

Understanding Bentham's Theories of Meaning and Publicity

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Gerald J. Postema, [Utility, Publicity and Rights: Essays on Bentham's Moral and Legal Philosophy](#) (2019).

Professor Gerald Postema's new book, *Utility, Publicity and Rights*, offers a brilliant set of essays on Jeremy Bentham's jurisprudence, complementing his previous works. In *Jeremy Bentham and the Common Law Tradition*, Postema departed from received interpretations that misread Bentham in two ways: first, decoupling Bentham's normative moral and political theory from his jurisprudence and failing to explain the foundational role of utility in his account of the nature of law; second, underestimating the impact of Bentham's legal positivism in practical reasoning and adjudication.¹

Like his previous work, Postema's new book is a major contribution to the pursuit of integrity in Bentham's jurisprudence. One of its merits is that it not only builds on the principle of utility but also unpacks two less known while no less foundational doctrines in Bentham's philosophical system: his theory of meaning and his psychological theory.² The book is divided in two parts. The first focuses on Bentham's basic philosophical commitments. Chapter 1 introduces his account of language, epistemology, and ontology, offering a quasi-pragmatist interpretation of his theory of meaning. Chapter 2 turns to Bentham's psychological theory to single out the self-regarding interests and social motives that can play a role in one's individual and social life. The rest of the first part discusses Bentham's utilitarian theory of value, with special reference to his expressivist meta-ethics (chapter 3), his theory of publicity (chapter 4), his account of equality (chapter 5), and the role of universal interests in Bentham's moral and political theory (chapter 6). Postema describes these elements as integral parts of the meaning of utility, which play a foundational role in understanding the specific topics of the second part.

This part is dedicated to more concrete legal themes. Chapter 7 discusses the historical development of Bentham's critique of common law jurisprudence, including an analysis of early texts in which he intended to reform instead of abolishing it. Chapter 8 situates Bentham's command model of law in a historical context, emphasizing the revisions to the model that he made in his long career. Chapter 9 analyses Bentham's account of evidence and the role of probability in the determination of legal truths beyond sensorial experience. Chapter 10 revisits Bentham's forceful objections to rights language in politics and constitutional law, with an attempt to take Bentham's critique seriously while offering a normative reply. Chapter 11 discusses the place of law in the global order. Chapter 12 attempts to make Bentham's conception of the rule of law explicit, unpacking his views on publicity to make sense of the impact of this value on legal practice and legal reasoning. And chapter 13, finally, explains how the value of publicity provides an integrative reading of the previous chapters.

The book begins with an intriguing analysis of Bentham's theory of meaning, which is based on a distinction between "real" and "fictitious" entities. Fictitious entities should not be confused with mere "fictions", which "play no proper role in thought." (P. 6.) While Bentham regards fictions as "fabulous" beings that deceive interlocutors when they are portrayed as real entities, he preserves a crucial role for the fictitious entities that are embedded in our language and organize our thought. Without the latter, "no thought beyond that of the most primitive and non-human would be possible." (P. 5.) Fictitious entities are rational devices which figure among the "ontological commitments of ordinary language". They play an essential role in Bentham's epistemology, in virtue of the "relationship they bear to real entities and their participation in the world that they populate." (P. 6.) On Bentham's philosophical system, ontology and epistemology are intertwined. (P. 9.) His epistemology begins with the empiricist assumption that "all knowledge has its source in human experience." (P. 9.) Nevertheless, perception is not sufficient to produce knowledge, because the *judgment* that an object exists "in the world beyond impressions and ideas" presupposes the exercise of what

Bentham described as the “active powers of the mind.” (P. 10.)

On Bentham’s ontology, it is only when we exercise these mental powers, i.e., we engage in the activity of analysis, that we can achieve a proper understanding of the objects we purport to describe. When we turn to nature to understand “real” or “physical” entities, our sensorial experience presents to our mind “a large number of simple ideas, produced by bits of extra-mental reality”, which need to be “bundled together” through these mental activities. It is only “*after* this analysis or partitioning of primitive sensorial experience, and its subsequent synthesis”, that we can understand these bundles of ideas. (P. 11.) A similar move occurs when we analyze the architecture of language, which begins with singular propositions, but require abstraction to be transformed into words, through their association with fictitious entities that are the product of analysis. (P. 11.) To determine the meaning of any entity, including “real” entities to which we have access through perception, requires an “aggregate of fictitious entities.” (P. 13.) Our unarticulated perceptions, which constitute a *psychical* reality, are like the *physical* reality that constitute the “raw materials... on which the active mind operates.” (P. 13.) To make sense of them, as experiences of the world, we resort to fictitious entities like “space and time, colors and sounds, relations and properties, persons and minds, duties and rights” etc. (P. 20.) As Postema explains, “our minds have constructed these fictitious entities over time to understand and manage our interactions with the world in which we live, a world that is planted firmly in the physical and psychical base.” (P. 14.) This account of language and meaning is a form of “quasi-pragmatism” because our use of these fictitious entities stems from the *practical commitments* we must undertake to achieve a meaningful experience of our world. We need these entities, for Postema, because the domain of “human experience” needs to be “ordered and rendered meaningful by thought” (P. 23.), and this ordering cannot be achieved by mere representational acts that duplicate mind-independent objects in our minds. Bentham’s fictional entities are, thus, constructed by *participants in linguistic social practices* who develop an *artificial* vocabulary to understand the relationships among properties, events, and the feelings and emotions we can apprehend through our senses. Conceptual vocabularies are not established in a second-order metaphysical realm, for their content is, instead, *responsive* to these social practices.

To transform mere sensorial perception in experience, we must resort to fictitious entities that are *constructed* through the exercise of the active powers of the mind. According to Postema, fictitious entities are “rooted in an independently existing material world” but *not* dependent on *a priori* principles or categories, in a Kantian sense. On Postema’s reconstruction, Bentham’s ontology is a “combination of empiricist, realist, and quasi-pragmatist elements.” (P. 16.) To construct the artificial vocabulary made possible by these entities, Bentham resorts to two types of definitional activity: first, definition *per genus et differentiam*, in which one clarifies a term by subsuming it into a genus or locating properties that distinguish it from other species; second, through the technique of *paraphrasis*, in which we explore relations among concepts to explain a concept’s *genealogy*, tracing it back to the aspects of the physical world that provide the *warrant* of its use. (P. 19.)

As Postema explains,

Fictitious entities ... all *exist*; they are fictitious only in the sense that they do not exist as *physical entities*. The mistake we make about fictitious entities is not the mistake of attributing existence to them, but rather of thinking that we can confirm their existence by just looking. Their ontological status is different from physical objects (or rather space-time material movings). Moreover, their ontological legitimacy, and their meaningfulness (in propositions), is made manifest through skillful deployment of the technology of paraphrastic definition. (P. 21.)

Postema interprets Bentham, thus, as a linguistic pragmatist *avant la lettre*. Instead of a representationalist theory of meaning, Bentham supposes that a large part of our knowledge comes from *inferences* and *analysis*, through the social use of active powers of the mind. The sense of the concepts we use stems from the implicit fictitious entities we construct to make sense of our world and to make it possible to understand and gain knowledge by rational means.

I believe that Postema’s quasi-pragmatist reading of Bentham is reinvigorating. It lies at the heart of the value

of *publicity*, which constitutes another central topic of the book. Postema's reconstruction of the Benthamite theory of meaning makes sense of the claim that publicity is "the very soul of justice" (P. 267), and articulates the infrastructure that this principle provides for the rule of law. (P. 268.) Publicity is a source of security against misrule, because it creates a rational environment and an institutional structure in which governmental officials can be held accountable for their responsibilities and develop the proper "moral aptitudes" required by the commitments to their official roles. (Pp. 269-271.) It explains why Bentham's motto "*obey punctually and censure freely*" should not be taken at its face-value, since part of the duties of a free government is to "cherish, encourage, and enable the popular disposition to resistance." (P. 274.) It invites us to revise our first impression that Bentham's command theory of law fails to impose "*leges in principem*" (P. 279) or render the sovereign accountable to the law. (P. 288.) It shows, in addition, the failure of the Hartian interpretation, which holds that Bentham's thesis that law exists in virtue of the "habit of obedience" of subjects implies a passive attitude toward an unaccountable sovereign. As Postema explains, "*habit* is not a thoughtless, rote, and strictly singular responsiveness to commands, but rather a co-ordinated collective response to the efforts of those in power." (P. 281.)

It makes sense, in addition, of Bentham's skepticism about classical common law, which he described as "dog-law" because its vocabulary depended on mysterious fictions that allowed judges to "impose penalties with no warning and no public rationale, treating citizens like creatures who understand only the lash." (P. 277.) The failure of the purported rationality of common law was a failure of publicity, because it depended on an aristocratic professional vocabulary that withdrew from the ordinary citizen the active powers of mind which are necessary to make a judgment about the concepts and values lawyers employ. Common law was dog law, for Bentham, because he thought that classical common lawyers made use of fictions, rather than traceable and warranted fictional entities. The fictional entities, or intellectual commitments, on which a competent participant in social practices must rely were not shared with or available to the ordinary public, rendering the lawyers an unaccountable and irresponsible caste.

The interaction between active powers of the mind, or inferential capacities, and public processes and institutions, provides us with the equipment to understand Bentham's apparently cynical dismissal of the language of rights in politics and constitutional law. The rhetoric of rights, on Bentham's view, is stained with indeterminacy that renders it impossible for one to make a rational and objective judgment about the public justification of a legal or political claim. (P. 235.) The rationality of legal processes depends, for Bentham, on the assumption that Postema described as the *demonstrability thesis*, i.e., the thought that an action "is publicly justifiable only if it can be grounded in arguments that any competent member of the community in question would accept as conclusive support for it." (P. 236.)

The connection between publicity and inferential capacities shows also how to criticize the demonstrability thesis, or how to turn Bentham against himself, as Postema does when he argues that what democracy requires is not uncontroversial or always determinable rules, but rather a participatory and discursive practice, above all a *reflective* practice, in which citizens can engage with their interpretive capacities to make sense of their common norms. (Pp. 239-242.)

I will probably not do justice to Postema's extraordinary achievements in this brief review. But I am glad that Bentham finally received, after almost two hundred years of his death, the systematic, insightful, and generous interpretation he deserves.

1. Gerald Postema, **Jeremy Bentham and the Common Law Tradition** (2nd ed. 2019).
2. According to Postema, Bentham believes that human motivations are constituted by complex affections that are adaptable because they are "capable of responding to social circumstances and education. (P. v.)

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