutions in a political community, and I'll be explaining and developing that idea even more in the Boutwood Lecture. So, on the one hand I'm working on that idea.

The main publication project is very different though it has... it's indicative of the kind of way in which I work philosophically. I've got a contract with Oxford University Press to produce a collection of works by the 17th century jurist, Sir Matthew Hale²⁰. There is an unpublished manuscript in the British Library of some hundred or more pages, a treatise on natural law and another only obscurely published essay in critique of the important English philosopher, Thomas Hobbes²¹. I'm transcribing and editing those and then adding to that a selection of essays and other portions of works of Sir Matthew Hale. So it's something like the "Jurisprudence of Sir Matthew Hale". That's an editorial project, not a philosophical one, but it indicates one way in which I approach my philosophical work which has always been through the history of philosophy, through the history of legal theory and in this case through the history of law itself.

I am a philosopher. I address issues of contemporary legal and political philosophy and ethics, but always through the lens and against the backdrop of my work in the history of philosophy and history of law. So, "Bentham and the Common Law Tradition" is a major piece of work in which I did just that. Through working on "Bentham and the Common Law Tradition" and David Hume²², I was able to address and bring to, at that time, the middle eighties, a perspective on core issues that were being debated at the time in legal philosophy. That's always been the way I approach things. I will then, after I pretty much finish up the editing project on Sir Matthew Hale's work, I'll put together a book on Hale and Hobbes and perhaps Bentham on some key themes: the nature of law, the nature of legal reasoning, authority and sovereignty. I haven't decided whether to put Bentham into the picture yet but it will certainly be on Hobbes and Hale. So there's the philosophical side of the editorial work.

18. Very interesting. This brings us now to your scholarly output. Obviously I have to be restrictive here (a) because of your very large output and (b) of course my very restricted knowledge. So I have focused on your first publication, which I'll come to shortly, and your two books on which you were single author. I hope that we can go through these now. So your first paper was published a year after you left Calvin College.

Right. That was written while I was an undergraduate and then it took a while to publish.

19. The school was dedicated to Calvin and I wondered if this was what inspired the title and the subject matter: "Calvin's Alleged Rejection of Natural Theology". It was

²⁰ (1609-1676).

²¹ (1588-1679), English philosopher.

²² David Hume, (1711-1776), Scottish philosopher.



published in the *Scottish Journal of Theology*²³ when you were 23 years old.

Well, yes, Calvin, in his most famous work, “Institutes of the Christian Religion”, works within a largely scholastic, philosophical framework. So he develops, what in philosophy we call an epistemology, a theory of knowledge, and then works within that to develop his core theological ideas: the nature of scripture, the nature of God, the status of human beings relative to God, and the like. He opens up, some people say he opens up the whole enterprise by saying we should not approach these questions from a philosophical or a natural theology perspective, but from a perspective that’s distinctively scriptural and internal to the religious tradition, and what I did is I took that on. I said, “No, I think there’s really a philosophical project here.” He really has and presupposes an epistemological framework and a certain metaphysical framework and we need to see that if we’re going to understand well his theology. It’s interesting because what that paper indicates is that I was a philosopher, but I was also an adherent to the theology, to a certain extent anyway, but I wanted to make sure that I could combine those and this was an expression of my attempt to find in the text itself some support for that approach, that philosophical approach to the issues of theology.

20. Have these influences guided your future career in the law?

Largely no, although the one thing that’s true about the reformed Protestant tradition is that it’s very serious about the role of the Old Testament, to the Hebrew Bible in its understanding of major theological issues. One of the core concepts in that tradition is the concept of covenant and it turns out that I am now at work, when I’m not working on rule of law and Matthew Hale or Jeremy Bentham, I’m working on a project which I may be able to bring to completion this year as well, on a paper and maybe something larger on the theme of the Covenant as a political idea, not a theological one. So, I find myself coming back or feeling some affinity to and some expressive resources in that tradition. And especially this reformed theological tradition that has strong connections or possible roots with Judaism and Jewish views of things as well. So I’m finding those notions to be richly suggestive, not for theological purposes, but for purposes of understanding the nature of political obligation and that sort of thing.

21. Coming back to something that you concluded in this paper with a qualified “yes” that Calvin did assert the validity of natural theology and that one can contemplate God through the scriptures. You also claim that Calvin implied that one can find knowledge about God even apart from the scriptures (page 430). You imply in your conclusions, (page 434), that one has to believe in God for a reason and that faith cannot be irrational. I wondered, Professor Postema, whether you’ve modified your views on this over more than 40 years?

I’ve grown in many, many ways and I don’t know whether I am, shall we say, an orthodox reformed Christian believer, but pretty much so, and I think that does... I had forgotten that part of what I had said some 40 years ago, more than 40 years ago, but I think that is indeed the view I still hold. I think it really does reflect how even trying to approach these issues of faith and practice, my philosophical bent was pretty clear even as an undergraduate, and I think it’s probably stayed with me.

22. That brings me to your first book published in 1986 by Clarendon: “*Bentham and the Common Law Tradition*.” Obviously I haven’t been able to read the whole book and

²³ *Scottish JI Theology*, 24(4), 423-434.



I'm very much guided by a review by Michael Lobban²⁴ and also a recent critique by Ferraro in the *Journal of Bentham Studies*.²⁵

So, I've just picked up on a few points. On page nine you say your main theme of the book is Bentham's theory of adjudication and after a thorough analysis of Bentham's writings, you concluded (page 453), that his overall theory of law, which is supposed to unite positivist ideas in a code and utilitarian principles via methods of adjudication, is self-defeating. Your overall conclusion on page 459 is that Bentham's theory is valuable not in, and I quote, "his successful treatment of the problem but in his having brought it to our attention". I wonder if this is perhaps not damning with faint praise.

Philosophers oftentimes offer their most sincere esteem through their most severe criticism. This was an attempt to take very, very seriously the work of a legal theorist who had been well-known and, not in his lifetime, but to a certain extent subsequent to that, quite influential. But not nearly as influential, I thought, as he could have been had he actually published most of what he'd written. So, a large part of this value of this book, should it have any, is that it brought to the attention of legal philosophers and political philosophers and historians, I suppose, in the mid-eighties through the end of the 20th century, elements of Bentham's thought that were just not well-known and put them together in a way... with an attempt to make them as coherent a theory as possible. So I worked all the way through it and I came to the end that the struggles he had are struggles with deep and abiding issues and that his struggles are worth paying attention to. The fact then that his proposed solution didn't quite achieve what he would like seems to me less a worry to us and certainly no reason for putting aside thinking about both the problems he articulated and the way in which he approached them. It seems to me that there's still much to be gained from the study of that, though in the end I thought it was unsuccessful. That's a typical way in which we philosophers approach the matter. One wouldn't be a card-carrying-philosopher if you said, well, this is what he did and it's just wonderful. Most of us want to be a bit more critical of things.

23. Yes. Ferraro discusses your "direct utilitarian" theory. You believe Bentham implied the judges could lay aside the code in order to adjudicate utilitarian principles, and Ferraro says that your interpretation needs modification to where judges have flexibility only in procedural matters. He says that Bentham meant to give them the power only to refer the code to legislation for modification. I wonder, Professor Postema, whether you still stand by your radical revisionist interpretation some 30 years later.

Well, what Ferraro did, to his credit, is he identified texts that I had not seen. So, in order to assess the strength of his argument, I need to look more carefully at those. My plan is to... another project, you asked what my projects are; my plan is in the next year or so to bring out a second edition of "*Bentham and the Common Law Tradition*" in which I attempt to address just that, those criticisms. I don't have an immediate answer on that. Ferraro has done a very good job of looking at texts and it remains, I think, for me to see whether the case is serious enough. I'm willing to modify the conclusion should the texts warrant it. I'm mindful, however, that sometimes we may disagree, not about the reading of texts but about the underlying philosophical assumptions that are being made, and I'm not sure that he

²⁴ Michael Lobban, Professor of Legal History London School of Economics.

Lobban 1987, book review, *Cambridge Law Journal* p. 520-523.

²⁵ Francesco Ferraro, Dipartimento di Scienze Giuridiche "Cesare Beccaria", Università degli Studi di Milano. Ferraro, 2010. Direct and indirect utilitarianism in Bentham's theory of adjudication. *Jl of Bentham Studies*, 12, 1-24.



and I would agree on that, so what I need to do is to be sure that... in particular I want to understand better what he takes the commitments of what I call a “direct utilitarian” might allow. If it turns out that Bentham was indeed insistent that judges not appeal to their own assessments of, as he called it, the balance of utilities, all things considered, in making important decisions in the course of adjudication. If that indeed was his view then we need to really seriously go back and think of a whole lot of other more fundamental commitments that Bentham had made and try to figure out how to resolve that. It’s possible that Bentham was inconsistent and that he has no coherent theory. One of my friends is inclined to think that. One major criticism of this book is that it makes Bentham more coherent than he in fact was.

24. Fascinating.

But I’m inclined to say let’s give this really intriguing, engaged and creative mind as much benefit of the doubt as possible and see what we can do with the materials he provides us, and coming up with a perhaps very nuanced, but nevertheless overall coherent view of the relationship between practical reasoning of the judges and a structure of the laws and the system of laws and the like. Ferraro’s work here will be very important in my addressing that again, though I’m not willing yet to accept that modification is necessary.

25. So, after all your study of Bentham, what would you say are his main contributions for modern legislators and adjudicators?

There are perhaps two or three. One is that he took a standard model of law and treated that as a kind of template for understanding the operation of law, a standard model being a so-called command model. Laws are commands of someone who has sovereign power. And then he understood sovereignty in a certain typical way. He took that but... and that’s a notion that’s common to many, many theorists prior to Bentham and well after. You find it in Hobbes very prominently but in many, many other theorists before Hobbes and between Hobbes and Bentham. Bentham took that command model and then worked it so carefully and over time trying to think of various applications of it and developments of it, so that by the time we get to a mature theory of law, the command model has pretty much been exploded and developed into something altogether different. I think that his need to work both with that model and to transform it in order to meet the needs of what he took to be the demands of rationality on a legal system, that struggle he had is a struggle that’s well worth thinking about in legal theoretical terms generally.

The other thing is that, while he is often thought to be the kind of originator of, or one of the most important originators of, contemporary legal positivism, unlike other positivists, he thinks that what’s essential to law is reason and rationality and providing reasons for people to act and not just commands backed by some kind of sanction, and he wraps that up in a very complicated discussion about the role of system and systematicity in law. I think that’s well worth paying attention to in our thinking about or theorising about, common law or civil law systems.

The other thing in Bentham’s work that I think is especially important, and I give it some treatment in the book, but I’ve done it more in subsequent work, is that Bentham took the publicity of law to be one of its most important attributes. Law has to be something that is always accessible and those who are to be governed by law must be able always to understand what the law requires of them, but also be in a position to hold those who are administering the law accountable to that law. So what we have is, it turns out, a fairly radical view of what we would now call the Rule of Law requires. Now, this notion of



publicity and accountability at the core of his notion of a law is what we now think of as an important part of the Rule of Law, so there's another aspect of this which I hadn't seen fully in the book, but I have now explored more and I think is really a valuable contribution.

I gave a lecture in China in 2012 on just this topic. It's called "The Soul of Justice" because Bentham, at one time, says that publicity is the soul of justice, and so I presented the thesis there of Bentham's sort of radical publicity, which of course is contrary to a good bit of what Chinese government structure and ideology would find comfortable. So it was an interesting time to present that kind of issue and things have gone even sadly worse in the last couple of years since then.

26. Professor Postema, looking at your publications, your titles, I noticed that the name Bentham occurs 11 times in the title of 52 articles etc produced since 1971 to 2006. That's nearly one in five, and after that none. Bentham's work was clearly a consuming interest until 2006. Has there been a conscious shift in your research emphasis since then?

Well, no, I've actually come back to Bentham again and so, as I say, in 2012 I wrote another paper and I will be doing so again. So it's not so much a shift away as that I've been working on Bentham and then a number of other things as well all along. There are a number of papers on David Hume for example and his moral philosophy, which I find really important and interesting. A number of papers on, as I say more recently, on the Rule of Law. A number of papers especially for a while on the idea of custom and convention, both in international law and in domestic law context which have nothing really very much to do with Bentham at all but actually much more issuing from my attempt to understand classical common law views of law, quite different from Bentham's, and their relevance to 20th century both political and legal theoretical problems.

So, in a way, this book [*Bentham and the Common Law Tradition*] provided a kind of a template for a load of research I did subsequent to its publication. There's more work on Bentham. There's a lot more work on common law, both its history in the 17th century in a classical context and modern common law notions. I have a work on argument by analogy. I have a piece on law's systematicity. The only piece I actually sang at one point is a piece on melody in law - I say there's an analogy between melody and law, legal reasoning. On one side I'm thinking about the common law issues and the notions of custom and convention and common reasoning that I needed to further develop in a contemporary context, notions I based the book on, issue from that strand. And then there are a couple of chapters on Hume in the book and I've worked on Hume more generally on its own and then I've worked on Bentham subsequent to this as well. So, there are kind of three strands of the work after that and then some others that were really not related to this at all.

27. Thank you, which brings us to your latest book where you are a single author again: "Legal Philosophy in the Twentieth Century: the Common Law World"²⁶. This book charts the course of two widening streams of thought that are epitomised in lectures given by Oliver Wendell Holmes Jr in 1897 and Hart in 1957 in Boston. You place much emphasis on the development of these streams on the personalities of these two giants. Clearly, Professor Postema, you never met Holmes, but I wondered whether you ever had the chance to meet Hart during your time at Oxford?

I did. Yes. I met him just briefly in 1973 or 1974, I'm not sure when it was. [*Also*],

²⁶ *Legal Philosophy in the Twentieth Century: The Common Law World*". A Treatise of Legal Philosophy and General Jurisprudence, Volume 11. Springer, 2011.



when I went back to England to study to do work for the Bentham book and working on the Bentham project at University College London, I did have an opportunity to meet with him several times in Oxford over Bentham materials especially. So I did get to know him. He was a giant. He also was a wonderfully warm and generous man, and really one of the most important figures in English-speaking legal philosophy in the 20th century.

28. I wonder, as well, whether you had a chance to meet his wife at any point?

Jennifer. [No. But] my good friend, Niki Lacey, Nicola Lacey²⁷, who wrote a wonderful biography of Hart, actually was very close to them and she and I conferred about some things. There was another occasion on which I actually spent time with Hart. There was a conference in Hart's honour at the Hebrew University in Israel in 1984 and I presented a paper there and he commented on that paper. It was critical of some parts of Hart's work, and he was very generous at that point and Niki told me later that he spent a lot of time thinking about the problems that I had raised with this paper and that encouraged me because I didn't think it was... and that was very early in my career.

29. In the conclusion to this book, page 577-78, you say that in the Middle Ages, quoting Kelly 1976, "jurisprudence was the true philosophy and that it lay at the very heart of theoretical studies," and that law, I quote again, "penetrated the practical dimensions of daily social life." Later, you say, page 583, that in modern Anglophone jurisprudence you sense that natural law theory has returned and there is room for a genuinely philosophical jurisprudence, sensitive to both legal practice and the place of law in human social life. I wonder how you see this return to former values manifesting itself?

So the story of this book, there are a number of different plotlines, but one of them is that in the stream that issues from John Austin²⁸ in the latter part of the 19th century through to Hart and a good bit of Anglo... let's call it British legal philosophy became more and more restricted in the range of questions and issues it wished to deal with. More and more willing to say, "well, that's not a problem for us", whereas Bentham, for example, had this just wide open compendious kind of view of what someone concerned philosophically about law would be interested in. So I thought there was an increasingly narrow, narrower, narrowing kind of view. The stream that came out of Holmes, a more American one, was always much more open, but far less disciplined so you had a very highly disciplined, rigorous, precise kind of legal theory that got narrower and narrower as opposed to a legal theory that was open to just about everything - latitudinarian - but not very disciplined. There was a kind of struggle between those two. What I think's happening now is that we've become a bit more aware of two things, I think. We're much more - I'm hoping this is true - much more interested in looking at the role of contemporary issues relative to the history of legal theory as it's been... well, as it's been written and thought about since the ancient times.

This sort of echoes my prejudice here but I think legal philosophy, like any philosophy, is done best only when it's done through its history, and I think we're finally getting back to that. So there's much more attention to the history of these things than before and I think that can be energising. Oddly enough, I think what it can do is provide us with a new critical perspective on the issues that we otherwise take to be sort of obvious and allows us to stand back and challenge some of the accepted views. Like learning a new language gives you new perspective on your own, looking at the contemporary legal theoretical problems from

²⁷ Nicola Lacey, Professor of Law, Gender and Social Policy, London School of Economics. *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (OUP 2004).

²⁸ John Austin (1790-1859). English jurist and legal philosopher. Professor of Jurisprudence University College London (1826-33).



something of its history can really give us an enlivened critical perspective on them. I think we're now opening up a bit more to that and so that's very good.

Also on the other side, there's more openness to thinking about normative political issues in the context of analytical legal theory than there was some time ago. So those two elements go together. It's not really natural law theory in the old-fashioned sense of it, except that natural law theory was first of all not a theory that law and morality are somehow the same but rather a view that law is a kind of human enterprise that we can understand only by setting that enterprise in its larger human and social context and understanding all of that. I take that to be the key insight of our natural law theory and hoping that we have actually moved, begun to move, more in that direction.

30. Professor Postema, do you think that there are analogies or parallel philosophies for civil law and Islamic legal systems?

Sadly, I know little about Islamic theories. This book, *Legal Philosophy in the Twentieth Century, the Common Law World*, is actually a part of a 12-volume treatise. It's volume 11 of a 12 volume treatise, which I and my colleagues in Bologna have been working on, producing since the mid-nineties. The first volumes came out in – I don't know – early 2002/2003, something like that, of this new millennium. The aim of that was to build bridges and to have a kind of cross-fertilisation of ideas. I'm inclined to think that there's a lot that thinking about common law tradition can offer to the civilian tradition. I also think that Bentham, who was not a typical common law theorist at all, has a great deal to offer and would be much attractive to our civil law brothers and sisters in legal theory. I tried to make it intelligible to audiences that are not already sort of inured in the common law system but actually are coming to it from the outside, from outside of this tradition.

31. Very interesting. Do you in any way see that there is some element in these ideas that in some way gels with Professor Allott's views on international law? If we bury enough of our differences that the Eunomian vision might prevail?

Yes. Well, what I'm inclined to think is that while the roots of the civil tradition and the roots of the common law tradition are different, they're not radically different. Inevitably, the differences between us which in particular cases look very large, when you step back a bit they are much less fundamental. The importance, for example, of something like ongoing judicial development of law through interpretation and precedent is a part of civil systems, though it's not part of the civil ideology, and in the common law approach there's much more need for, and concern for, a kind of systematic structure of it. Much less tolerance for what T. E. Holland²⁹ said in the late 19th century that common law is a chaos with an index. There's not a tolerance for that, so the drive for something like a more systematic approach to it. So I think there are places and motivations for coming together and I hope that, in part, in some of the reflections on the common law that I've engaged in this book might provide some basis for that bridge building.

32. Notions of sovereignty have figured prominently in positivist thinking. The US and the UK used to have sovereign parliaments, I'm using the term loosely, and while the US still has, we no longer do in some senses. I wonder how you would characterise the situation here, the notion of sovereignty in light of the Commission and the European Court of Justice?

²⁹ See "Law's System: The Necessity of System in Common Law", G. J. Postema, 2013. *University North Carolina Legal Studies Research Paper No. 2324438*
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324438



Right. In some ways that's one of the most interesting historical developments in English law, I think. English law has been forced in a way that American law has not to internationalise itself. The American system can still be very insular. That's much harder for the British, for the English system. I think it's unclear just how that's going to develop. In a way, the law here follows the politics rather than leads it, though in some respects it has to lead it as well, but it really follows it, and the politics of that connection are really up for grabs, much more so than back in the nineties. I was seriously considering moving to London then, and one of the things that attracted me about it at the time – and teaching in London – what attracted me at the time was what I thought was a really dynamic movement of a kind of broadening of English law into Europe and a kind of unification, but I think that's much less evident now. Nevertheless, notions of sovereignty, that is national sovereignty and so our legal system sovereignty, are much in question and much being rethought now. I don't have, myself, a good sense of where that might go.

33. Professor Postema, that brings us to the end of this interview. All that remains is for me to thank you very much for a fascinating account which our readers will greatly enjoy, and listening to. I hope that we can follow up in a few months' time when perhaps you can give us some of your concluding observations on your time here at Cambridge. Thank you very much.

Very good. Thank you very much for this opportunity.

