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## The Utilitarian Influence on American Legal Science in the Early Republic

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In *Utilitarian Jurisprudence in America*, Peter King held up Thomas Cooper, David Hoffman, and Richard Hildreth, as those early American legal thinkers most notably influenced by Bentham.<sup>1</sup> For King, Hildreth represented “the first real fruition of Benthamism in America,” whereas Cooper’s use of Bentham was subservient to his Southern ideology, and Hoffman’s use was mainly to “reinforce” a utilitarianism otherwise “derived from Paley.”<sup>2</sup> Although Hildreth’s work falls outside the timeframe of early-American legal science, Cooper’s and Hoffman’s work falls squarely within it. What follows is, in part, a reevaluation of Cooper and Hoffman within the broader context of early republican jurisprudence. Because Cooper became an advocate of southern secession late in life, too many historians have dismissed his life’s work, which consisted of serious intellectual undertakings in law and philosophy, as well as medicine and chemistry. Hoffman, on the other hand, has become a man for all seasons among legal historians. His seven-year course of legal study contained such a vast and eclectic array of titles, that one can superficially paint Hoffman as advocating just about anything. As of late, Hoffman has been discussed as a leading exponent of Scottish Common Sense philosophy, second only to James Wilson a generation earlier. This tension between Hoffman-the-utilitarian and Hoffman-the-Scot requires a new examination. A fresh look at the utilitarian influence on American jurisprudence also requires that we acknowledge

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<sup>1</sup> PETER J. KING, *UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY* 139-218 (1986).

<sup>2</sup> *Id.* at 180, 168.

the influence of William Paley, a figure far more at home in early American colleges than Bentham.<sup>3</sup> Aside from Cooper and Hoffman, several other legal theorists called forth utilitarian philosophy in expounding upon jurisprudence in the early republic, most notably Gulian Verplanck of New York and several professors of law from the Transylvania University in Kentucky.

The argument herein will advance the proposition that there was spectrum of utilitarian jurists in the early republic, ranging from Cooper, the strong Benthamite; to Hoffman, the tepid utilitarian; to Verplanck, the Paleyan. We must also confront Hugh Legaré, the most articulate and profound opponent of utility as applied to law.

### **I. Thomas Cooper: Thoroughgoing Benthamite**

Thomas Cooper (1759-1839), originally of Oxford, England, was no latecomer to the doctrine of utility. Quite the contrary, Cooper left good documentary evidence that he, not Paley, originated a new moral theory in the 1780s. While still living in England, Cooper was an active member of the Manchester Society where he read a number of philosophical papers he eventually published in 1787 under the title, *Tracts, Ethical, Theological and Political*. The first tract was “On Moral Obligation.” Cooper felt compelled to drop a footnote to its listing in the table of contents indicating that the paper was originally read on September 29, 1784. He mentioned this information “chiefly because Dr. Paley’s book on Morals, which was published sometime after, and which I

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<sup>3</sup> See Wendell Glick, *Bishop Paley in America*, 27 NEW ENG. Q. 347, 347 (1954) (“more American students before 1850 read Paley than any other ‘moral philosopher,’ not excluding even Butler, Dugald Stewart, and Locke”); Wilson Smith, *William Paley’s Theological Utilitarianism in America*, 11 WM. & MARY Q. 402, 410-11 (1954) (“It was ... Paleyan utility, not Benthamic utilitarianism, which was composed within a framework of ideas that young Americans could comprehend.”).

never saw till lately, states the question somewhat in the same way I do.”<sup>4</sup> In seeking the true source of moral obligation, Cooper proceeded to examine ten answers frequently given by moral philosophers. Two answers he found more compelling than the others: 1) “It is conducive to general utility” and 2) “It is conducive to the *bene esse*, to your own greatest good upon the whole.”<sup>5</sup> Cooper emphasized that virtue and prudence were synonymous.<sup>6</sup> He thought, “private happiness is the only ultimate motive of action, where there is any apparent motive at all.”<sup>7</sup>

Before arriving at his favored reasons for moral obligation, Cooper first disposed of the religious and the Scots’ arguments. [His treatment of the un-satisfactoriness of appeals to God’s will is similar to Paley’s]. Cooper associated Hutcheson and Kaimes with “moral sense” and Herbert, Reid, Beattie and Oswald with “common sense,” neither of which was very dissimilar from the other. Hutcheson’s “*instinctive* approbation common to all men” was incredibly “unphilosophical.”<sup>8</sup> Had there been anything to it, then “there ought to be no difference of opinion on the subject of morals.” As empirical proof that “moral sense” was nonsense, Cooper pointed to “the codes of laws ancient and modern”: “The difference is so great as to be the sole foundation [of those who] with some plausibility assert that nothing is just or unjust, but what is determined so to be by the laws of each state.”<sup>9</sup> Cooper then ridiculed the notion of conscience as espoused by the common-sense crowd by showing its uselessness at distinguishing virtue from vice. He recalled a number of famous historical assassinations and massacres whose agents

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<sup>4</sup> THOMAS COOPER, *On Moral Obligation*, in TRACTS, ETHICAL, THEOLOGICAL AND POLITICAL (Warrington: W. Eyres, 1787; reprinted Bristol: Thoemmes Press, 2001), quotation from Table-of-Contents page.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.* at 95-96.

<sup>7</sup> *Id.* at 117.

<sup>8</sup> *Id.* at 34, 32.

<sup>9</sup> *Id.* at 34.

claimed they were motivated to take action solely by their consciences. For Cooper this was enough proof to refute those who turned their backs on the role of reason in morality. He thought his heavy-handed examples would not have been necessary but for the “arrogance of the authors themselves, and by their contemptuous manner of treating those who have *reasoned* upon the same subjects, and whose knowledge was so far superior.”<sup>10</sup> As we will see, David Hoffman treated appeals to unreasoned instinct as similarly unconvincing and held the same negative view of what he thought was an anti-intellectual strain to advocates of Common Sense.<sup>11</sup> Both Cooper and Hoffman followed through on their philosophizing with application to their professional lives as lawyers.

Most of Cooper’s writings on law reform come from the final decade of his life. Although he edited and published the first American edition of Justinian in 1812 and the first collection of tracts on medical jurisprudence in 1819, we do not see a sustained and focused law-reform agenda until the 1830s.<sup>12</sup> The first spark seems to have come from his review of Bentham’s *Rationale of Judicial Evidence* in May 1830 for the *Southern Review*.<sup>13</sup> Cooper’s review is quite lengthy, running forty-six pages, and contains an extended discussion of why Bentham was correct about everything he had reported in that work. Cooper’s most original ideas come near the end of the piece, where he recommends codification for the American states.

The only real criticism Cooper leveled against Bentham was that the “Benthamee dialect” in which the work was written required him to study every passage twice to

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<sup>10</sup> *Id.* at 45.

<sup>11</sup> *See infra* pp.

<sup>12</sup> *See* THE INSTITUTES OF JUSTINIAN WITH NOTES (Thomas Cooper ed., Philadelphia, 1812); TRACTS ON MEDICAL JURISPRUDENCE (Thomas Cooper ed., Philadelphia, 1819) (reprint, Lawbook Exchange, 2007).

<sup>13</sup> Thomas Cooper, *Bentham’s Judicial Evidence*, 5 S. REV. 381 (1830).

appreciate the full implications of the work. On the whole, Cooper agreed that the common law needed reform because it served the interests of the profession rather than the public. The review focused on a number of the evidentiary exclusions Bentham had criticized as anti-utilitarian. At the outset, it should be said that Cooper disliked any general rule of exclusion precisely because of its general nature—it allowed for no consideration of the utility of exclusion in a particular case. But what comes through most forcefully is Cooper’s hostility to the religious nature of any part of the common law, specifically, those evidentiary exclusions based on religious grounds.

Sounding as though speaking from personal experience, Cooper lamented, “Even in this country of religious freedom under the constitutions of the several States, but we cannot honestly say in this country of religious toleration, a man is sure to encounter much obloquy, and great practical inconvenience who has the courage to run counter to the religious persuasions of his fellow citizens.”<sup>14</sup> Among the features of evidence law that bothered Cooper, perjury was particularly troublesome because through the crime “we do not punish his offence against society, viz. the falsehood; but we let that alone and punish his offence against religion.”<sup>15</sup> Religion also worked to disqualify some, like atheists, from providing testimony at all. Yet if one confessed to such non-belief in the face of societal disapproval, Cooper thought, “can a stronger proof of devotion to the cause of truth, to veracity in public as well as in private, be exhibited? Can more decided evidence of undoubted honesty be imagined? ... Language does not admit of expressing a case of more detestable absurdity.”<sup>16</sup> It astonished Cooper that judges in England and America continued to assert that Christianity was “part and parcel of the common law,”

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<sup>14</sup> *Id.* at 394.

<sup>15</sup> *Id.* at 393.

<sup>16</sup> *Id.* at 394-95.

especially after it was “so decidedly, so irrefutably exposed by Mr. Jefferson” to be a lie.<sup>17</sup> Realizing that his passions were getting the better of him, Cooper had to add this caveat: “Let us not be misunderstood: we are no advocates of Atheism, or any other kind of ism.”<sup>18</sup>

Cooper chose an interesting example to further his point about religious disqualification. “Suppose a set of tipsy soldiers, were to enter a Quaker-meeting, bind the men and violate the women, how are the offenders to be convicted? not a witness present admissible in a court (of justice?—no, let us not be guilty of such misnomer) of law!” The reason this example stands out is that Cooper had previously encountered trouble with the Quakers in Pennsylvania. In fact, one of the reasons he was removed from his judicial post was that he had allegedly yelled at a Quaker who had refused to remove his hat in the courtroom. Cooper always thought that he had been unfairly treated in that he had never been permitted to explain himself before he was removed by the legislature. Perhaps this was his attempt to show he had no hostility to Quakers, only sympathy for their mistreatment by the law.

Cooper shared Bentham’s objections to three particular privileges: self-incrimination, lawyer-client, and marriage. All three discounted public utility in favor of the pecuniary interest of the legal profession. Moreover, all three defied the sensible best evidence rule. The privilege against self-incrimination was designed “to screen guilt, to give impunity to crime, to cherish fraud, and counteract, in the most effectual way, the

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<sup>17</sup> *Id.* at 396. Cooper was referring to Jefferson’s famous essay disproving, through an examination of English treatises and case law, that Christianity was part of the common law. *See* Thomas Jefferson, *Whether Christianity is a part of the Common Law?*, in *REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA* 137 (Thomas Jefferson ed., Charlottesville, 1829).

<sup>18</sup> Cooper, *supra* note 000, at 396.

real ends of public justice.”<sup>19</sup> Cooper also made allusion to Bentham’s fox-hunter analogy, in which he described the rule as one arising not out of sympathy with the accused, but in order to treat him like a “bag-fox; he will return, and we shall have our sport. Impunity of this kind created business.”<sup>20</sup> Cooper easily dismissed the lawyer-client privilege: “A contract between a rogue and his lawyer, to avoid the punishment of roguery, is no such a contract as need be treated with much respect.” Nevertheless, it was “a fruitful source of causes and fees.”<sup>21</sup>

It was his discussion of the marriage privilege that showed Cooper at his most eccentric. Well aware that the rationale of such a privilege was to keep the family peace, Cooper completely rationalized his way around this rule. First he noted that the marriage contract was entirely voluntary, and sometimes evils were attendant on such an undertaking. Second, there really was no rational reason for being angry with a spouse who was compelled by law to testify against the other. “Had it been voluntary, there might be some reason for anger; not where the disclosure is compulsive.” Finally, bringing the argument back to public utility, “If the witness be the wife of a rogue, is that a reason why his roguery against me should be concealed and protected?” Such a privilege was also dangerous because it meant that “an evil-doer” would potentially “have a perpetual confidant and accomplice in the bosom of his family, from whom no law can wring the secret of his delinquency.” If that were not frightening enough, the privilege would convert every family “into a nursery of unpunishable crime.” This in turn “intermingles hostility to the public with the marriage tie, and inculcates concealment and protection of crime and dishonesty, as a marriage duty.” Cooper got to the heart of the

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<sup>19</sup> *Id.* at 399.

<sup>20</sup> *Id.* at 400.

<sup>21</sup> *Id.* at 401.



matter when he concluded that the fundamentals of marriage had not been fully thought out. Had they been subjected to close scrutiny one would have concluded: “Surely, the proper ethics of the marriage contract are, that love, respect, confidence and attachment are due only where those qualities exist, which reasonably call for them.”<sup>22</sup>

While acknowledging that legislators and judges had too often deceived themselves “from the prejudice of legal education and long habit of thinking and acting in a legal routine,” Cooper thought parts of America less worthy of condemnation than in England. “In this country, and in our own State of South-Carolina, many glaring evils have been remedied or avoided; much has been well, because honestly done.” Unfortunately, the same praise could not be laid on all states of the Union. “But look at the present state of the law and its practice in New-York, and who will say that reform is not required?” Cooper did not say what exactly it was about New York that was so egregious, but he did mention that they needed to be reminded, “the criterion of the propriety of every public law and every public measure is, the good of society—public utility.”<sup>23</sup> Clearly, the South was more utilitarian than the North.<sup>24</sup> Always the democrat, however, Cooper thought that only “to the people must the people look for effectual reform.”<sup>25</sup>

Whenever the people got around to actually reforming the common law, Cooper had a suggestion to them: look to the civil law. The civil law was a science, while the common law was merely a trade. No man could read the Code Napoleon or Pothier

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<sup>22</sup> *Id.* at 402-04.

<sup>23</sup> *Id.* at 406-07.

<sup>24</sup> This claim would continue to be asserted throughout and after the Civil War as Southerners advanced the utility of a protective society over the disutility of the Northern individualistic, capitalist society.

<sup>25</sup> *Id.* at 411.

“without being wiser in the science of law.” Whereas under the “artificial technical system,” the common lawyer is trained “as a shoe-maker learns to make shoes: it has no tendency to enlarge the mind.”<sup>26</sup> The first step toward moving in the direction of a more scientific legal system was to simplify the existing law.

American common law was wrought with examples of its ostensible failures. The fundamental shortcoming of the common law was its looseness of principle, which allowed self-interested lawyers and judges to create mischief with the public’s business. For example, a legal novice in Pennsylvania in the company of his elders once remarked that it was the virtue of their state bench that “party spirit” never invaded judicial proceedings. According to Cooper, no one present could keep a straight face because of the manifest absurdity of the newcomer’s statement. Cooper—removed from the state bench for political reasons—knew well how partisans used the Pennsylvania legal system as a weapon in their political arsenal. But the federal courts were even starker examples of judicial opportunism. According to a *New York Evening Post* article that Cooper had recently read, the United States Supreme Court affirmed lower courts at a rate of only fifty-six percent. This proved that the common law was no better at providing predictability than a coin toss.<sup>27</sup>

The solution for the United States was to follow “the simple and natural code and practice of Louisiana; thanks to Edward Livingston.” Cooper urged for each state that a committee be appointed to collect the laws and list them under “separate heads and branches.” The legislature would then enact this code, with decennial revisions if necessary. “But the great reform is that adopted in Louisiana. Substitute a national

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<sup>26</sup> *Id.* at 413.

<sup>27</sup> *See id.* at 419.

[natural?] system in lieu of a technical system.”<sup>28</sup> The court systems as well should be streamlined, thought Cooper. He suggested only two separate courts, one for civil and the other for criminal matters, although he allowed for the possibility of a family court if those sorts of issues occupied too much of the civil courts’ time. Cooper also suggested reducing the number of jurors from the fetishistic twelve, which was fine for the number of months, zodiac signs, and apostles, but not particularly suited for achieving justice. Of course this was not all just a “wild dream,” “Have you been in a court in Louisiana lately?”<sup>29</sup>

Cooper carried forth his “wild dream” when he delivered his “Introductory Lecture to a Course of Law” at South Carolina College in 1834. The basic outline of his lecture was to begin with the origins of civil society, discuss the role of utility and lawmaking within a political community, and then move on to the actual state of the American legal system and suggest ways it could be improved. Cooper began with five principles that formed “the foundation of a whole system of Ethics,” principles “plainly founded upon the necessary character and constitution of human beings, met together in a community.” The first principle was the existence of a “Law of Nature” that sounded oddly Hobbesian. The second principle was the necessity of the institution of marriage, created to prevent “revenge and blood” that would otherwise occur without it. The third principle followed from the second, the parent-child relationship with its attendant obligations and duties. Fourth was the existence of obligations and contracts, without which there would be “a resort to the remedy of violence.” Finally, there was the owner-

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<sup>28</sup> I’m certain that “national” is a misprint, and that it should read “natural”. I’ve found this same error in the *South Carolina Statutes* as well. Perhaps his writing was difficult for printers to read; the error would be comical if the implications were not so extreme.

<sup>29</sup> *Id.* at 424-26.

slave, master-servant relationship, which originated from theories of a just war. These five principles presumed a natural default to a state of war, man against man, all against all. The first four also mirrored what in 1787 he had verged on calling, inalienable rights, which no government could legitimately claim to invade.<sup>30</sup>

Repeating his formulation from his 1787 “Foundation” essay, Cooper proclaimed that “in all communities of voluntary origin, the modern axiom is true: the polar star of morals and of law, is, *the greatest happiness of the greatest number.*”<sup>31</sup> It was only a wise legislature that could ably adopt laws in keeping with utility. And the only way to ensure a wise set of lawmakers, was to ensure a wise set of electors, which could only be achieved through a level of education that led to moral citizens. Only with regard to educated citizens would the sanctions of laws adequately act on their motives. Any man properly educated would consciously consider the good of the community at the expense of “his own temporary gratification.” However, this was far afield from a Benthamite legislative scheme that relied on no one’s selflessness, but instead depended on a constitutional code to help keep the governors in check.

According to Cooper a great civilization once existed, namely, “in the early days of Rome.” This was not a new idea for Cooper as he had published the first American version of the *Institutes of Justinian*, complete with his own notes, while still at Carlisle College in Pennsylvania in 1812. In his expository notes to that work he openly advocated codification in emulation of the Roman law, while realizing that this was the minority view in the United States. Presumably he was referring to Pennsylvania law in 1812, when he indicated that it would only take four years to accomplish this worthy

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<sup>30</sup> See THOMAS COOPER, *On the Foundation of Civil Government*, in TWO ESSAYS 5 (reprint Da Capo Press, New York, 1970) (1787)

<sup>31</sup> THOMAS COOPER, INTRODUCTORY LECTURE TO A COURSE OF LAW 7 (Columbia, SC, 1834)

goal.<sup>32</sup> However, he does not appear to have pursued the idea until the 1830s. Cooper's goal in his Law Lecture was to show how far the English common law was from Roman law and how this gap could be bridged.

As Cooper had alluded to in his review of Bentham on evidence, there was a great need for the simplification of American legal sources. Cooper figured (how is unclear) that a lawyer in the United States needed "350 to 400 volumes of American law" in order to practice competently. As usual, the South was ahead of the rest of the nation such that "Our South Carolina reports are cited by the lawyers of the middle States."<sup>33</sup> Nevertheless, Cooper feared that as society became more complex, the more difficult it would be to simplify the law if steps were not undertaken immediately.

The goal of simplification was to eventually make the common law case method obsolete. In order for law to be a science, one had to be able to "deduce general principles," which could only occur if the voluminous source material was compacted "into a few pages of settled maxims." "Like all other sciences, the science of Law will be simplified by a patient accumulation and review of separate facts, to deduce from their comparison the leading rule involved in each of them."<sup>34</sup>

The United States hardly had any examples to follow when it came to creating a science of law, largely because "British sources" had been so blindly adopted. There was one major exception: "Louisiana had a peculiar system of its own; perhaps the best in the United States; certainly worth more investigation than it has yet received."<sup>35</sup> In terms of legal literature, Cooper knew "of no book that [would] serve to direct him [the student]."

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<sup>32</sup> Cooper, JUSTINIAN, *supra* note 00, at 410.

<sup>33</sup> COOPER, LECTURE, *supra* note 00, at 11

<sup>34</sup> *Id.* at 12.

<sup>35</sup> *Id.* at 18.

Kent's Commentaries were good, "but that learned man is not, upon every point, to be relied on implicitly." Of course there was always Blackstone, but his "doctrines on politics and prerogative are so abhorrent from our republican principles, and so much of his book is filled with matter, worthless to the American student, that some other system had become desirable, for home use." Wilson's Lectures were out of the question: "Little is to be said in their praise, excepting that it is praise enough to have been the first in a laudable career."<sup>36</sup>

It is unclear what happened to Cooper's plan for his remaining law lectures, which were quite bold in scope. The goal was to create a legal system better understood by the many, where it could not be said, as it was now, "Common Law is one thing, common sense another."<sup>37</sup> "I shall endeavor, therefore, to treat Law as a branch of knowledge, in itself intrinsically of high value; and show that no plan of liberal education, for a legislator and a gentleman, can be complete without it." Cooper concluded his introductory lecture with the promise that the next topic would be political economy taught out of his own manual: "no lawyer in the country can permit himself to be ignorant of this absolutely indispensable portion of the elementary knowledge of a statesman."<sup>38</sup>

By 1836, Cooper was making headway in his efforts to reform South Carolina law when he was appointed by the state legislature to compile all the statute law of the state since 1682. There had been three attempts at compilation before, but none like the present, that is, "a plan sanctioned by public authority...formed and executed to collect,

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<sup>36</sup> *Id.* at 19-21.

<sup>37</sup> *Id.* at 22.

<sup>38</sup> *Id.* at 25-26.

revise or digest our written Laws.”<sup>39</sup> The best collection of laws was 100 years old, and still quite useful to Cooper. A 1790 collection had been too heavily edited, with the compiler deciding for himself which laws were good and which had been repealed or were obsolete. The most recent 1814 set of laws was only ever intended as a student’s manual, and therefore was quite unsatisfactory for the grand ambition of full-scale law reform. Cooper’s review of these earlier works led him to conclude: “Hence, I have carefully considered the wants of the profession and of the public in the respect, and have determined to submit to the Legislature, through the governor of the State, a publication that shall fulfil [sic] the idea of *the Statutes at Large*; and which shall serve as an adequate basis or platform for future operations by the Legislature, and more satisfactory decisions by the Courts.”<sup>40</sup>

In undertaking this project, Cooper was adamant about one thing in particular: it was “better to insert somewhat too much than somewhat too little.” This might seem counterintuitive for someone who was trying to simplify the law, but Cooper had his reasons. Including dated material of questionable validity would enable the present generation to learn from past mistakes and make progress toward more enlightened laws. This would also allow the people and the lawmakers to understand how old ways of reasoning had failed. Another reason why even repealed legislation should be included was that “rights” may have “vested” under old enactments, and courts would have an easier time doing justice with the statutes in front of them. But by far the most important reason for including even the kitchen sink, or in this case the Magna Charta, was because “although ministerial authority may be delegated, legislative authority cannot.” And

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<sup>39</sup> Thomas Cooper, *Preface to 1 STATUTES AT LARGE OF SOUTH CAROLINA* iii (Thomas Cooper ed., 1836).

<sup>40</sup> *Id.* at iv.

deciding what to include and what to omit was tantamount to saying what the law was and what it was not. This did not mean Cooper's work was opinion free: "I may (as I shall do) suggest that a law is obsolete, but I cannot leave it out, if it bears on the face of it, a public character."<sup>41</sup>

One of Cooper's charges from the legislature was to include an index with the statute books. Cooper envisioned this endeavor as "making up a full general Index of all the Laws of a public nature that have been enacted; arranged under appropriate heads, and comprising a digested summary or code of the Statute Law of the State as it stands." It is clear that this index was the first major step to convincing people of the benefits of a code of laws. "Indeed, the main object in view with many persons at the present time, is a full and accurate digested INDEX of all our statutory enactments—an Index that may serve as a Code and Manual of our Statute law, for popular use."<sup>42</sup>

One aspect of the compilation that appears to have troubled Cooper was that the arrangement began chronologically. It is unclear at this point why the main plan was so organized, but Cooper immediately asked permission to compose certain volumes by subject matter. The reason provided to the legislature for his request was that the proposed subjects were so frequently recurring that it would be inconvenient to have to consult different volumes while researching one topic. The legislature basically gave Cooper *carte blanche*, praising his efforts and providing him with assistants and money. Unfortunately Cooper only lived to publish four volumes through 1838 and never the subject-matter volumes, which were completed after his death according to his plan.

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<sup>41</sup> *Id.* at iv-vi.

<sup>42</sup> *Id.* at x-xi.



## II. David Hoffman: Tepid Utilitarian

David Hoffman was most recently singled out by Susanna Blumenthal as an example of an elite lawyer who “specially commended [the Common Sense] school of thought to those who aspired to join their ranks.”<sup>43</sup> Blumenthal’s evidence for Hoffman’s Scottish leanings was his listing of the works of Beattie and Reid under the first title of his *Course of Legal Study*. Charles Barzun, in a recent law review note,<sup>44</sup> also latched onto the same paragraph of Hoffman’s in which he says, “The essays of Reid, Locke, and Stewart, are inestimable to the student, who ... is ambitious to add the talents of profound and severe investigation, of just reasoning, and happy illustration.”<sup>45</sup> The problem is rather obvious, however, that Hoffman was not making the case for a morality founded on intuitive notions of common sense. Lumping Locke together with Reid and Stewart shows that Hoffman could not have been making any philosophical point, only a pedagogical one, namely, that the aspiring lawyer should be well read in competing theories of metaphysics. Hoffman regularly listed and discussed authors with whom he disagreed, most notably, Adam Smith, whose theory of sympathy Hoffman found “obnoxious to many powerful objections.”<sup>46</sup>

Hoffman did his best to present his *Course* as a liberal studies program, offering his students instruction on all sides of philosophical and political debates. We can, however, detect Hoffman’s own leanings by taking a broad view of the *Course*, noting which works he dwelled upon in the expository notes and by consulting his other

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<sup>43</sup> Susanna L. Blumenthal, *The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, 26 LAW & HIST. REV. 99, 122 (2008).

<sup>44</sup> Charles L. Barzun, Note, *Common Sense and Legal Science*, 90 VA. L. REV. 1051, 1077 n.123 (2004).

<sup>45</sup> DAVID HOFFMAN, COURSE OF LEGAL STUDY 111 (2d ed. Baltimore: Joseph Neal, 1836; reprint New York: Arno Press, 1972).

<sup>46</sup> HOFFMAN, COURSE, *supra* note 00, at 109.

writings, including those of a non-legal character. The *Course* was first published in 1817, with a second edition appearing in 1836. The “General Syllabus” of the *Course* contained thirteen titles, under which were listed numerous readings corresponding to the various subjects. There was also a listing of nine “Auxiliary Subjects,” which greatly expanded the student’s study. Close adherence to the *Course* would require six or seven years of full-time reading. While most of the major titles concerned traditional areas of legal study, such as equity, crimes, and constitutional law, they were sandwiched between “Moral and Political Philosophy” and “Political Economy”—the first and last titles respectively. Perhaps it was just coincidence that Hoffman entitled his first substantive section using the same name as Paley’s famous volume,<sup>47</sup> but perhaps not.

A most notable difference between the first and second editions of the *Course* is Hoffman’s significant expansion of his “note” on Paley.<sup>48</sup> What motivated the extended discussion of Paley were the critical reviews of Hoffman’s subsequent legal writings. This is how Hoffman began his new response to the critics: “The utility of moral philosophy, as a substantive branch of scientific study, has been questioned by some, under the objection that it has generated vain and subtle theories of moral obligation, and that natural reason, and moral sense are the surest and safest guides!”<sup>49</sup> Hoffman never mentions these critics by name, nor does he refer to where the criticisms appeared. Later on in the note he recalls “American critics” of his intervening *Legal Outlines*, who found fault because he had “intimately connected law, not only with ethics and the physical

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<sup>47</sup> See WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY (Liberty Fund, Inc. 2002) (1785).

<sup>48</sup> After listing the course readings for each title, Hoffman followed up with explanatory notes for some, but not all, of the works listed. For example, the notes on Beattie and Reid take no more than one page total. However, the 1836 note on Paley takes up four pages, expanded from the one page it occupied in the 1817 edition. See *id.* at 101-05. The only notes to the first title longer than that on Paley were those on the Bible and Aristotle’s Ethics.

<sup>49</sup> HOFFMAN, COURSE, *supra* note 00, at 101.

sciences, but with the higher branches of metaphysics, and the esoteric philosophy of politics, and of legislation.”<sup>50</sup> *Legal Outlines* was a series of written lectures based in large part on works contained in the *Course* syllabus, focusing particularly on the first title of Moral and Political Philosophy.<sup>51</sup> Of all of the reviews of the first edition of the *Course*, I have found none that could be considered, on the whole, negative. With regard to *Legal Outlines*, one review does fit Hoffman’s response—a critique that appeared in 1829 in the *Southern Review* written by Hugh S. Legaré.<sup>52</sup> Before turning to Legaré’s review, however, let us consider Hoffman’s defense of the value of moral theorizing to legal practice.

Unlike Legaré and Hoffman’s other critiques who questioned “the utility of moral philosophy,” Hoffman himself thought that theory was essential to good legal practice. He observed that in the U.S. “law is both *studied* and *practised*, far more liberally and scientifically than it is in England. It is there, as well as in France, much more an art—a trade—a mere profession, and a narrow vocation, than it is in our country.”<sup>53</sup> Hoffman contrasted law with medicine, the more inferior profession, and noted that “if the history of medicine be looked into, it will be found that scarce any theory, any remedy, any prophylactic given to the world, was ever, in the first instance, fairly, and dispassionately examined by the profession.”<sup>54</sup> The problem was that physicians “read too little, after they have obtained a goodly share of practice!”<sup>55</sup> Because of the centrality of

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<sup>50</sup> *Id.* at 104.

<sup>51</sup> See DAVID HOFFMAN, *LEGAL OUTLINES* (Baltimore, Edward J. Coale, 1829).

<sup>52</sup> Hugh S. Legaré, *Hoffman’s Legal Outlines*, 4 S. REV. 47 (1829).

<sup>53</sup> DAVID HOFFMAN, *MISCELLANEOUS THOUGHTS ON MEN, MANNERS, AND THINGS* 325 (Baltimore, Coale & Co., 1837).

<sup>54</sup> *Id.* at 330.

<sup>55</sup> *Id.* at 328.

intellectualism and liberal study to the profession of law, the rise of the utilitarians cause Hoffman some pause.

For Hoffman, a utilitarian was the opposite of a schoolman, most notably epitomized by Aquinas. The problem was this: “We know that learning, without judgment, characterized the schoolmen; and we apprehend that common sense, without learning, will very soon characterize the utilitarians—and both are extremes, equally to be avoided.”<sup>56</sup> Although Hoffman appreciated the utilitarian distaste for “idle knowledge, and the influence of mere *authority*,”<sup>57</sup> he feared that utilitarianism was moving too far in the opposite direction. The compression and democratization of knowledge that resulted from the intense “seeking after *practicalness*,” was becoming “a too visible feature in the researches of our utilitarians.”<sup>58</sup> All of Hoffman’s efforts in legal pedagogy aimed at preventing law from becoming both too esoteric and too practical. It was in this effort that Hoffman thought Bentham could prove useful.

While still justifying the value of Paley’s Moral Philosophy to law students, Hoffman observed: “[H]ow much mistaken is the idea entertained by many in this country, that the lawyer (whose province is reasoning,) can attain to eminence, though he restricts his inquiries within the visible boundaries of his peculiar science, chiefly as it is found in the treatises of municipal law.”<sup>59</sup> Hoffman viewed his *Legal Outlines* as a corrective to this “narrow view” of legal science. It is within the pages of this work that Hoffman most forcefully expresses his admiration for Bentham—an “extraordinary

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<sup>56</sup> DAVID HOFFMAN, VIATOR; OR, A PEEP INTO MY NOTE BOOK 75 (Baltimore, Plaskitt & Cugle, 1841).

<sup>57</sup> *Id.* at 75.

<sup>58</sup> *Id.* at 76-77.

<sup>59</sup> HOFFMAN, COURSE, *supra* note 00, at 104.

man.”<sup>60</sup> Hoffman admired many of Bentham’s works, singling out his Evidence, Theory of Punishments and Rewards, and his essays on codification. He thought, “How much the world is really indebted to the labours of this conscript father of legal reforms, is even yet but little known.”<sup>61</sup>

In *Legal Outlines*, Hoffman devoted six pages to an intellectual biography of Bentham, mostly excerpting an essay by William Hazlitt to paint this personal portrait.<sup>62</sup> The result was a legal philosopher both quixotic and sincere. Bentham was also listed as one of Hoffman’s thirteen modern thinkers “who have contributed largely to the improvement of political science.”<sup>63</sup> Not surprisingly, no Common Sense advocate was among the honored. Although Hoffman said of Bentham’s utility, “we have some faith in it, but think it has not been clearly and dispassionately set forth,”<sup>64</sup> he agreed entirely with legal reforms that resulted from that philosophical program. American law students and lawyers should be exposed to works that “are freely censorial, pointing out what the law of evidence, in many instances, *ought* to be, rather than what it really is.”<sup>65</sup> They should also understand the “philosophy of criminal legislation” as set out by Bentham.<sup>66</sup> Americans should also welcome, not fear, codification.

Hoffman’s enthusiasm for both Paley’s and Bentham’s theories and reform efforts was too much for Hugh Legaré, a South Carolinian who had studied law in Scotland before returning to the U.S. Legaré began his review of *Legal Outlines* by calling Hoffman’s work an “enormous mass of irrelevant matter which has been huddled

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<sup>60</sup> *Id.* at 437n.\*.

<sup>61</sup> *Id.* at 364.

<sup>62</sup> HOFFMAN, *LEGAL OUTLINES*, *supra* note 00, at 464-69.

<sup>63</sup> *Id.* at 604, app. I.

<sup>64</sup> HOFFMAN, *COURSE*, *supra* note 00, at 105.

<sup>65</sup> *Id.* at 362.

<sup>66</sup> *Id.* at 434.

together.”<sup>67</sup> He thought, “two thirds at least of the volume before us is liable to a mixed charge of irrelevancy and triteness.”<sup>68</sup> Demonstrating his penchant for sarcasm, while criticizing the diversity of topics, Legaré, wrote: “As far as utility—we use the word in its most comprehensive acceptation—is concerned, it would puzzle Jeremy Bentham himself to settle their comparative pretensions.”<sup>69</sup> Legaré’s “*beau idéal* of an elementary treatise in jurisprudence,” which balanced theory and practice, was “Bell’s Commentaries on the Laws of Scotland.”<sup>70</sup> In order to understand why Legaré’s review was actually a thoughtful piece taken seriously by Hoffman, we must know something more about Legaré’s own philosophical background. Unlike Hoffman, Legaré, a classicist by training, had actually studied law and philosophy at the University of Edinburgh, and openly embraced the work of Dugald Stewart. His critique of Bentham in the *Southern Review*—the same pages in which Cooper had praised Bentham’s Evidence—reveals the disparate treatment of utility by a true Stewart (common sense) partisan.

### III. Hugh S. Legaré: The Common Sense Romantic

In August 1831, Legaré reviewed the first American edition of Jeremy Bentham’s *Principles of Legislation*, which had been published the previous year in Boston. The work was the editorial product of John Neal, who can only be described as a man of moderate talents in both law and literature, prone to exaggeration, full of a sense of self-importance, and completely ignorant of his own limitations.<sup>71</sup> Neal, a native of Maine,

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<sup>67</sup> Legaré, *supra* note 00, at 47.

<sup>68</sup> *Id.* at 52.

<sup>69</sup> *Id.* at 53.

<sup>70</sup> *Id.* at 58.

<sup>71</sup> See JOHN NEAL, WANDERING RECOLLECTIONS OF A SOMEWHAT BUSY LIFE: AN AUTOBIOGRAPHY (Boston: Roberts Brothers, 1869).

had lived with Bentham for [a year] at Queens Square Place. That experience was enough for Neal to consider himself the most intimate friend of Bentham's then living, and to surmise, "probably no person alive knows more of the true character of Jeremy Bentham than I do."<sup>72</sup> That conceit and arrogance oozed from every page of Neal's introduction to Bentham's work, which comprised just over half the number of pages in the volume. Neal does deserve some credit for the work he actually did, which was to translate Etienne Dumont's French version of the work into English. Both halves of the publication came under Legaré's scrutiny in the *Southern Review*. What we learn is that Legaré did not suffer fools gladly, nor had he gained any more tolerance for political theory. We also get a glimpse at how his experience with the Edinburgh crowd influenced his understanding of Bentham.

It is difficult to appreciate Legaré's criticism of the work without understanding just how foolish Neal sounded. Throughout his biographical sketch, Neal constantly referred to Bentham as "Jeremy," with the clear intent that the readers not forget his intimate acquaintance with the philosopher. As a result, Legaré began doing the same in clear mockery of Neal. We learn from Neal's "uncouth jargon" that Bentham was afraid of ghosts, that he never left his house nor changed his bed sheets, and many other personal eccentricities that seemed highly out of place. As Legaré accurately noted of Neal's portrayal of Bentham, "it is difficult to conceive a more ridiculous figure than he makes him cut in his pages."<sup>73</sup> For example, Neal related Bentham's first, and last, foray into the practice of law at the English bar. Bentham had argued a cause citing precedent based on his extensive researches, all of which proved for naught because the cases had

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<sup>72</sup> Hugh Swinton Legaré, *Jeremy Bentham and the Utilitarians*, 7 S. REV. 261, 268 (1831) (review of *Principles of Legislation*, trans. John Neal).

<sup>73</sup> *Id.* at 261.

been overruled without being reported, or as Neal quotes Bentham, “the law had been altered without my knowledge or consent.” After this humiliating defeat, Bentham refused to practice law again. Legaré interpreted the incident as such: “for the man who was destined to reform the whole body of the law, does not seem to have been fitted to excel in the most important part of it, viz. the application of its principles to practice.”<sup>74</sup>

Legaré’s most recent biographer called him a “snob,”<sup>75</sup> and his review of Neal and Bentham might well provide support for that evaluation. The majority of the overwhelming sarcasm, however, is really reserved for Neal, whose pretensions earned no respect from Legaré. Characteristic of Legaré’s review is this observation: “It would be exacting too much of a biographer to require him to write the life of another, without occasionally alluding to his own, and Mr. Neal had, therefore, taken the liberty of detailing, with the greatest precision, all the circumstances which led to his acquaintance with Jeremy.” When Neal defended the circuitous route of the American edition of *Principles* from Bentham to French to English, Legaré was amused by the admission that “the only means of understanding many of the great Reformer’s speculations, is to read them in a foreign language.” The resulting precision from Bentham’s language, which Neal likewise defended, was also lost on Legaré: “The progress which the Philosopher had been gradually making in this corruption of style, is rather a singular phenomenon in itself, but it is not more strange than his biographer’s notion that it is to be explained by the tenderness of Mr. Bentham’s conscience.”<sup>76</sup> At this stage, we can already detect Legaré’s disgust for Neal’s hero-worship of Jeremy, the Reformer, and the

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<sup>74</sup> *Id.* at 263-64.

<sup>75</sup> Michael O’Brien, *Politics, Romanticism, and Hugh Legaré: “The Fondness of Disappointed Love”*, in *INTELLECTUAL LIFE IN ANTEBELLUM CHARLESTON* 125 (Michael O’Brien and David Moltke-Hansen eds., 1986).

<sup>76</sup> Legaré, *Jeremy Bentham and the Utilitarians*, *supra* note 00, at 266.



Philosopher. That sort of subservience was a clear sign of intellectual weakness, especially since Neal was more interested in the irrational parts of the man, rather than the logical ideas that made any study worthwhile.

When Legaré considered the substance of the *Principles of Legislation*, he acknowledged, “That Jeremy Bentham is a most vigorous and original thinker cannot be denied.” What Legaré could and did deny, however, was that Bentham’s utilitarianism was an attractive philosophy for life. In short, Legaré thought Bentham wasted too much time on his theory of language, that he was mistaken in turning moral philosophy into a science, and that his whole theory was impoverished by its lack of appreciation of nature as an unknowable force. In other words, Bentham did exactly what Legaré counseled against—he attempted to bring nature into the realm of legal theory. Although the results of Bentham’s utilitarianism were not disastrous like the state-of-nature philosophers, Benthamism was aesthetically unappealing.

Legaré’s interpretation of Bentham seems to have been influenced by his interaction with the folks at the *Edinburgh Review*. Dugald Stewart was away from Edinburgh the year Legaré was in residence, but it is clear from his writings that Stewart had a large impact on Legaré’s own theories. As John Dinwiddy has written, the Scottish philosophy of Stewart was dominant in the *Review* at that time, and his followers “had objections to utilitarianism as a general system of morality.”<sup>77</sup> As we will see, Legaré’s criticisms of Bentham also closely resemble those Thomas Carlyle published in the

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<sup>77</sup> J.R. DINWIDDY, *Early-Nineteenth-Century Reactions to Benthamism*, in *RADICALISM AND REFORM IN BRITAIN, 1780-1850*, at 354 (1992).

*Review*, in which he discussed utilitarianism's preference for "prudence rather than virtue."<sup>78</sup>

The first substantive criticism of Benthamism is Legaré's objection "to ethical *science*, strictly so called—to inquiries into the *principles* of morals."<sup>79</sup> Legaré assured his readers that he had no objection to ethical literature or art, just ethical science. Science, being entirely a human creation of much utility itself, had absolutely nothing to do with ethics or morals. The term "moral principles" had no meaning for Legaré because the realm of the moral was the realm of the natural, and therefore, unknowable to man, who was the sole inventor of principles. How did man come upon principles for legal and governmental conduct? Legaré's answer was through the study of history, from which one could detect what had worked and what had not. It is true that this assumed some sort of human nature that was unchanging, but that was not man's concern because it was not in man's control. Bentham, on the other hand, began with nature: "Nature has subjected man to the dominion of *pleasure* and *pain*. To them we are indebted for all our ideas. To them we refer all our opinions, and every judgment we give."<sup>80</sup> But Bentham did more than explain a phenomenon of nature, he laid down a rule of conduct, according to Legaré. Explaining nature was not problematic, it was what poets and artists did—it was a pleasurable experience. However, Legaré was unimpressed with Bentham's explanation: "We have searched in vain for any substantial addition which it has made to the previous stock of knowledge upon the subject—whether for theoretical or practical purposes." The theoretical aspect of utility, Legaré thought, was merely a repackaging of

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<sup>78</sup> *Id.* at 357.

<sup>79</sup> Legaré, *Jeremy Bentham and the Utilitarians*, *supra* note 00, at 280.

<sup>80</sup> JEREMY BENTHAM, *PRINCIPLES OF LEGISLATION* 196 (John Neal trans., Boston: Wells and Lilly, 1830).

the obvious. With regard to knowledge of human nature, Legaré's rhetorical questions best establish his feelings on the matter: "What can you tell a man of himself, which he has not over and over again experienced?...But what discovery is to be made in human nature, at this time of day? What nook had been left unexplored in the heart?—what *terra incognita* in the mind of man?"<sup>81</sup> In other words, if moral philosophy was a species of self-exploration, like literature and art, then Bentham was not particularly original or creative because he offered nothing new for one to contemplate about man-in-nature. What Bentham said about man-in-society, however, was slightly original, although rather derivative of the Epicureans, and definitely problematic.

The practical aspect of utility, Legaré thought utterly impractical; he characterized it as "the absurd affectation of mathematical exactness, in a matter which does not admit of it."<sup>82</sup> It was not Bentham's utilitarian foundation Legaré found problematic, it was "the *spirit* in which [the] doctrine [was] preached and the purposes and the character" of the preacher. Legaré understood pain and pleasure as human motivators but absolutely disagreed that they alone should guide conduct. Legaré committed the Edinburgh error of supposing that Bentham was advocating utility as a code of personal ethics rather than as a purely political theory. However, he had plenty of reservations about the political, social engineering, aspects of Benthamism as well.

The spirit in which Bentham reduced all human motivation to pain and pleasure was cynical, thought Legaré. Moreover, it was arrogant to think that one could explain the whole of nature in one sentence. This is how Legaré saw Bentham treating nature:

The presumptuous and reckless confidence which such views must needs inspire, is not the least pernicious of their effects. A thorough bred

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<sup>81</sup> Legaré, *Jeremy Bentham and the Utilitarians*, *supra* note 00, at 280.

<sup>82</sup> *Id.* at 283.

Utilitarian, or rather Benthamite, is never wrong.... Talk to him of the voice of nature or the instincts of the heart, he laughs outright at such childish and ridiculous superstition. To say that his sensibilities have been extirpated by the stern discipline of his school, is only to say that he is an Utilitarian—but a worse effect, if possible, of this discipline, is the inevitable extinction of that chastity of moral feeling, which has never sinned even in thought.<sup>83</sup>

Legaré was acknowledging that Benthamism, as a school of thought, could work, but at great cost. Most people did not realize that what they viewed as their own motivations for action—sympathy, desire to please God, parental duty—could be reformulated as nothing more than pursuit of one’s own pleasure. Legaré thought it was not a good idea to start getting people to think this way, because then one would lose the unconscious—perhaps natural and inexplicable—virtue that most non-utilitarians possessed. The result, Legaré thought, would be quite startling:

It is the boast of Jeremy, that by his version of the maxim just cited, he has exploded altogether, what he calls the system of sympathy and antipathy—that his disciples can very coolly argue propositions, of which the bare idea is revolting to people whose consciences are more nice than wise—and that, if his sect spread, civilized nations may not long have to envy savages the right of destroying their sickly children and superannuated parents, or Mr. Mill, jr. or Mr. Francis Place, or any other good Malthusian, boggle about teaching and practising infanticide as “the sovereignest remedy on earth” for a glut in population.<sup>84</sup>

For Legaré, there was something positively good about not analyzing and decomposing social and moral practices that had historically been shown to be longstanding or the result of progress.

In Legaré’s desire to preserve nature, rather than make it the mere handmaiden of man like Bentham would have, we see his romantic tendency in full force. Who else but a

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<sup>83</sup> *Id.* at 286.

<sup>84</sup> *Id.* at 294.

romantic would celebrate “the instinctive love which springs up in a mother’s bosom, as soon as she has an infant to press it for nourishment,” and at the same time shudder at the alternative notion that a mother would have “to work an algebraic equation of utility” before her love settled upon the child.<sup>85</sup> Such a scenario touched too close to home for Legaré to give the practice of utility a second thought. Legaré feared that had it not been for his mother’s natural “instinctive love,” a fatherless, crippled four-year-old might have produced a negative sum, especially when two healthy sisters and a failing plantation were added into the equation. But Legaré’s romanticism was not simply reactionary; it was well thought out.

Legaré’s romantic rationale was indebted to Hume’s theory on sentiment, in which he distinguished it from reason. “The origin of the *sentiment* is within, and its operation is what is commonly called instinctive or mechanical—and therefore not liable to the objection of explaining that by *reason*—which must be resolved into an original law of nature.”<sup>86</sup> Yet, for one who objected to Bentham’s dismissal of sentimental religion, Legaré analyzed the workings of the religious sentiment in a similar manner. The reason religion had been far more effective “than any scheme of philosophical teaching” in retaining adherents was because it “inspire[d] a certain degree of enthusiasm, a divine fervour of feeling, a holy intenseness of purpose.” Legaré was not religious himself, but he understood and shared the empty void religion filled. More importantly, he thoroughly enjoyed his religion-substitute, which was, first and foremost, classical studies, as well as literature and poetry. Cold, calculating machines were not completely human: “he who can look out upon the material world, as it lies before him in

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<sup>85</sup> *Id.* at 290.

<sup>86</sup> *Id.* at 291.

its grandeur and beauty, or read of the heroic doings of the mighty dead, without feeling his bosom warmed with that enthusiasm which is the soul of poetry, falls, so far, short of what man ought to be.” Legaré could not bring himself to cut man off from nature the way the utilitarians had. For Legaré, man would never be fully triumphant over nature. Nevertheless, man could, and should, compartmentalize the natural and social.

“What a difference is there between a cold compliance with the letter of the law...and the religious veneration, the fervid and holy love, the entire devotedness of soul which Sophocles has consecrated in the person of Antigone!”<sup>87</sup> Astonishing as it was to behold, it was a difference that had to be maintained. The reason was because sentiment was personal, whereas reason was public. Not everyone experienced nature the same way. In fact, the beauty of nature was the diverse reactions it inspired in man. Society, on the other hand, had to accommodate all persons. Law, therefore—the rules of society—had to be non-foundational, or, more precisely, law’s foundation had to be created from scratch with absolutely no illusion that law had to answer to anything more than human needs, which consisted of more than maximizing pleasure and minimizing pain, however natural that utilitarian formula might be.

#### **IV. Gulian C. Verplanck: A Paleyan Lawyer**

In this final section, I offer Gulian Verplanck as an example of a legal scholar influenced by Paley to such an extent that he applied his moral theory to suggest a fresh look at contract law in America in 1825.

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<sup>87</sup> *Id.* at 296.

Verplanck claimed that he was motivated to write his essay when he read the 1817 case of *Laidlaw v. Organ*,<sup>88</sup> and was troubled by the lack of “reasoning or authority” in Chief Justice John Marshall’s opinion.<sup>89</sup> The case arose out of a commercial contract for tobacco, transacted just as the War of 1812 was coming to a close. In preliminary negotiations, the vendor had agreed to sell to the vendee a certain quantity of tobacco at a certain price. On the morning the parties formalized the contract, the vendee got word that a peace treaty had been signed with Britain and thus the price of tobacco would thereafter increase 30-50%. The vendee remained silent about the information he had received and concluded the contract. The seller delivered the product but then confiscated it after delivery because of the news affecting the price. The vendee sued for the sequestration of the tobacco and enforcement of the contract. The vendor pleaded fraud in the inducement and asked the court to declare the contract void. The trial went against the vendor and the Supreme Court affirmed the principle that the vendee was not required to share his information with the vendor. All Marshall said in support of this conclusion was that the opposite principle would be difficult to limit in practice.<sup>90</sup>

Verplanck thought that most people’s gut reaction would be to view the decision as “somewhat revolting to their notions of sound morality.”<sup>91</sup> He claimed that he was concerned when the “untutored moral feeling” was at variance with the law.<sup>92</sup> There must be a way, thought Verplanck, to distinguish between “the fairest gains of industry and

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<sup>88</sup> 15 U.S. (2 Wheat.) 178 (1817).

<sup>89</sup> GULIAN C. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS, BY CONCEALMENT, ERROR, OR INADEQUATE PRICE 5 (Arno Press 1972) (1825) [hereinafter VERPLANCK, ESSAY].

<sup>90</sup> *Laidlaw*, 15 U.S. (2 Wheat.) at 195 (“It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.”).

<sup>91</sup> VERPLANCK, ESSAY, *supra* note 00, at 5.

<sup>92</sup> *Id.* at 7.

enterprise” and “the arts of deliberate knavery.”<sup>93</sup> Rather than attempting such a distinction, Marshall had based his decision “not so much on the ground of justice as of policy and convenience.”<sup>94</sup> For the same reasons of tradition and convenience the common law had embraced the doctrine of caveat emptor. What Verplanck set out to do in the *Essay* was to develop “a few fixed and broad rules, founded in nature, conscience, and reason.”<sup>95</sup> These rules would be “in unison with the great laws of universal jurisprudence; and not inconsistent with...a commercial country.”<sup>96</sup>

Various scholars have interpreted Verplanck’s stated concern about the “untutored moral feeling” to be an indication that he was invoking Common Sense philosophy in criticizing the *Laidlaw* case.<sup>97</sup> Indeed, taken out of context, one could mistake Verplanck’s phrasing as a critique of moral philosophy. However, considering the whole of the *Essay*, it is impossible to conclude that Verplanck rested moral obligation on untutored feelings. Instead, he followed Paley in countering those “who argue from innate moral principles” and in deducing the moral obligation to keep promises and perform contracts from “the necessity of such conduct to the well-being, or

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<sup>93</sup> *Id.* at 10.

<sup>94</sup> *Id.* at 12.

<sup>95</sup> *Id.* at 14.

<sup>96</sup> *Id.* at 15.

<sup>97</sup> See Barzun, *supra* note 00, at 1080-88, 1087 (claiming Verplanck derived contractual obligation from neither “ground of expedience nor on theories of political economy, but rather on a ‘common sense’ moral intuition); CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 60-61 (1993) (claiming Verplanck relied on “moral sense philosophy” in the same vein as Thomas Reid and James Wilson). Interestingly enough, unlike Barzun, Verplanck never uses the word “intuition” to describe “unstudied impressions” or “untutored feelings.” Moreover, while serving in Congress during the tariff and nullification crises, Verplanck urged settling the matter according to what was “just,” which he equated with what was “practical” and “prudent and expedient.” GULIAN C. VERPLANCK, A LETTER TO COL. WILLIAM DRAYTON, OF SOUTH-CAROLINA 30 (1831).



the existence indeed, of human society.”<sup>98</sup> Nor did Verplanck attempt to mask his extensive use of Paley, either in his *Essay* or in any of his other works.<sup>99</sup>

In the part of his Moral Philosophy that concerned “relative duties which are determinate,” Paley explained the morality of promise-keeping as arising out of social expectations. The interpersonal confidence that a promise entailed was “essential to the intercourse of human life.”<sup>100</sup> Paley further illustrated his point: “every hour of our lives, we trust to, and depend upon, others; and how impossible it is, to stir a step, or, what is worse, to sit still a moment, without such trust and dependence.”<sup>101</sup> So commonplace in human society was the practice of promise-keeping that its ubiquity created the moral obligation—or bound the conscience—to the point that the average member of society did not have to engage in any moral philosophizing to expect certain practices from his fellow man. But for Paley—and Verplanck—the untutored moral feeling that an individual should and would act a certain way arose from social organization, not from instinct, or rather, social expectations created social instincts. These same morally-based expectations also extended to the analysis of contracts of sale. Before we can see precisely how Verplanck used Paley to solve the problem in *Laidlaw*, we must first understand a small point of political economy.

History taught Verplanck that mankind progressed from “a very rude state of society” to a more “civilized life.”<sup>102</sup> A mark of an increasing civilization was the division of labor and the development of commerce. The result was that certain

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<sup>98</sup> WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 73 (Liberty Fund, Inc. 2002) (1785).

<sup>99</sup> Especially noteworthy is Verplanck’s first published work, which was modeled on Paley’s *Evidences of Christianity*. GUILIAN C. VERPLANCK, ESSAYS ON THE NATURE AND USES OF THE VARIOUS EVIDENCES OF REVEALED RELIGION (New York, J.W. Palmer & Co., 1824).

<sup>100</sup> PALEY, PMPP, *supra* note 000, at 74-75.

<sup>101</sup> *Id.* at 74.

<sup>102</sup> VERPLANCK, ESSAY, *supra* note 00, at 107, 110.

commodities, because of their frequency of bargain and sale, combined with demand, cost, and quality, developed a “market price.” Goods subject to a market price were those of domestic consumption and wholesale staples—goods that could not be described as “unique.” Associated with mass-produced goods were “common facts” that underlay the market price. Verplanck described these as: “those facts which necessarily, directly and materially, influence the estimate on which the market value is founded, and therefore enter, of course, into the calculations of all dealers of ordinary prudence, and acquaintance with the business.”<sup>103</sup> In other words, the common facts that determined the market price of a non-unique good were objective. The existence of an objective market price did not mean, however, that contracts for commodities were wholly objective; subjective views always entered into contracts. What an objective price did mean was that variance from the market price in a sales contract was “strong presumptive evidence” of error or fraud.<sup>104</sup>

Paley’s basic rule for the interpretation and enforcement of contracts was: “*Whatever is expected by one side, and known to be so expected by the other, is to be deemed a part or condition of the contract.*”<sup>105</sup> Regarding sales contracts, Paley added, “Where there exists no monopoly or combination, the market-price is always a fair price; because it will always be proportionable to the use and scarcity of the article.”<sup>106</sup> When combined, these two premises meant that a seller never had to apologize for selling a

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<sup>103</sup> *Id.* at 112.

<sup>104</sup> *Id.* at 116.

<sup>105</sup> PALEY, PMPP, *supra* note 00, at 85. Verplanck explicitly criticized the “too great latitude of this rule.” VERPLANCK, ESSAY, *supra* note 00, at 129. But his criticism was limited to its application to speculative contracts, and he thought that Paley “had the right view of the subject in mind, though imperfectly developed.” *Id.* at 131.

<sup>106</sup> PALEY, PMPP, *supra* note 00, at 86.

sound article at the market price and that a buyer had an implicit promise that goods sold at such a price were sound *and* that the price was in fact the market price.

Verplanck's next step was to prove that because the market price for the tobacco in *Laidlaw* was 30-50% higher than the contract price, the withholding of the peace-treaty information was tantamount to fraud. Political economy had completed its work and this next consideration was "the purely ethical part of the question."<sup>107</sup> Verplanck approached the matter by asking, "how far, and when, may a man, consistently with honesty, keep his superior knowledge [of common facts] to his own breast, and profit by mere silence, from the ignorance of others?"<sup>108</sup> His answer was "never," so long as "there is a confidence expressly or impliedly reposed in him that he will take no such advantage of it."<sup>109</sup> As existing legal examples of this sort of relationship, he pointed to a trustee, an executor, and a guardian. None of those legal actors could take advantage of the beneficiary, testator, or ward for his own benefit. These cases were analogous to what had occurred in *Laidlaw*, Verplanck thought, because there "the knowledge of the actual fact of peace, and the concealment of it, amount[ed] to the seizing an advantage, where the contract itself was formed upon the understanding that no such advantage would be taken."<sup>110</sup> Therefore, *Laidlaw* was a clear-cut case of fraud.

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<sup>107</sup> VERPLANCK, ESSAY, *supra* note 00, at 117. Verplanck was greatly aided in this conclusion, once again, by Paley: no writers on ethics or natural law "come so near the truth as Paley, and his remarks on many collateral points are shrewd and just." *Id.* at 129.

<sup>108</sup> *Id.* at 118.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 123-24. *Cf.* PALEY, *supra* note 00, at 90 ("but if I have access to secrets of state at home, or private advice of some decisive measure or event abroad, I cannot avail myself of these advantages with justice, because they are excluded by the contract, which proceeded upon the supposition that I had no such advantage.").

In contending that ordinary business transactions regularly proceeded under certain moral assumptions, Verplanck offered the following example:<sup>111</sup> suppose a man newly arrived in town purchases flour from the first shop he enters at eight dollars per barrel, unaware that the market price for flour in that town was actually four dollars. Even if no discussion of the price of the flour occurred in the course of the transaction, Verplanck thought the vendor must be considered, by the standards of morality, to have committed a fraud. This was because the vendee must have considered the market price—an objective fact—to be eight dollars; otherwise he would not have paid twice the price for an ordinary commodity. Additionally, the vendor's action of selling the flour at eight dollars was an implicit representation that that was the market price of flour. Therefore, in such a transaction, the buyer's implicit confidence that the seller would not take advantage of a common fact known only to the seller was breached.

It is remarkable how much of this material Verplanck borrowed from Paley. It seems all he did was extend this example of Paley's:

Whoever opens a shop, or in any manner exposes goods to public sale, virtually engages to deal with his customers at a market-price; because it is upon the faith and opinion of such an engagement, that any one comes within his shop-doors, or offers to treat with him. This is expected by the buyer; is known to be so expected by the seller; which is enough, according to the rule delivered above, to make it a part of the contract between them, though not a syllable be said about it. The breach of this implied contract constitutes the fraud inquired after.<sup>112</sup>

This example, copied by Verplanck, emphasizes that what was important for him in *Laidlaw* was the breached societal expectation, and not any deviance from some innate, untutored moral quality.

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<sup>111</sup> See VERPLANCK, ESSAY, *supra* note 00, at 116.

<sup>112</sup> PALEY, *supra* note 00, at 87.

Verplanck did not leave Paley simply to the speculative legal treatise; he also brought his *Moral Philosophy* with him on the bench. While serving on the New York Court for the Correction of Errors from 1838-1842, Verplanck employed “public utility” as the rule of decision in numerous cases, especially disputes involving commercial transactions.<sup>113</sup>

## V. Conclusion

Considering the work of Cooper, Hoffman, Legaré, and Verplanck demonstrates the range of utilitarian influence on American legal scholars in the early republic. From Cooper’s strong embrace of Bentham’s work on evidence and codification, to Hoffman’s mild appreciation of utility, to Verplanck’s application of public utility to contract law we can see the varied areas where Paley and Bentham had direct effects, namely, South Carolina’s statutory reform, legal education through Hoffman’s *Course*, and New York commercial law. Even Legaré thought enough of Bentham to feel that he had to respond in such a direct fashion. It seems clear that future attention to the intellectual undercurrents of early American jurisprudence must focus more attention on utility as a moral and political philosophy.

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<sup>113</sup> A fuller treatment of the cases is available from me in a longer paper devoted to Verplanck’s legal thought.