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Postema and the Common Law Tradition

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Abstract. First published in 1986, Gerald Postema's pathbreaking and influential *Bentham and the Common Law Tradition* offered a controversial interpretation of how Bentham sought to combine the certainty of a code with flexibility in adjudication. A second edition of the work came out in 2019, with a significant new Afterword in which Postema addresses some of the criticisms of his interpretation. This article revisits some of Postema's arguments in the book, assesses the Afterword, and considers how his arguments might have been modified in view of other work he has done on the common law mind.

1. Introduction

Bentham and the Common Law Tradition (BCLT) has had a huge impact on the study of Bentham's legal thought since its publication in 1986. Its analysis of Bentham's critique of the common law and of Bentham's utilitarian jurisprudence was much more detailed and sophisticated than anything hitherto published. It thereby provided an essential building block for many later studies of Bentham. At the same time, it also put forward a novel and controversial interpretation of Bentham's thought, which sought to show that Bentham wanted both to fashion a code on utilitarian principles—which would help guide conduct and focus expectations—and also to allow for utilitarian adjudication at case level, allowing for flexibility at the point of application.

The publication in 2019 of this great work in a second edition, with an Afterword by the author, is a significant event. The book has been in print continuously since its first publication, and remains a key point of reference for Bentham scholarship, and for the study of jurisprudence more generally. At the same time, Postema's interpretation of Bentham's work was in some respects controversial and has attracted much discussion. With the publication of the second edition, the author has taken the chance to respond to his critics, and amplify his arguments.

In the preface to BCLT, Postema suggested that Bentham's thought showed there was an alternative to the well-established schools of legal positivism and common law theory, and again in the Afterword, he notes that Bentham's jurisprudence fits neither the model of Hart (the positivist exemplar) nor that of Dworkin (here associated with natural law). We tend to associate the positivist approach with seeking to define what law is, and to set out criteria to identify it. Positivist theorists see law as rules or commands issued by those in authority to guide the behaviour of

citizens. We associate the counterapproach with theories of adjudication, which are less concerned with identifying what law is than with looking at how judges and jurists should settle disputes. Where the positivist model sees lawmaking as essentially something for legislators—with judges acting as legislators only because of the shortcomings of the legislature—the adjudicative model sees law as a body of knowledge elaborated in the courtroom. Traditional jurisprudence courses see Jeremy Bentham as one of the founding figures of the positivist vision. He is seen as a man who created a theory of law for an age in which an activist legislator would intervene increasingly in daily life with more and more regulation. The adjudicative model is sometimes seen as a common law model, with its roots in a prelegislative age where law was developed very largely in the courts.

Postema's interpretation of Bentham's work presented him as a theorist both of *law* and of *adjudication*, who sought to secure both certainty and stability in law and flexibility in adjudication. Whether these positions in Bentham are compatible remains open to debate. One way of testing it is to see in what ways Bentham engaged with the common law tradition, and how his work relating to rules and adjudication relates to that tradition. This is of course the very task Postema set himself in BCLT, as the very title shows. Postema's subsequent work has also explored the common law tradition, in ways different from that presented in BCLT. Interestingly, he does not address this aspect of his later work in the Afterword, but confines himself to saying he has explored this issue elsewhere. In what follows, we will trace the changes in Postema's perceptions of the common law tradition and ask what impact a rethinking of the "common law tradition" might have on his wider reading of Bentham. As will be seen, in his Afterword, Postema responds to a number of critics who questioned his interpretation of Bentham's theory of adjudication. We will consider how convincing his responses are; and suggest that if we put Bentham into this "other" common law tradition, we can see more clearly the nature of his jurisprudential project.

2. Bentham and the Common Law Tradition

In the book, Postema has a very capacious view of what he describes as "classical Common Law theory." The "classical" period begins in the age of Sir Edward Coke; and it appears to run through William Blackstone and Edmund Burke as far as James Coolidge Carter (Postema 2019a, 19), and perhaps Guido Calabresi (ibid., 11), but not as far as Ronald Dworkin (ibid., 38). At the end of the first chapter, Postema attempts to "capture in a single phrase what law *is*, according to classical Common Law theory," and he concludes that it is "a form of social order manifested in the practice and common life of the nation" (ibid., 37). It has a social dimension. Each member of the community believes both that the rules are good and reasonable, and that others do so as well; and it is through history that this shared sense of acceptance is manifested (ibid., 8). History plays a central role in this conception. The "dominant" historical vision for Postema's theory is not Coke's rather flat version, which on its face appeared to argue for an unbroken and largely unchanging history, but Sir Matthew Hale's, which showed that law mutated and developed. What mattered according to this view was not the objective facts of past history, but "the *present sense or conviction of* this continuity" (ibid., 20). It was not necessary to show that any part of the present law existed in the past, but rather that the present laws fitted into "a public conception of the

nation's identity as a people shaped by its collective history" (ibid., 21). Hence Hale's metaphor of the Argonaut, which remained the same ship even though every plank which constituted it might have been replaced over time. The only thing which ensured the identity of the Argonaut in all its mutations was "the shared conviction that it [was] the same ship" (ibid., 22). Equally, the common law rested on the shared conviction and practice of regarding certain rules and institutions as the historically validated law of the land: exactly the same notion as Burke had in mind when explaining that society was a partnership of the living, the dead, and those yet to be born (ibid., 23).

A second pillar of common law theory (as Postema explains) is reason. In his discussion of reason, he puts together Coke's artificial reason, which (he argues) uses analogical reasoning in striving towards "*internal coherence* and *completeness*" (ibid., 30) and the eighteenth-century rationalist view of the common law as a rational science based on general underlying justifying principles. These two kinds of reason are compatible, Postema argues (ibid., 35), for one can uncover general principles by reflecting on particular cases and on "experience." Experience is of central importance: "General rules not yet confirmed by experience [...] must be treated as hypotheses, open-ended proposals, and not as firm and binding law" (ibid., 35). The form of reason which is central to the common law is not individual natural reason, but "traditionary" reason (ibid., 59). Postema suggests that there are a number of ways in which one can understand the relationship between law and reason in "Common Law theory." His preferred interpretation is described in the label "community practice constitutive of reason" (ibid., 68). Where the first two (which he labels "the wisdom of the ages" and "collective wisdom") see the validation of the common law as somehow transcendent (and consequently not open to challenge), this one sees it as more concrete. It is found in the reason of the judges, making decisions over a long period of time, on matters relating to human affairs in general, in situations in which judges can be trusted to understand the world and the way it works. "The suggestion is that *juris*prudence is not an enterprise of rational discovery of general, governing principles, but rather the enterprise of making judgments from a grasp of the concrete relations and arrangements woven into the fabric of common life" (ibid., 69). The common law is both constitutive of social action, and reflective of social action: "It is the reservoir of traditional ways and common experience, and it provides the arena in which the shared structures of experience publicly unfold" (ibid., 71).

In this characterisation, the common law is linked to the practices of the community. Postema explains that the common law rests ultimately "on general use and acceptance" (ibid., 5). It is the "*expression* or manifestation of commonly shared values and conceptions of reasonableness and the common good" (ibid., 7). Postema writes that "[s]ince the law exists only in, and is known only through, practice, a rule becomes law or a decision makes a new departure in the law only if it is taken up into the practice of the community" (ibid., 5). One telling example of this is the claim that for common lawyers such as Hale there was no sharp line between legislation and the common law. According to this view, parliament cannot make new *law*, but only regulations which "make no impact on the law until they are taken up into the practice of the courts and the community" (ibid., 25). If the courts do not receive and incorporate legislation into the common law, it remains a dead letter. This might raise a question of how far the common law was perceived to be the law of the lawyers,

and how far the law of the community. Postema's interpretation of Hale's views is that the judge is the voice of the community, who is able to understand the ways of the world in the way a "bare grave Grammarian" cannot (ibid., 69, quoting Hale 1971, 46). In contrast to Hobbes (whose sovereign must coordinate social interaction), he argues that for the common lawyers, differences between people are settled through the adjudicative activity of the judges "well acquainted with human affairs and conversation" (Postema 2019a, 77). One problem with this argument, which is attributed to Hale, is that (as Postema admits), it is "sketchy" (ibid.) As he puts it, "Hale only suggests this line of argument in a few places in his 'Reflections,' and he never develops it in detail" (ibid.). But it is (Postema argues) an "emerging theme in the Common Law tradition" (ibid.), which became increasingly important as the eighteenth century progressed.

In BCLT, this ripening is traced not in the work of any eighteenth-century jurist, but in that of a Scottish philosopher, David Hume, whose theory is described in the title of one chapter as "Common Law conventionalism." In Hume's theory, the judges have a rather less prominent role, for the conventions of justice he discusses appear to be the ones on which legal rules and systems are originally founded, prior to the naming of any judges. When we turn to Hume, we enter the world of social interaction among people in general. Like the common lawyers Postema describes, Hume was sceptical about the ability of natural reason to coordinate human actions, and he argued that law cannot be constructed out of reason alone. Rather, experience teaches people what rules work to secure their property and end conflicts, and it is this experience which led them to develop conventions to secure those rules. However they originated, it is a matter of historical fact that these conventions have developed over time, and that they have served their purpose. Hume's view is described by Postema as "a revision and extension of some basic themes of Common Law jurisprudence" (ibid., 86). Like the common lawyers, Hume traced modern law to common custom and tradition; and like them, he rooted its legitimacy in history.

Postema thus offers us a conventionalist account of common law theory, based largely on a reading of the works of Hale and Hume. What function does it serve in the overall argument of BCLT? Bentham's critique of the common law is plainly not a critique of a sophisticated conventionalist theory of the kind Postema sets out here (indeed Bentham himself draws on a notion of conventions as informing the response of the people when deciding whether to continue to obey the ruler or to resist: ibid., 245–7). Instead, the feature of the conventionalist account which seems most relevant to the ensuing discussion of Bentham is a feature found most clearly in Hume. According to Hume's view of conventionalism, once the rules were settled, they had to be invariably followed, whether or not they were the best rules which could have been devised. For Hume, it is argued, "absolutely inflexible compliance with, and enforcement of, the rules of justice" (ibid., 131) is necessary for social cooperation. There is no room for equity.

Before turning to Postema's later view of the common law tradition, we may make some observations on the version set out in BCLT. The first point to note is perhaps semantic. Postema, in all his works, refers to something he calls the "classical Common Law," which suggests a parallel with the "classical era" of Roman law. One may raise questions as to the usefulness of the label. Whereas one can identify quite clearly the classical era of Roman law (in roughly the first

two centuries of the Christian era) in the work of a number of professional jurists whose ideas would be Digested by Justinian, the idea that there is a single theory which embraces everyone from Coke to Burke might seem a stretch (and as will be seen, in later work, Postema recognises clear divergences of opinion among common law theorists in the seventeenth and eighteenth centuries). The vision of the common law tradition set out in the first chapters of the book is in effect an ideal type, the most prominent exponent of which was not a common lawyer. Secondly, there are questions to be raised about his interpretation of the thinkers. Let us take Hale. Consider first the notion that the judge speaks for the community's values. Postema's contention that the judges' decisions were informed by the understandings that "underlie the ordinary interactions of members of the community" (ibid., 70) rests on a passage in the *History of the Common Law* in which Hale speaks of how judges interpret deeds (Hale 1713, 70). In fact, in this passage, Hale says nothing about how ordinary people would interpret deeds, but rather says that the judge follows the rules of construction which have been elaborated in courts. Indeed, it was one of the central rules regarding the interpretation of deeds that oral evidence was not allowed to be heard to determine the meaning of formal documents. The judge could not ask what the community thought the rule was, but had to follow the rules set by law. Consider secondly the notion that what matters for lawyers is not past authority but present practice, and that everything is mutable. If that might be the conclusion to be drawn from the metaphor of the Argonaut, it is not one which sits easily with the metaphor of the common law being like Titius, who is the same man he was forty years ago, even though the material substance of his body changes completely every seven years (Hale 1713, 60). Now, Titius is not just Titius because other people (or he himself) *think* he is the same person. The idea conveyed is that there is a body which has grown from distinct foundations. This suggests that law does have stable bearings, which the judges must work with. Consider thirdly, the fluid interpretation of statutes. It is hard to believe that any common lawyer in the mid-seventeenth century would think either that a statute had no effect until digested by the common law, or that any statute could fall out of use simply by desuetude. Hale's examples of this all relate to the era before the time of legal memory, 1189, for which no records of written statutes exist.

As for Hume, Postema's exposition of Hume is rich and illuminating, but it is not clear how it relates to the common law which Bentham attacked. According to this exposition, coordination problems (such as who has the right to property) are settled for Hume not by simple reason, but by the imagination. Thus, in determining the acquisition of property by accession—as where the owner of a ewe acquires property in the lamb to which it gives birth—Hume says that "this source of property can never be explain'd but from the imagination" (Hume 1978, 509 n). As Postema explains, this "imagination is a *social* capacity" (Postema 2019a, 127). This social capacity generates shared conventions. In Postema's words, "Hume's self-professed scepticism led him, like Common Law jurists before him, to the view that the only solution to the paradoxes of private rationality [...] was to subordinate rational private judgment to the *collective rationality* of common opinion and established practice" (ibid., 130). However, this raises the question, *whose rationality*? Are we talking here of common opinion of society—custom *in pays*, in Bentham's phrase—or is it the common opinion of judges expounding the law?

If it is the opinion of the judges, then the question is raised as to how they develop the law. Although this is not made explicit in BCLT, we might assume that Postema thinks that Hume's position would elaborate that attributed to Hale, that the judges develop the law to meet community needs. They would do so in the same way that members of society first agree on general rules regarding the acquisition and transfer of property. In particular, it seems that judges develop the law by "discovering analogies and disanalogies to past cases" (ibid., 128). Presumably, according to the Humean model, the judge would alight on a fact which most pleases the imagination in developing the rule. According to Postema, they would alight on something which "a community of speakers of the language"—here, presumably, the legal language—"can recognize as appropriate" (ibid.). Two comments might be made on this. First, insofar as we are talking of the *communis opinio* of lawyers, there is no guarantee that what pleases the judges will also please the wider imagination or expectations of the public. For that to be shown, we would need a deeper theory of how the imagination of the legal mind engages with the public mind. Second, and more seriously, we are not shown that common lawyers actually did conceive of legal reasoning in these terms. Reasoning from analogy was of course one of the multiple forms of reasoning used by common lawyers—but there is little evidence that the Humean notion of imagination and convention was taken up by them.

The first chapters of BCLT therefore leave us with two problems. The first is that they present a vision of the common law as a form of conventionalism, which is not necessarily a convincing view of common law jurisprudence; and it is one to which Bentham does not seem to respond. The second is that the image it gives of common law judging is also problematic (insofar as it has too close a filiation between current law and current community practice, and does not focus sufficiently on the custom of the judges). It also raises some questions for the interpretation of Bentham which follows. For it is not clear that the common law judges saw their law as a system which had to generate the kind of inflexible rules which Hume advocated. As Postema argues, their view was one which had a good degree of flexibility in adjudication, and in the development of new rules. As the following chapters show, Bentham initially strove for a system of *stare decisis* in order to gain *stability* of expectations. But this was surely at the cost of flexibility in adjudication, suggesting that the former was at least for the young Bentham more important than the latter.

3. Later Works on "Classical Common Law Jurisprudence"

Over a decade after the publication of BCLT, Postema turned again to "classical Common Law jurisprudence" in a number of shorter works, which now focused on the first two-thirds of the seventeenth century. In these articles, Postema does not abandon the earlier interpretation, for it is still a central contention that the decisions that the judges come to also involve a sense of what the community expects. Judges must decide "what one has good reason to believe others in the community would regard as reasonable and fitting" (Postema 2003, 9). However, in this later work, two new aspects of common law thought entered into Postema's conception which were not there in BCLT. These aspects came to Postema's attention as a result of work done on the multivolume *Treatise of Legal Philosophy and General Jurisprudence*, of which he was one of the editors. One is the notion that

seventeenth-century common lawyers (most notably Coke) thought of law as a discursive form of forensic reasoning. As Postema puts it in one of his newer articles, "the artificial reason of common law was thought of as essentially *discoursive*, that is, as a matter of deliberative reasoning and argument in an interlocutory, indeed *forensic*, context" (Postema 2003, 7). That is to say, the common law was a form of reasoning which resolved cases. As Coke put it, it was in forensic argument that "Almighty God openeth and enlargeth the understanding of the desirous of justice and right)" (ibid., quoting Coke 1793, 9th report, preface, p. xiv). In discussing this feature of the common law, Postema now explains that common law deliberation was never a solitary activity, but was a social activity practised by lawyers in the courtroom.

> Law on this view, is not a set of rules or laws, but a practised framework of practical reasoning and this practised framework constitutes a form of social ordering. Its rules and norms can be formulated, perhaps, but no such formulation is conclusively authoritative; each is in principle vulnerable to challenge and revision in the course of reasoned argument and dispute in the public forensic context. (Postema 2003, 14)

Precedent cases therefore do not bind simply by virtue of having been handed down. They "do not preclude deliberation and reasoning in subsequent cases, but rather they invite and focus that reasoning" (ibid., 17). While the judges still have to make decisions which are suitable for the community, there is a much weaker sense here of the common law as a kind of community custom as articulated through the voice of the judges, or of a body of conventionally established (Humean) rules. Furthermore, Postema indicates here that for some theorists the common law might be something entirely different from what Bentham thought. As he explains, some common lawyers would not have thought of the rules of common law being "made," any more than the rules of grammar are made (Postema 2002, 166).

This is evidently a theory of law resolving problems after the event: adjudicating in a flexible and reasoned manner. Although Coke's language of artificial reason fell out of use in the eighteenth century, the underlying idea that common law reasoning involved the forensic solving of disputes after wrongs had been committed continued to be a central idea for many jurists. Indeed, the very development of major areas of law, such as tort, in this era, turned on the courts having to figure out whether wrongs had been committed when people were harmed in accidents. Insofar as this view of law cast it not in term of *rules* but in terms of adjudication, it might have been interesting to set Bentham's ideas of adjudication against this.

The second new feature in Postema's later work is his consideration of a wider body of Hale's work, including the manuscript treatise on the law of nature. Composed around 1668, it remained unpublished till 2015, when David Sytsma published his edition of the text (Hale 2015), soon followed in 2017 by Postema's edition in his collection, *Matthew Hale on the Law of Nature, Reason, and Common Law* (Hale 2017). In this work Hale (following John Selden but also walking in the footsteps of an older voluntarist tradition) defines law in terms of the commands of a superior with the power to give rules *per modum imperii et sub ratione legis* (cf. Lobban 2007, 63ff.). As Postema notes in his introduction to this text, "[t]his might seem an unpromising beginning for an account of English common law" (Hale 2017, xxxi), much of which is unwritten. With this work in mind, we may see Hale making a significant departure from the adjudicative model

of Coke. At the very least, this is very un-Cokean, for it explains law in terms of rules to guide conduct, which have an imperative force. It raises some interesting questions about how Hale combines his view of law as custom, or law as a form of juridical reasoning, with this idea of law as command. In the treatise, Hale sets out a position not unlike that of John Austin. Customary laws obtain the force of law on two grounds: First their long usage carries with it an implication that they originated from "just legislative authority" (ibid., 14); and secondly, their continued use suggests the tacit consent of the present legislative authority, which enforces it. Some kind of legislator is therefore the formal source of all law.

What of the content? As both Postema and Sytsma point out, Hale follows Francisco Suárez in arguing that law is both prescriptive and indicative: The binding nature of natural law comes from God's will, while it has an intrinsic moral goodness which comes from divine wisdom (which exists antecedent to their binding force in law). Unlike Hobbes, Hale does not think that the commands of the sovereign define what is good. However, he does agree that there are many matters of natural law which are indeterminate or indifferent (and consequently left to human societies). These matters must be made determinate by human judgment, which might be by the legislator, or in particular cases by the judge. Hale makes it clear (ibid., 109–10) that subjects are by the law of nature bound to obey the determinations on these matters made by "civil magistrates," and though he notes that "there is a great difference in many respects between a lawgiver or governor and a judge" (ibid., 110), the laws of nature were equally obliging on both. The determination of this natural law might be a matter of difficulty. Although Hale does not here discuss the nature of judging—for that was not his subject—one might speculate whether he might not have had judges in mind when writing that "the remoter consequences and conclusions" of the law of nature were not intended as the "common rule for all mankind, but at most for such that having their faculties exercised were able to follow the clue of reason to such degree" (ibid., 24). At the risk of overinterpreting, it would be a way of noting that the judge's skills in the reasoning process of the law might figure out the rule to be applied. This would seem to fit with a common law view of legal reasoning—but it would be far from any idea of the judges articulating the customs of the community.

This revised vision of the common law tradition suggests that there were at least a couple of models against which Bentham could react. One of them eschewed the notion that law was to be seen as a command, but saw it as the working out, *post hoc*, of rights and wrongs through adjudication. The other did see law in terms of commands, though treated this more as a formal feature of law, with the substantive law being developed in the adjudicatory forum. By this view, the motor of the common law was flexible courtroom adjudication, which only generated vague guiding rules, in a not very authoritative manner. Bentham took his view of the common law tradition largely from Blackstone, whose definition of law followed the command model, rather than taking it from the adjudicative model derived from Coke.

According to the traditional interpretation of Bentham's project, his desire to write a comprehensive and authoritative code which gave little room for flexible adjudication was driven by perception of a failure in the approach taken by common lawyers like Blackstone, who defined law in the abstract in terms of commands, but failed to give a coherent account of the content of law on those terms, and instead slid back to describe it in terms of adjudication by legal "oracles" (Blackstone 1765, 69). According to this view, Bentham was not seeking to develop a better theory of

adjudication. In BCLT, Postema's challenge to this view was to argue that Bentham was seeking to present a theory which would combine the needs of clear legislation with flexibility in adjudication. In the following section, Postema's responses to criticisms of his interpretation will be considered. The final section will consider what an examination of the alternative "adjudicative" model of common law reasoning can suggest about Bentham's aims.

4. Postema's Revisions

According to the traditional interpretation, Bentham's critique of the common law (as read through Blackstone) led him to seek to develop a firm code, which judges, like citizens, would be obliged to follow. According to this view, "Obey punctually, censure freely" might be seen as much as the motto of the judge as of the citizen. Postema challenged this position by arguing that the code was only to be a rule of thumb for judges, who should be free to adjudicate on direct utilitarian principles where necessary. It was this argument which proved to be the most controversial claim in BCLT, and a number of critics challenged Postema's reading (Dinwiddy 1989, 283–9; Ferraro 2013, 140–60; Schofield 2006, 307–12; cf. Lobban 1991, 151–4). Postema seeks to address some of these criticisms in the new Afterword, in which he qualifies and refines some of his earlier arguments. In so doing, he concedes some ground to his critics, without abandoning his argument that Bentham sought to optimise flexibility of the law, while providing maximal security for expectations. For instance, although he admits that there is "no compelling textual evidence that he thought his watchword, 'no inflexible rules,' should apply to *all* areas of the law," he still believes that "Bentham *sometimes* was inclined to extend his antinomian approach to parts of substantive law" (Postema 2019a, 485; emphasis added). Equally, while he concedes that "some revision of the account of Bentham's theory of adjudication in *BCLT* is in order"—and indeed identifies some new problems in Bentham's approach to ensuring flexibility in law—he nonetheless concludes that his critics "do not fully acknowledge the subtlety of Bentham's account" of adjudication, which (he suggests) "offers a salutary challenge to contemporary jurisprudence" (ibid., 497). In this section, Postema's response to his critics will be considered, in order to explore how much flexibility in adjudication was in fact provided for in Bentham's theory, and whether Postema has satisfactorily answered his critics.

Postema identifies three critiques of his work. The first is that he was wrong to describe the code as "Janus-faced," with judges treating it in one way, and citizens in another (ibid., 449). In BCLT, Postema argued that the citizens must follow the authoritative guides given for prospective behaviour by the rules: The commentary of reasons is for them only an explanation or commentary on the rules. By contrast, the judge, who is not faced with the pressure of *prospective* coordination (but only after-the-fact adjudication), should look firstly to the reasons, rather than the rules; and if the rules do not match the underlying reasons, he could depart from them. In the book, Postema points out a dilemma this created for Bentham (ibid., 453). Once people saw that judges departed from the code, its function in guiding conduct and securing expectations would evaporate, so that his theory of adjudication was in conflict with his theory of the code. Postema's critics, who took issue with his interpretation of Bentham's theory of adjudication, retorted that there was no such conflict. In the Afterword, Postema concedes that he was

wrong to describe the code as "Janus-faced," but says that this is true for reasons which differ from those of his critics. Postema now argues that Bentham did not expect the rules of his code to be peremptory, deliberation-excluding reasons for action for the citizen. Instead the law supplies reasons for compliance with its directives, with the code containing "perpetual commentary of reasons" (Bentham 1998, 121 n. a) addressed to the citizen. Sovereign commands therefore do not replace the subjects' exercising their own judgment with respect to the actions in question. This means that Benthamic judges and citizens do not look at the code differently, but in the same way: Neither was to regard its provisions as "peremptory rules, excluding any appeal beyond the letter to broader moral-political considerations" but both were to assess the code in terms of its public reasons, viewing the code "through public, security-oriented, utilitarian lenses" (Postema 2019a, 480). Postema's response to this first criticism is therefore a kind of "confession and avoidance."

The second criticism of Postema's work challenges his argument that Bentham's "antinomianism" went beyond matters of procedure—in respect of which he insisted that there should be no inflexible rules—to matters of substance, allowing his judges space for flexible adjudication. He argues that his critics' objection to his interpretation "would be conclusive if Bentham had offered principled reasons for treating the two domains differently with respect to the kind of reasoning expected of judges in them" (ibid., 480). However, he counters that Bentham did not perceive "a categorical distinction between the domains" (ibid., 482) and argues that "there is evidence that Bentham did, at least in some contexts, give wider scope to his antinomian approach" (ibid.).

In BCLT, Postema argued that this approach was to be found in Bentham's late writings proposing a new Equity Dispatch Court. Although Postema now concedes that these writings—which were addressed to resolve a particular problem in the Court of Chancery of the late 1820s—might not properly represent Bentham's wider views, he maintains that a passage in this text "suggests that Bentham did fancy reasoning in his equity court as in some respects a model for adjudication institutionalized in his *Constitutional Code*" (ibid., 484; cf. 420). The passage in question is, as Postema notes, "mysterious" (ibid.), since in it Bentham suggests that the working of the Equity Dispatch Court might offer an "experimental exhibition" of the "eventually-emendative function" of the judge in the *Constitutional Code*. It remains mysterious, since it is not evident how the *adjudicative* proposals in the Equity Dispatch Court papers relate to the issue of how to *amend* the Code which is discussed in the relevant passages of the *Constitutional Code*.

As Postema points out, in his Equity Dispatch Court writings, Bentham directed the judge to follow the disappointment-prevention principle, while insisting that his decisions should not have precedential effect. However, it is important to note that in these writings, the adjudication was not to be made within the shadow of any code, or indeed any substantive law. His proposal was a short-term measure, designed with the very specific aim of clearing the backlog of cases in the notoriously slow and expensive Court of Chancery. Bentham said that there was an overriding utility for this: The pain caused by the expense and delay of the Chancery was greater than any disappointment any loser might suffer there. His assumption was that the applicable legal rules—those of English Chancery equity—were so bad that they had to be abandoned altogether, with decisions being made purely on the basis of

the disappointment-prevention principle. That was to say that the old system was so flawed and unjust that it was necessary to supersede it with what was in effect a system of arbitration. The judge of this court—chosen by the people—was to decide disputes not by law but by "consider[ing] within himself whether, if the case were his own, if that same arrangement took place, any such uneasy sensation as that expressed by the word disappointment would thereby have been produced in his breast" (Bentham 1843c, 388).

This discussion is particularly interesting in light of Bentham's notion of the importance of "utility derived from expectations," the expectation that officials would follow established rules or practices, or even patterns of behaviour. As Postema shows in his discussion of Bentham's views on *stare decisis*, he expected judges to give effect to expectations generated by past legal practices. How were the judges in the Equity Dispatch Court to deal with such expectations? Bentham wrote that in this court,

> no regard need be paid, or ought to be paid, to any *rules*, on which, in the Courts in which you are respectively undergoing plunderage, the proceedings have been grounded. For, that no decision can be more decidedly in contradiction to any one of those rules, than, in instances in vast abundance, those same rules are to one another; and that accordingly a much better chance for the prevention of disappointment will be obtained, by aiming at that object immediately, than by aiming at it through so unconducive, and in every respect unapt a medium, as that which is composed of those same rules. (Ibid., 312)

This passage might be read in two ways. On the one hand, Bentham's proposals might be read in a limited way, as applying only to the procedural and technical rules of the Court of Chancery, with the arbitrator still able to consider expectations derived from the substantive law about matters such as trusts. On the other hand, it might be read more broadly, to indicate that the decision should be taken with no reference being made to any substantive equitable doctrine. This interpretation might be supported by the answer Bentham gave to the concern that such an approach might entail "*violation of vested rights*, and so forth, meaning, if anything, neither more nor less than the production of disappointment, with the suffering attached to it" (ibid., 312–3). Bentham's answer was that these established rules could continue to be used in *other* courts, with only the parties before the Equity Dispatch Court abandoning these rules. This would suggest that Bentham could envisage a system of adjudication without any reference to clearly articulated prior rules, in which expectations generated in a different way—perhaps from private interactions, perhaps from community conduct—could be applied. However, this was at best a *pis aller* only to be used *in extremis*. We may therefore infer that the Equity Dispatch Court writings do not offer a model of how Bentham would envisage adjudication under a code, where these problems would not arise.

The third critique addressed by Postema relates to his interpretation of passages in Bentham's *Constitutional Code*, which are said to support his view that Bentham favoured flexibility in adjudication. These passages outline the judges' power under Bentham's plan to suspend the execution of the law—the "sistitive function"—when making suggested amendments to the code. In BCLT, Postema argued that the sistitive power of the judge,

> does not impose a constraint on the judge, but rather provides him with another possible *option* when faced with a case in which simple application of the law would appear to bring about a

less than optimal result. The judge may decide to set aside the law, making his decision by direct appeal to the principle of utility, *or* he may decide to submit a proposal for amendment to the legislature. (Postema 2019a, 429)

A closer reading of the *Constitutional Code* texts suggests that the sistitive function was used only when an amendment was proposed to the legislator, and it was for the legislator to make the final decision. In this work, Bentham squarely addressed the problem that this might result in an *ex post facto* law. Although this was an undesirable thing, Bentham accepted that on some occasions, it was the better of two evils; for, as he explained, the public looked to the legislature and judiciary to execute salutary laws and not to "the production of evil by admission or omission of this or that word in a law, through inadvertence or otherwise" (Bentham 1843a, 509). He argued that the shock to public expectation in such cases would be greater if the bad law were enforced than otherwise. An example of the problem he gave here was the familiar Bolognese case of a medical practitioner prosecuted under a law which condemned to death those who shed blood in the street, after performing an operation in the street to cure a patient. In such cases, public expectation would be more shocked by the execution of the doctor than the amendment of the law (ibid.). He had already drawn on the same example in his writings on the judicial establishment in France, where he had also argued that the judge should suspend the execution of the judgment and refer the matter to the legislator (Bentham 1843b, 313). This was of course a familiar example from medieval jurisprudence, which raised the question of how judges were to interpret the words of legislation, when looking to the intent of the legislator. Bentham's solution—made explicit in the *Constitutional Code*—was that the matter was not to be left to "strained construction in judicature" (Bentham 1843a, 509). It should also be noted that Bentham's attention was focused on cases "where through oversight, a clause, or a word, adverse to the general design of the law, has crept in" (ibid., 510). It was to solve a rare problem and not to set up a routine procedure.

While Postema now concedes that Bentham's discussion of the judges' power to suspend the execution of a law and to suggest amendments in the *Constitutional Code* does not entail their acquiring a flexible power to adjudicate freely "within the shadow of the code"—since the process ends in the legislature clarifying the law—he argues that this itself poses a problem for Bentham. The problem is that in such problematic cases, the decision of the instant case (as well as the future direction of law) is left in the hands of the legislator. Postema points out that this undermines the sharp separation between legislation and adjudication which was so important to Bentham. It also poses "rule of law" problems for Bentham, when the legislator is the dernier resort for contested interpretations of the law. Drawing on the work of Timothy Endicott, he suggests that this "subjects the interpretation of law to potentially distorting political pressures," which could have been avoided if Bentham had developed "something akin to the Aristotelian notion of equity" (Postema 2019a, 497).

Is this a strong objection to Bentham's argument? To begin with, it might be a matter of debate whether the "rule of law" concerns Postema raises here would come into play. If one function of the rule of law is to constrain executives, and to prevent arbitrary uses of power, it may be suggested that Bentham's very elaborate institutional structure mapped out in the *Constitutional Code*, with its multifarious securities against misrule, its institutional design to make power holders' interests always match their duties, and its high degree of public participation (both as voters and

as critical observers), was surely designed to provide the best possible safeguards against the dangers the rule of law seeks to provide a security for. Bentham's legislator was not to be subjected to judicial review: And it was in the legislative forum, under the gaze of the Public Opinion Tribunal, that the utilities and disutilities of *ex post facto* legislation were best debated.

Postema's suggestion appears to be that, even if Bentham's texts on the *Constitutional Code* did not explicitly make out a case for flexibility in adjudication, perhaps they should have done so, by making space for an Aristotelian notion of equity. Would such a move have solved the dilemma Postema identifies? Aristotle's idea of *epieikeia* was a solution to the difficulty of setting general definite rules which can be applied to an infinity of possible factual problems. It entailed the correction of law, where it was defective owing to its generality. For Aristotle, equitable decrees were needed in some cases, since it was impossible to lay down a general law for every situation: "when the thing is indefinite the rule also is indefinite, like the lead rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts" (*EN* 4.10, 1138a1 [Aristotle 1984, 1796]). Aquinas also argued that the aim of *epieikeia* was to secure the dictates of justice rather than apply the letter of the law: "*Epieikeia* does not set aside that which is just in itself but that which is just as by law established" (*ST* Ia-IIae, q. 120, a. 1). The Aristotelian notion connoted that one needed to look beyond the letter of the law for justice, and that is in some cases it was necessary to set aside, or go outside the law, for its sake.

How might this fit with Bentham's idea of law? Some hints might be found in an early essay on justice, discussed by Postema in his chapter in *Utility, Publicity, and Law* entitled "Utility, Public Rules, and Common-Law Adjudication" (Postema 2019c). In this work, Bentham speaks of "justice" in terms of settled rules, whereas the demands of utility may be more flexible. In a phrase which may be said to have Aristotelian echoes, Bentham writes that "Utility is spoken of as something that will yield—Justice as an inflexible line—something that will break rather than bend" (Bentham UC 70(a), 17, quoted in Postema 2019c, 149). As Postema explains, Bentham seeks to argue here that there should not be a clash between justice and utility. The notion of utility should not be confined to immediate expediency, or original utility: There are also expectation utilities, engendered by the rules of law themselves. "Justice" is not in conflict with utility but focuses on a particular kind of utility. However, Bentham concedes that while in most cases, utility demands that the rules of justice should be applied, in some cases, those rules may be departed from and an appeal made to original utility. According to his argument, where the utility of another action is *manifest*, or "sufficiently clear and public" (Postema 2019c, 159), then the judge should follow what utility requires. This suggests an equitable adjudication going outside the rule: But in Bentham's view, this should occur not simply where it is of the utmost utility in the particular case, but where it is manifest to the public, and so can dislodge the rule without undermining established expectations. This equity must coordinate with public expectations. Perhaps in this work Bentham might have offered the germ of a theory where original utility, as a kind of equity, could be invoked against the code. Yet it is hard to see how it would offer a system of regular flexible adjudication going outside the code. If the utility in question is not simply fairness to the parties in question (who, like the litigators in the Equity Dispatch Court, would be

allowed simply to "opt out" of the legal system), but a matter of the code having a disutility *manifest* to the public in general, this would appear to be a prime example of where the code would need amendment, in the manner for which he made provision.

This is to suggest that Bentham did not see his code as requiring the kind of flexibility in adjudication which Postema argues for. It was envisaged that the utilitarian code would fail to fulfil its function only on the rarest of occasions. Nor was the kind of flexibility Bentham wished to see in procedural law extended to substantive law. These two forms of law had different functions, for the aim of adjective law was to bring about the execution of the substantive law. As Bentham explained, the only defensible end in view of substantive law was the maximisation of the greatest happiness of the greatest number, whereas the only defensible end of adjective law was "the maximization of the execution and effect given to the substantive branch of the law" (Bentham 1843d, 6). Adjective law was a law largely addressed to lawyers, being the procedural rules which needed to be followed to bring actions, and which enriched "Judge & Co." Indeed, it was the very complexity of procedure, which resulted in parties losing their actions on points of technicality rather than their merit, which was to be one of the strongest critiques launched against the common law system of remedies. Bearing in mind this wider historical context of the nature of common law pleading, and the critiques made of its complexity, might help explain why Bentham might have a radically different approach to how to view procedure and substantive law. For in many ways the project of his pannomion—with a clear code of substantive rules and a highly flexible code of procedure—was the reverse of the contemporary common law practice (Lobban 1991).

5. Bentham's Revisionism

Postema's work challenges not only the traditional conception of the nature of Bentham's code, but also the familiar view of his legal theory. In the Afterword, he describes Bentham as a "revisionist" positivist—an intriguing epithet, given that the jurisprudence he is said to revise was largely developed after his death and in response to his work. In so describing him, he draws attention to two features in Bentham's jurisprudence. First, in Postema's view, Bentham's conceptual apparatus was as much informed by his utilitarian theory as his substantive proposals were. He was not seeking an account of the "essential, dominant, or salient features of law from a strictly conceptual, metaphysical, or neutral sociological point of view" (Postema 2019a, 461). Bentham's definition of law was not driven by his metaphysics:

> Nothing in his pragmatic-empiricist metaphysics demands that we tether "law" to expressions of the will of sovereign lawmakers. His criticism of common-law rules was not that an equally satisfactory definition, tethering them to "real entities," was not possible, but rather that such "constructed" rules could not serve the fundamental task of law. (Ibid., 468–9)

According to this view, Bentham was not a methodological positivist. Secondly, Postema argues that Bentham departed from the standard positivist model in not regarding rules as peremptory demands. Instead, Bentham's laws address the understanding as well as the will, and require evaluation by the subject. Furthermore, "on Bentham's view, coercion is not law-defining, but rather is one element of a

multi-part institutional-cum-informal structure for securing the effectiveness of the law's system of norms" (Postema 2019b, 199). The fact that law's status may derive from an evaluative response from the community is perhaps best seen in Bentham's notion of constitutional laws *in principem*. These laws impose legal duties on sovereigns by virtue of their enforcement by the moral sanction of public opinion. In what follows, we will explore how convincing this "revisionist" vision of Bentham is.

Postema's argument for a pragmatically oriented mode of conceptual analysis suggests that Bentham did not regard his definition as a necessary one, but the best one for its purpose. It focused on what he saw as the most important function of law, to coordinate social interaction through publicly articulated rules. Since law's primary task, in Bentham's view, was to provide security of expectations for the community, it needed to provide public common standards to which all people could refer. His definition therefore followed what Bentham took to be law's essential function: "For Bentham, the question of the nature of legal validity was not primarily a conceptual matter, but rather a practical matter; not a question of what properly falls under the ordinary concept of law, but rather what notion enables law to do its fundamental work" (Postema 2019a, 469).

This suggests that Bentham did not hold that there was only one way to think of law. Support for such a notion can be obtained from Bentham's comment in his "Preparatory Principles" writings:

> The idea of a Law has never yet been precisely settled: the conditions requisite to reduce the idea of a command so as to render it commensurate to that of a Law have never been ascertained. [...] My business is, therefore, not to remind the reader what *is* meant by a Law: but to declare what *shall* be meant by a Law. If the meaning which I, or any one else, limits it to is deemed a commodious one, what follows? Not that any one is censurable for deviating from it, till sanctified, if it ever be sanctified, by common usage. But any one is censurable if, without warning, he contradicts the common usage of mankind: much more is he, if he contradicts his own. (Bentham 2016, 431–2)

Did this mean that Bentham agreed that there were several distinct ways in which one could define law, and that he was simply alighting on the meaning which was most useful? He went on to explain:

> Great is the multitude of different ideas to which the word Law has been indiscriminately applied: all distinguishable, all highly necessary to be distinguished. 'Tis for want of their being distinguished that a great part of the political disputes that distract the world have arisen. 'Tis by pointing out the difference between these ideas, and tying each of them down to it's proper name, that these disputes, if at all, are to be appeased. (Bentham 2016, 432)

Bentham's discussion here suggests not that there is a variety of ways in which the rules applied by judges in courtrooms might be defined, but to say that there was confusion because people used the same word to connote a different number of things. He then listed the "ideas with which the word Law is most in danger to be confounded," which included "a dictate of Utility," "a Custom," "a Judicial Opinion or Decision," "a Regulation of a Voluntary Society," and "an imaginary cause of uniformity in the actions of sentient beings." (ibid., 433). Bentham's writings here, and elsewhere, indicate a belief that his definition of law in terms of sovereign commands

was the clearest and most correct definition of the phenomenon he was interested in explaining: the rules articulated and enforced by the coercive apparatus of a state.

Bentham's comment that he had to declare what "*shall* be" meant by a Law connoted that he was not simply reflecting general usage. As he explained, if he were to make the claim that a statute was not a law, "usage would contradict me"; but he would reply "that it does not correspond to the idea I would wish to have exclusively annext to the word Law" (Bentham 2016, 82). In fact, Bentham's idea of a "complete" law was a complex and abstract idea, including imperative and expository matter. Postema is of course aware of this, for he notes that "Bentham's core concept of law was not an empirical, but rather a rational, and, in one sense of the word, ideal concept" (Postema 2019a, 472). As Bentham himself put it, it could only be found in the imagination: "I much doubt whether there exists or ever has existed in the world an instance of a Law, a written Law, thoroughly compleat, the matter whereof is all drawn together" (Bentham 2016, 411).

At the heart of Bentham's definition stood the notions of command and sanction which had long been found in what Postema labels the "thetic" tradition in European jurisprudence. It was these core commands which would guide people's conduct. A law was at its core an expression of the will of the supreme power in a state. This command had to be compulsory: "That command [...] only is a Law, which, being issued by the Supreme Power, has belonging to it a motive of the same power's providing" (ibid., 62). Bentham did argue that the sanction was not "properly speaking a part of a Law" (ibid., 411). It was not necessary, since the legislator might in many cases trust to other kinds of sanctions besides the "political" ones initiated by the sovereign—such as moral or religious sanctions—to provide motives for action. Nonetheless, he also noted that "it is in the sanction that the force of a Law consists" (ibid., 361), and suggested that a complete law needed both an assignment of the actions it embraced, and the actions which would secure its enforcement: "A Law is compleat which contains a compleat designation of the sort of act it wills to be done or not done, together with a compleat assignment also of those other acts, consequences of the first act, in which consists the motive" (ibid., 62).

In Postema's view, Bentham's view of law departed from the "thetic" tradition in significant ways. In particular, in common with some other scholars, he argues that Bentham's "discussion of laws *in principem* represents a further effacement of the command model" (Postema 2019a, 270). As Postema explains,

> Bentham held that these constitutional norms bind the sovereign. The commitments undertaken by the sovereign over time take on the character of customs or conventional understandings incorporated into the publicly recognized conditions of authenticity, they are among the "accustomed formalities" authenticating expressions of the sovereign's will. While not properly seen as commands (from a superior to an inferior), they are "volitions." Although they not enforced by ordinary penal, i.e., coercive sanctions, they are enforced, on Bentham's analysis, by that which underlies all law, the "moral sanction," i.e., public opinion. (Ibid.)

Bentham clearly felt that sovereigns were bound by constitutional rules, which they had themselves articulated, and that their observance of these rules was secured by the fear that the people's habit of obedience on which sovereignty ultimately rested would dissolve. However, it is far from clear that Bentham's conception of laws *in principem* is consistent with his wider discussion of the concept

of a law. For Bentham, constitutional laws *in principem* had two makers: the sovereign, whose will determined the content of the obligation, and the people, who enforced the covenant given shape by the sovereign. In making this argument, Bentham compared the constitutional position of the sovereign with that of a person who bound himself under the law of contract, where the contracting party—the "covenantor"—expressed a will which would be enforced by the guarantor, who was the sovereign (Bentham 2010, 86–93). The comparison was not a happy one: for in Bentham's notion of contract, the command which underpinned the contract was that of the sovereign, whose power of imperation could be shared by the contractor through what Bentham called the "accensitive power." It was this command which made the legal obligation (*pacta sunt servanda*), and not the sanction which secured its enforcement (which as Bentham explained elsewhere was not a necessary part of a law). Bentham's conception of constitutional laws *in principem*, which rested on an expression of will of one party enforced by the other party's moral sanction, was thus one which was inconsistent with Bentham's wider notion of a law (Lobban 2014).

Questions may therefore be raised as to how far Bentham can be regarded as a "revisionist." Postema is certainly correct to point out that Bentham's legal and constitutional thought was much wider-ranging than many of the jurists who followed the analytical path Austin took, having read Bentham's work. As Postema clearly explains, Bentham wanted to undergird all his law with reasons which citizens could see (for instance in the rationales provided by the legislator for the rules) and which they could evaluate. Bentham's laws sought to address the understanding, as well as the will of the citizens. As Postema puts it, "[l]aw, in Bentham's view, must be a joint product of reason and authority, of authentic, publicly articulated, posited norms integrated into a rationally compelling systematic structure, the reasons for which are everywhere manifest" (Postema 2019a, 477). From this, he draws attention to Bentham's revisionism: "Contrary to contemporary positivist legal theory, Bentham not only allowed that laws are properly assessed in terms of these public reasons, but also specifically designed his code to encourage such assessment" (ibid., 480). The point is well made that Bentham expected the citizen to do more than allow her will to be guided by whatever the sovereign commanded. As is well known, he anticipated that citizens would evaluate the laws they were required to obey, and would make their own choice whether to obey or not. However, it would be a step too far to suggest that Bentham would accept that a law which was not grounded on good reasons was not a valid law.

There has of course been a vast literature on the Benthamic concept of a law. For present purposes, it is noteworthy that Bentham did not experiment with different definitions of what law might be. To borrow Postema's terms, he responded to the "thetic" tradition, but sought to offer a richer and fuller explanation of the idea of a law based around the concept of *thesmos* rather than *nomos*. This was not only because this voluntarist tradition was dominant in much European juristic thought by the time Bentham commenced on his project—in the works of writers such as Hobbes and Pufendorf—but also because his principal common law foil, Blackstone, began his work with a "thetic" definition of law, whose shortcomings Bentham would expose so mercilessly. Nor was Blackstone the first common lawyer to use this kind of language when seeking to define law in the abstract: For both John Selden and Matthew Hale in the seventeenth century had turned to this model.

These earlier English writers were not ones Bentham engaged with, and indeed it is extremely unlikely that he would have known of Hale's then-unpublished work. However, they were to a large degree innovators in the legal world of the seventeenth century, where the model of law as the rules issued by a sovereign was not one which represented a common law consensus. As is well known, early seventeenth-century jurists such as Sir Edward Coke spoke of the common law in terms of a particular kind of reason: "the common Law it selfe is nothing else but reason, which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every mans naturall reason" (Coke 2003, vol. 2, p. 701). In Coke's view, the common law was founded on both nature and the custom of the people. While its principles were timeless and unchanging, it had been "fined and refined by an infinite number of grave and learned men" over "many successions of ages" (ibid.). It was beyond the reason of any single man. Indeed, "if all the reason that is dispersed into so many severall heads were united into one, yet could he not make such a Law as the Law of England" (ibid.). As Coke saw it, the law "is not incertain *in Abstracto* but *in Concreto*" (Coke 2003, vol. 1, p. 306): The correct solution to any legal problem was therefore to be found in legal argumentation in the forensic forum (Lobban 2007, 37).

Although eighteenth-century jurists were not themselves prone to describe law as a system of artificial reason, Coke's works were repeatedly republished in that century, and continued to be influential. One jurist who drew from Coke's ideas was Thomas Wood, whose definition of law did not focus on the concept of a command. As he described it:

> As *Law* in General is an Art directing to the knowledge of Justice, and to the well ordering of Civil Society, so the Law of *England* in particular, is an Art to know what is Justice in England, and to preserve order in that Kingdom. (Wood 1720, vol. 1, p. 6)

Other writers, who conceded to Hobbes the notion that legal obligations could not derive from reason, defined the law of nature in terms of divine command, but without describing law in terms of specific rules. Richard Cumberland, for instance, saw the law of nature as derived from God's commands, enforced by natural rewards and sanctions:

> The Law of Nature is a Proposition, proposed to the Observation of, or impress'd upon, the Mind, with sufficient Clearness, by the Nature of Things, from the Will of the first Cause, which points out that possible Action of a rational Agent, which will chiefly promote the common Good, and by which only the intire Happiness of particular Persons can be obtain'd. (Cumberland 2005, 495–6)

For Cumberland, the obliging force of the law of nature did not derive from the sanction, but from God's will: The natural sanctions—in effect the pleasures and pains which followed from certain actions—were means by which people could know God's will. What, then, was God's will? In Cumberland's version,

> the *Law of Nature*, which I have now laid down, is the very same that enjoins *Universal Justice*. For it enjoyns nothing but what is contain'd in *Justinian*'s Definition of Justice, when rightly explain'd, which runs thus. "*Justice is the constant and perpetual Will to give every one his Right*." (Ibid., 667)

Cumberland's work was influential on the early eighteenth-century jurist Jeffrey Gilbert, who was also keen to offer a rival view of law to that of Hobbes. Gilbert's debt to Cumberland is evident from the following passage in his draft treatise of property and contract, when he discussed laws in general:

> Justice is a constant and perpetual inclination to give every man his own, and that which can be called a man's own, is what he possesses either by the laws of nature or by the laws of civil society. [...] In the state of nature before the erecting of civil communities, God only is the legislator. [...] All the laws of nature are reduced to this single head, viz. to maintain an universal love to all mankind, and procure as much as in us lies the good of all men, to do no hurt or injury to the innocent, either in body, fame, or property. (Lobban 2019, 94)

Much of Gilbert's work dealt with the common law of obligations, in which there were very few rules laid down by legislation or custom. In such areas, the judge sought to resolve disputes by adjudication. In many of these areas, such as disputes over contracts or rights to personal property, there were few positive rules which might have shaped expectations—akin, for instance, to the complex rules relating to real property. In his draft treatise of the law of nature, Gilbert attempted to set out the analytical tools judges would need in order best to understand the nature of property and contract, in order to help arbitrate between parties. The fact that Gilbert spoke of "arbitrators" in the state of nature reveals that he here conceived of the task of the judge as engaged in an essentially backward-looking exercise of adjudicating between parties. Unlike Coke, Gilbert did not speak of "artificial" reason, the technical reason which presumed lengthy study in the sources and forms of reasoning used by the common law judges. Instead, he sought to articulate a clear set of concepts which would facilitate logical reasoning.

This is not to argue that eighteenth-century common lawyers had developed a particularly sophisticated or elaborate theory of adjudication, which could challenge a voluntarist model. Indeed, when common lawyers sought to describe their law in a systematic way, as both Hale and Blackstone tried to do, they were led to formulating it in terms of rules enforced by the sovereign, which derived from positive historical moments (Lobban 2016). Such descriptions of the common law not only laid themselves open to the kind of critique made by Bentham but were unable to account for many areas of the law—notably the law of obligations—in which the common law continued to act as a system of remedies rather than a system of rules. For our purposes, however, it suffices to say that there was another way of looking at law in the mid-eighteenth century, which was held by many practising lawyers, which saw law as a system of adjudication or "arbitration" of cases where the expectations of parties which had been disappointed had not derived from legal rules or legislation. But this was not a vision which Bentham was interested in exploring. Reading Bentham in the context of this common law tradition might make us recognise again his centrality as a theorist of legislation, rather than as a theorist who wished to develop the kind of flexible adjudication found in the common law courts he so abhorred.

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