

Conversations with Professor Gerald J. Postema

by

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This is the second part of 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.

34. Professor Postema, here we are again roughly six months later. In your first interview you said that your Michaelmas Term teaching for the Goodhart chair had consisted of two courses, one in jurisprudence and the other in legal and political philosophy, and I wonder if you felt pleased with the feedback that you received from students and so on.

Yes, indeed, I think those lecture courses went very well, from my point of view; students seemed very engaged. I also was engaged and encouraged by them very much. And I have had opportunity to interact with a number of the students over the next several months, not each of them by any means, but a goodly number of them, and even in one or two cases, students I had in the course helped me with my own research. In one case in particular, a very important piece of translating from Spanish and from Latin into English I needed, and a student from Venezuela was able to help me. And other students I've kept in contact with, they've written papers for me. I read, oh, I don't know, 20, 25 essays that were sent to me at the end of the term, and I was able to read them, comment on them, interact with students about them and the like. All that was very good, I think I got a lot out of it personally and I think that I was able to offer them something as well.

35. Did you do any different courses in the Lent Term?

No, I didn't do any more or different. My primary responsibilities were in Michaelmas Term and of course, marking exams at the end. But nothing in between except in these informal contacts with students.

36. Your research projects. You said in your interview that there were two or three of these and the first was, and I quote from your interview, "Articulating a view about the nature and underlying foundations of the idea of the rule of law", and you said this would be enunciated in the forthcoming Boutwood lecture at Corpus Christi College. I wonder if you could just elaborate the ideas that you presented there.

Right, the invitation to offer the Boutwood lecture gave me an occasion to think more extensively about a project that I had begun before that, thinking about foundations of the idea of rule of law - moral and social foundations of the rule of law. And I

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combined some ideas that I had already developed in preliminary papers, which have since been published, working on the core idea, I call the idea of fidelity to law. I incorporated that plus some material that I had come to see as especially important from my work in the manuscripts of Sir Matthew Hale³ in the 17th century and lectures on it in the Michaelmas Term, and then some other work I had done some years ago on the role of public reasoning in law and political matters generally. So, I combined those three kinds of ideas. The core idea for the whole project on the rule of law is this concept of fidelity and the main argument is that when we speak of the rule of law we should distinguish between what I call ruling by law and law's rule. Ruling by law is a phenomenon, a way of governing such that those who hold power use law as an instrument for the exercise of their power. Whereas the rule of law, or, as I call it, law's rule, has the aim of subjecting the exercise of power itself to law; law is to rule, not human beings or institutions. So, the question that arises, what could it be for law, not human beings, but law to rule; after all, law rules only if human beings act in accord with it in some way. So, I spent the Boutwood lectures especially thinking about and articulating three ways in which you might say law genuinely rules and the first idea is this idea of fidelity, which is the core idea for the whole project. And by fidelity I mean a broad community-wide responsibility held by citizens, ordinary people and by officials, mutually and reciprocally to hold each other accountable to the law. The law in this way itself, as it were, doesn't rule but those who are ruled by it hold each other accountable under that law. And a large part of my argument is that we have always thought of the rule of law as somehow an exercise, a way of exercising power, but in this way I'm arguing that there is a prior kind of moral commitment on the part of all of us to hold each other accountable to that law, which we regard as governing our interactions and activities, both official and ordinary. So, that was the first core -, what it is for law to rule? It is for there to be a robust, I call it ethos or culture of fidelity, of taking responsibility for holding each other accountable to the law, that's one way. The second way was suggested by some ideas of Sir Matthew Hale, fairly complicated ones and they really have to do with his views of English, if you will, constitutional law.

But the main idea, introduced by a very strange Latin tag, label, he calls it the *Potestas Irritans*, that's the Latin for it. That is the invalidating power of law. His idea here is that the activities of especially those in power, those in ruling power, are governed by law in such a way as for some, for many of their activities law will empower those, give legal status to those actions, but if they are performed not meeting the conditions of that legal status or that authorisation, those actions are deprived of their legal status, and being deprived of their legal status, those who try to exercise power under the color of law but without having this warrant from law, they stand as it were legally naked, unprotected by these legal powers. So, there's a sense in which law, Hale suggests, a sense in which law both provides the resources for exercising power, but in the very providing of those resources, provides means of controlling the exercise of them. So, that's the second kind of idea.

The third has to do with public reasoning, that's a more complicated idea, but the thought here is that for law to rule is for there to be a very robust framework and discipline of providing arguments and reasons with respect to the requirements of law. A framework for argument and reasoning that is open not only to the ruling elite, but is as broadly as possible open to all participants in the legal system. That's very briefly put, but I articulate three ways in which we might want to say law rules: it's as a robust ethos of fidelity, there is a kind of capability of law to give status but also withhold legal status from actions of those who are exercising power, and there is in place a framework for public

³ English jurist. (1609-1676).



assessment and public reasoning and argument about the claims that law makes and demands on us. There may be more to this idea but those are the three ideas that I articulated in the Boutwood lecture and it's really the core of the larger project now of working out this notion of the rule of law.

37. Thank you. Your main research project was based on the contract that you have with OUP to produce a collection of works by Sir Matthew Hale, and you've mentioned this was based on an unpublished manuscript in the British Library and another only obscurely published essay and critique of the important philosopher, Thomas Hobbes⁴. Could you share with us, Professor Postema, any discoveries or progress that you've made in this project?

Yes. Well, because I was very keen to develop ideas I had begun thinking about on the rule of law, develop them for the Boutwood lecture, I spent a great deal of time working in the background on that project, and then subsequent to that, lecturing around in various places, Athens, London, Krakow, Poland, and elsewhere, on that idea. As a result, much more of my time was put into the rule of law project than the Hale editing project. Nevertheless, that key second point I mentioned a few minutes ago about Hale on the invalidating law, as he calls it, the irritating power of law, that came from a rather extensive piece of work I did trying to get clear on some of the philosophical and legal historical background of the main themes and theses that Hale was articulating in those two unpublished manuscripts, especially the manuscript and critique of Hobbes. So I spent a great deal of time working on trying to locate the source of Hale's idea of the invalidating power of law. It is in one respect a fairly familiar idea to legal philosophers and to constitutional theorists. On the other hand, the particular way he used it and the odd Latin tag he gave for it was puzzling to me, and so I worked back and back and back, and I actually found some very interesting resources in mediaeval canon law and even some earlier resources in Roman law, which he may well have been drawing on, not directly I suspect, but through the work of the early 17th century Spanish legal philosopher called Francisco Suárez⁵. So, working from Hale back to Suárez, through Suárez to some of these canon law sources, I do now have a much richer understanding of at least that part of his work. Just a few weeks ago I started back on the editing project in general and so now I'm sort of doing the somewhat more mundane work of getting the manuscript put in shape.

38. Professor Postema, what strikes me is the materials that you found very useful, were these materials that you may also have found back home in Carolina or did you find there was more material available to you here?

The resources here, not so much the library resources, although that too, but the intellectual resources, the resources of my faculty colleagues in particular, and a couple of knowledgeable PhD students, they were invaluable for my work and this particular aspect of Hale's work, the connection between Hale and Suárez, and the like. In fact, that was a very important kind of thing for me. I could have gotten access to the published resources, I'm sure, back in the University of North Carolina. I am very sure that I would not have been put on this particular trail had it not been for my being here and talking with colleagues, and exploring things with them. It was just through a chance conversation with a colleague over coffee that I expressed my puzzlement over Hale's use of this odd term *Potestas Irritans*, irritating or invalidating power, and we began talking about it and talking about it, and I was

⁴ English philosopher. (1588-1679).

⁵ Francisco Suárez (1548-1617). Spanish, Jesuit priest, philosopher and theologian.



put on Suárez and cannon law, and I worked it out more and found all sorts of things. Then I employed a graduate student to help me translate some of the work of Suárez that was most directly relevant to this topic. [*LD: It*] has never been translated into English, and I don't have adequate command over Latin to be able to read it myself. So I had this PhD student help me, and there is some work on this portion of Suárez by a Spanish writer and I read Spanish a bit but not with altogether great confidence, so I had this student from Venezuela who helped me do that. So, I had resources here that I probably would not have had elsewhere - it was really quite wonderful. And no doubt there will be at least one separate research paper out of that piece all by itself, I've written it up and presented a version of it already to the legal history seminar here at Cambridge. So, all those sort of things would not have happened had it not been for my year here.

39. The interactions.

Yes, yes.

40. Still on the subject of your research topics, you said in your last interview, “Then after 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 Bentham⁶ in some key themes, the nature of law, the nature of legal reasoning, authority and sovereignty.” Did you make much progress with that, Professor Postema?

That's still on the agenda but it's now clear to me that the work on the rule of law has the shape of the book, and in fact I've talked to publishers about it and they seem to be excited about it. So, I think I'm going to throw my energies first into that work and then get back to the Hale, Hobbes and Bentham at a later date. Time is only finite in its...

41. During your interview you spoke about your 1986 book, “Bentham and the Common Law Tradition” and I wonder if I can just ask you a few sort of follow up questions? We talked briefly about Francesca Ferraro’s⁷ observations on your direct utilitarian theory and you said that you might bring out a second edition of the Bentham to address these criticisms and I wondered whether you’d had any further thoughts about that?

Yes, well, indeed, one of the reasons why I've decided not to turn early on to the Hobbes, Hale, Bentham project that we just mentioned is that I'm now very keen to bring out a second edition of “Bentham and the Common Law Tradition” and I've talked with a publisher already and I will continue, that seems pretty likely though we have not nailed it down.

And in pursuit of that project I did a considerable amount of work going through the most important criticisms that have been published over the years of “Bentham and the Common Law Tradition”, and there are two or three issues that are really very important. One of them had to do with the one that you mentioned, one of them had to do with my interpretation of Bentham's view of adjudication and the role of the principle of utility in a judge's legal reasoning. I researched that a great deal, went back to a number of the manuscripts and other published works of Bentham, and then wrote a paper, which I presented in Paris and in London on just that topic. That will be the core of the, what will probably be an afterward or a postscript to the 1986 publication, and there what I do is I take

⁶ Jeremy Bentham (1748-1832), legal and moral philosopher.

⁷ Francesco Ferraro, Dipartimento di Scienze Giuridiche “Cesare Beccaria”, Università degli Studi di Milano.



seriously the criticisms of Ferraro and others, John Dinwiddy⁸ is a major early critic in this respect. And what I discovered is that their calling attention to aspects of the texts and competing interpretation, reading of the texts was valuable for my rethinking of the position I came to in essentially the second to last chapter of the book. However, I think both they and I made a serious error of a more fundamental sort about the nature of Bentham's project. So the revision that I will propose in this second edition will be a revision of accepting part of the criticism, but saying neither are quite on track and there's a more fundamental point that we have to understand about Bentham's project first. Which, once you see that, one can still maintain what I want to maintain in the "Bentham and the Common Law Tradition" that Bentham was in sort of anachronistic language, a direct utilitarian all through his life and through all his work, but nevertheless had at certain points in his career, views about the institutional context in which judicial reasoning or legal reasoning, or reasoning of ordinary citizens, which is ultimately rooted in the principle of utility.

Nevertheless, the institutional context in which that occurs changes and so the framework for making utilitarian deliberations also changes. The result is that you don't have to give up the interpretation of Bentham as a direct utilitarian to see that he had in some case rather strict constraints of an institutional sort, constraints on judicial reasoning. I didn't see that clearly enough in the last chapter of the book, I now see it much more clearly. So I think in the next edition of this there will be an attempt to both affirm some parts, a goodly part of the book and also to say, well, there's some more yet to say about this whole project, and I think something even more subtle and interesting than I was able to see now, what, 25 or 30 years ago.

42. Well, you mentioned last week that there has been a recent Chinese translation of the book, which I thought was very interesting, with a new preface, published by the Law Press of China and I wondered, why do you think there should be this interest in China in the writings of a 19th century English philosopher about the common law?

Yes, it is not easy for me to see why, I know there are a couple of explanations by way of personalities involved; it just turns out that there's a young man doing a PhD, I think probably completed now, at University College London in legal theory who got very closely involved in the Bentham project and UCL is the place where Bentham's manuscripts are all located, and there's a major editing and publishing project headquartered at University College London. This young man got involved in it and he also had connections in China, I mean, he is, sorry, he is Chinese, comes from Beijing University and Zhengzhou, and a new international institute for Bentham studies was established at Zhengzhou University. So that's the vehicle by which the Bentham Institute was established, but why there would be interest in it and so much interest in actually establishing an institute of that sort, is not all together clear to me. Bentham is not a defender of the common law. He's in many ways a radical critic of the common law or the structure of the English legal system, was something of a reformer with significant liberal tendencies, but also with much more attention to kind of institutional structure. Now, it's possible that something like that attracts the Chinese. I don't know. There's also a very thriving culture of interest in Bentham in Japan. That might be a little bit easier to explain, but nevertheless they are two very different cultures that have now begun to take a considerable interest in the work of Bentham. Maybe over time I'll be able to understand more deeply why, but I welcome it. There's enough interest such that a

⁸ John Rowland Dinwiddy (1939-1990), Professor of Modern History, Royal Holloway and Bedford Colleges, University of London. General Editor of *The Collected Works of Jeremy Bentham* (1977-83). A leading Bentham scholar.



book like mine, published some years ago now, was thought significant enough... there was enough of a market for there to be a full scale translation, and that books is 420 or 30 pages long and that was a major endeavour on their part.

43. There has recently appeared a CUP volume, “Bentham’s Theory of Law and Public Opinion”, as edited by Professors Zhai and Quinn by CUP, supposed to have been published last month, to which you contributed two chapters⁹. Both are about the rule of law, one on mutual accountability and the other on publicity and I wondered if you could summarise briefly your overall contribution with these chapters to the theme of the book, which focussed on Bentham’s notions of public opinion.

Yes. So that book collected the papers presented at a conference in Zhengzhou University in 2012 at the inauguration of this international Bentham Institute in Zhengzhou. I was asked to do a lecture on Bentham for that. They also asked me to do a general lecture to students and faculty not directly associated with the inauguration of that institute. The paper I wrote on Bentham for the Bentham part of that event there was on Bentham on the idea of publicity and the really central role of the idea of publicity and openness of government, transparency of government and the role of public control or he calls it the public opinion tribunal, the role of public control in the shaping and managing and control of ruling power. So it was on that issue, which is very close to the idea of the rule of law. He never uses the term rule of law, he talks of securities against this rule; publicity is the single most important constraint on the exercise of power, he thinks. Now, his language is very different, even the conceptual framework is different, from my work on fidelity and the rule of law, but you can begin to see a kind of convergence between the two. So the paper I gave, independent of the Bentham Conference, was on law’s rule and it was one of the two papers that I had already been working on in which this notion of core, sort of foundational notion of fidelity of law, is used to explain how it is that law rules. Fidelity of law is, you might think, a notion that approaches Bentham’s idea of the rule of publicity and public opinion tribunal. It’s all his own particular way of framing things and my way of framing things is different, but the ideas converge. So, those two papers, one was on the rule of law and one was on Bentham and publicity; they actually were on the same topic, coming at it from two very different directions.

44. I was intrigued by a comment made in the introduction by Professor Frederick Rosen¹⁰, apropos your second chapter where he cited the possibility of Bentham’s public opinion tribunal being seen as, “An alternative system of law to that emanating from legislators.”

Yes, even Bentham says at one point in his extensive work on what he calls the constitutional code, that is the public law and his view of the public law as codified, he says public opinion and the norms or rules that emerge from it, customs you might say, could constitute a form of law in itself, at least as seriously to be considered as the common law itself, which is thought to be deeply customary in a way but in Bentham’s own view, not truly customary because its roots are not sufficiently broadly sunk into the community, whereas the public opinion tribunal and its norms, its customs, its rules are more broadly rooted in the

⁹ Chapter 2. Law's rule: reflexivity, mutual accountability, and the rule of law. Chapter 3. The soul of justice: Bentham on publicity, law and the rule of law. In: Xiaobo Zhai & Michael Quinn (Eds.), *Bentham's Theory of Law and Public Opinion*. 2014, CUP.

<http://www.cambridge.org/gb/academic/subjects/law/jurisprudence/benthams-theory-law-and-public-opinion>

¹⁰ Emeritus Professor of History of Political Thought, Dept of History, University College London. Past-Director of the Bentham Project at UCL.



community as a whole. I think that's what Professor Rosen had in mind. It's a startling thing for someone like Bentham to say because he also holds the view that law doesn't exist unless it is the product of someone's making, and public opinion explicit making and explicit making in language that is itself articulated and sort of statutory and the like, public opinion doesn't have that shape at all. So, it's an extraordinary thing for Bentham to say and it is a one-off comment, so one doesn't want to put a lot of weight on it.

45. Professor Postema, looking back on your year, what would you describe as the highlights?

Well, I think two things as far as my being here at Cambridge. The one thing is that I think the teaching was an energising, intellectually nourishing kind of activity. I thoroughly enjoyed the interactions with the students and I found their openness and their willingness to engage quite seriously in the kind of questions that I think interesting but also I think are important for them to consider, their openness was really encouraging to me. So, the lecturing, the teaching was a high point. The other is that this extraordinary encounter just over coffee, which sent me down a whole new research path, really confirmed to me the value of changing one's academic surroundings from time to time, which then enables one to see things new and to learn from the experience and capabilities and intelligence of other people around. So those are the two highlights I think, new directions in research. The third, I think, is probably I've had the opportunity here in Cambridge and elsewhere in England and in Europe to bring to the public these emerging thoughts about the foundations of rule of law in a way that was both encouraging and also enabled me to think much more deeply and broadly about the topic than I had before. So I have a chance from time to time to lecture elsewhere but this was where I had intense and many opportunities to do that and that was really very good for my own sort of intellectual building, filling my batteries back up again.

46. You'll soon return to North Carolina and I wonder what awaits you when you return?

Well, I'm very fortunate in that I will return to my own department, meaning the Philosophy Department and the Law School, but the first term back I have an additional semester's research leave, at which time I'll carry on the various projects we've talked about, and in the Spring I will be back to full time teaching and then I'll teach one course in the Law School in the University of North Carolina, Chapel Hill and one, I believe it is an undergraduate political philosophy course, and continue to do whatever research I can squeeze in.

47. Well, it brings us to the end of this second interview. All that remains is for me to thank you very much indeed for such a great contribution to our archive, we're very grateful to you, thank you.

It's been a pleasure for me too, thank you very much.

