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## Scottish Common Sense and Nineteenth-Century American Law: A Critical Appraisal

JOHN MIKHAIL

One overriding concern I have with Susanna Blumenthal's insightful and stimulating article, "The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law,"<sup>1</sup> is whether there is anything sufficiently distinctive about Scottish Common Sense philosophy that justifies the role Blumenthal ascribes to it. In a representative passage, she writes:

Common Sense philosophy left would-be "moral managers" with a puzzle. If rational and moral faculties were innate and universal, what explained the great conflicts among men concerning matters of belief, manners, and morals . . . leading some to commit acts that were . . . patently irrational or downright evil? And to the extent that there *was* a common sense about the dictates of reason, propriety, and moral sense, why did some individuals act in defiance of them?<sup>2</sup>

These and similar questions that Blumenthal relies upon to frame and motivate her lucid analysis of the medical jurisprudence of the antebellum period are hardly unique to the philosophy of Reid, Beattie, Stewart, and Ferguson. Most classic British moralists would do just as well, including fellow Scots like Hutcheson, Hume, Smith, and Kames, along with prominent non-Scots like Shaftesbury, Clarke, Butler, and Price. Indeed, one could probably replace "Common Sense philosophy" in Blumenthal's

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1. Susanna Blumenthal, "The Mind of a Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law," *Law and History Review* 26 (2008): 99–159.

2. *Ibid.*, 118.

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formulation with something as diffuse as “The Enlightenment,” or even “Western jurisprudence,” without significantly altering its import, because the assumption that rational and moral faculties are innate and universal is common to most writers in these traditions. There are subtle differences among individual authors, of course, but most embrace the notion in one form or another, and their differences often trace to questions of nomenclature.

This is how Benjamin Rush saw the matter. In *An Enquiry into the Influence of Physical Causes Upon the Moral Faculty*, his 1786 address to the American Philosophical Society, Rush affirmed his belief in an innate moral faculty and observed: “St. Paul, and Cicero, give us the most perfect account of it that is to be found in modern or ancient authors.”<sup>3</sup> Rush then explained that this faculty

has received different names from different authors. It is the “moral sense” of Dr. Hutchison [sic]—the “sympathy” of Dr. Adam Smith—the “moral instinct” of Rousseau—and “the light that lighteth every man that cometh into the world” of St. John. I have adopted the term of moral faculty from Dr. Beattie, because I conceive it convey with the most perspicuity, the idea of a power in the mind, of choosing good and evil.<sup>4</sup>

John Adams expressed an analogous point of view in an 1814 letter to John Taylor: “Being men, they all have what Dr. Rush calls a *moral faculty*; Dr. Hutcheson a *moral sense*; and the Bible and the generality of the world, a *conscience*.”<sup>5</sup> One finds similar reflections in the Common Sense philosophers themselves, along with their leading American interpreters, such as John Witherspoon, James Wilson, David Hoffman, and James McCosh. All these writers used moral faculty, moral sense, and conscience interchangeably and located its antecedents in classical sources.<sup>6</sup> Finally, this is also how the era’s leading critics of the moral faculty, the Philosophical Radicals, understood the broad scope of their target. When Bentham delivered his blistering attack on those authors who had assumed the existence of such a faculty, he included not only Common Sense philosophers like

3. Benjamin Rush, “An Enquiry into the Influence of Physical Causes Upon the Moral Faculty,” in *Two Essays on the Mind*, ed. Eric T. Carlson (1786; New York: Brunner/Mazel, 1972), 1.

4. *Ibid.*, 3.

5. Adams, *Works*, 4:449; quoted in Morton White, *The Philosophy of the American Revolution* (New York: Oxford University Press, 1978), 97–98.

6. See, e.g., James Witherspoon, *Lectures on Moral Philosophy* (Philadelphia: William W. Woodward, 1822), 24; James Wilson, *The Works of James Wilson*, ed. Robert Green McCloskey (Cambridge: Belknap Press, 1967), 132–33; David Hoffman, *A Course of Legal Study* (Philadelphia, 1846), 106–7; James McCosh, *The Intuitions of the Mind Inductively Investigated* (1860), 286.

Beattie, but also Shaftesbury, Hutcheson, Hume, Price, and Clark, together with that “great multitude of people [who] are continuously talking of the Law of Nature.”<sup>7</sup> Likewise, Austin held that moral sense, common sense, moral instinct, and conscience “are but equivalent expressions for one and the same hypothesis,”<sup>8</sup> and he claimed with some justification that both the *jus gentium* and *mala in se/mala prohibita* distinction depended on it.<sup>9</sup>

Belief in an innate moral faculty, therefore, is not a particularly distinctive feature of Scottish Common Sense philosophy. Nor is the assumption that individuals are metaphysically free, that is, capable in some sense of choosing their own actions. Blumenthal dwells upon Reid’s affirmation of moral liberty, but, again, the same view is held by most of his predecessors. Rather, what set Reid and his followers apart is what Perry Miller aptly called “Scottish Realism,” a philosophical thesis about the ability of the human mind to apprehend the physical world and its objects. Reid thought Hume’s epistemology was valid but unsound—“not only coherent in all its parts, but justly deduced from principles commonly received among philosophers,”<sup>10</sup> as Reid wrote to Hume in 1763. Hence it was necessary to question the Lockean principles on which it was founded or to admit Hume’s skeptical conclusions, however destructive the latter were to science, religion, or the common affairs of mankind. Once Locke’s way of ideas was rejected, however, the path was open to reassert the traditional faculty psychology of the schools and to render it into simple, comprehensible English, free of philosophical jargon. All this was immensely appealing to early American educators like Francis Wayland, Francis Bowen, Mark Hopkins, and Noah Porter, because it allowed them to pass over the beguiling complexities of eighteenth-century metaphysics and get on with the task of forging a new national ethic, rooted in comfortable biblical certitudes.<sup>11</sup> Wayland’s *Elements of Moral Science*, for instance, one of the most popular and influential textbooks of the period, conveniently avoids

7. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart (1780/1789; Oxford: Oxford University Press, 1996), 26, note d.

8. John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (1832; Cambridge: Cambridge University Press, 1995), 81.

9. *Ibid.*, 92. On Bentham’s and Austin’s rejection of the moral sense hypothesis, see generally John Mikhail, “‘Plucking the Mask of Mystery from Its Face’: Jurisprudence and H. L. A. Hart,” *Georgetown Law Journal* 95 (2007): 733.

10. Letter of Thomas Reid to David Hume (18 March 1763), in Thomas Reid, *An Inquiry into the Human Mind on the Principles of Common Sense*, ed. Derek R. Brookes (1764; Edinburgh: Edinburgh University Press, 1997), 264.

11. See generally D. H. Meyer, *The Instructed Conscience: The Shaping of the American National Ethic* (Philadelphia: University of Pennsylvania Press, 1972). See also Mark Warren Bailey, *Guardians of the Moral Order: The Legal Philosophy of the Supreme Court, 1860–1910* (DeKalb: Northern Illinois University Press, 2004), 24–84.

the problem of perceptual acquaintance that preoccupied Reid in favor of an uncomplicated synthesis of Christian theology, faculty psychology, and natural law.<sup>12</sup> (“I am built railroad fashion,” Wayland once remarked. “I can go forwards, and, if necessary, back; but I can’t go sideways.”<sup>13</sup>) Common Sense proved ideologically useful, then, not so much because it reaffirmed the existence of conscience and free will in the new scientific age initiated by Locke and Newton—previous writers like Butler and Hutcheson had already done this much—but because it made certain knotty epistemological problems disappear. As Miller put it, Reid’s philosophy “contradicted Hume’s skepticism by a blanket assertion that idea and object correspond so faithfully that Americans, intent upon their business, need never give a second thought to so unprofitable a worry.”<sup>14</sup>

In light of these observations, I am inclined to think that the problems of responsibility on which Blumenthal focuses our attention are not specific to Scottish Common Sense, but rather descend straight from the core of the Western legal and moral tradition. The same problems would arise if Common Sense philosophy had never existed. Blumenthal’s own skillful and illuminating exposition of mid-century medical writers like Isaac Ray reinforces this conclusion. Although she initially suggests that the brunt of their criticisms was directed at the Common Sense model of moral agency, she later confirms that their ultimate targets were common law doctrines laid down by Coke and Hale, specifically Coke’s classification of persons *non compos mentis* and Hale’s total deprivation of reason test.<sup>15</sup> American jurists who adopted these doctrines can hardly be said to have relied too heavily upon the Scots in developing their own law of insanity.

More generally, even if it is true that Scottish Common Sense exerted a powerful influence on American academic life in the antebellum period, it still must be shown that this influence extended to specific features or practices of American *law*, which after all remained at the time almost entirely the product of English common law. Has Blumenthal met this

12. See Francis Wayland, *The Elements of Moral Science* (1835; Cambridge: Belknap Press, 1963).

13. J. Lewis Diman, “The Late President Wayland,” *Atlantic Monthly* 21 (1868): 72; quoted in Joseph L. Blau, “Introduction,” in Wayland, *Elements of Moral Science*, ix. Wayland did eventually treat the topic of perceptual acquaintance in his *Elements of Intellectual Philosophy* (1854).

14. Perry Miller, “Introduction,” in *American Thought: Civil War to World War I*, ed. Perry Miller (New York: Rinehart, 1954), x. For a useful introduction to the problems of epistemology and sense perception that occupied Locke, Hume, and Reid, see generally John W. Yolton, *John Locke and the Way of Ideas* (Oxford: Oxford University Press, 1956); John W. Yolton, *Perceptual Acquaintance from Descartes to Reid* (Minneapolis: University of Minnesota Press, 1984).

15. See, e.g., Blumenthal, “Mind of a Moral Agent,” 129, 140.

burden? I am inclined to think she has not. We are not referred to any specific doctrines or judicial opinions, for example, that might support the conclusion that early American jurists “were steeped in the Common Sense philosophy”<sup>16</sup> or sought to construct “an indigenous legal tradition, built on the universalistic premises of Common Sense.”<sup>17</sup> Rather, Blumenthal’s defense of this interesting claim is highly selective, resting mainly on the writings of Wilson and Hoffman.

In Wilson’s case, there is little doubt that he was immersed in Scottish philosophy and was drawn to the writings of Reid in particular.<sup>18</sup> Yet he was also a child of the Enlightenment, broadly construed, and he drew from a wide range of sources to fashion his own idiosyncratic interpretations of jurisprudence and common law. Wilson was also arguably an outlier in the new republic, a juristic visionary whose ideas were far ahead of his time, as Robert McCloskey has persuasively argued.<sup>19</sup> Hence one should not assume that his philosophical beliefs accurately reflected those of his contemporaries. When Wilson stood at the Federal Convention and ventured to affirm that his preferred method for selecting the Executive was “an election by the people,”<sup>20</sup> he certainly could be regarded as building on the universalistic premises of Common Sense. But how many of Wilson’s colleagues agreed with him? Even George Mason balked at Wilson’s proposal, comparing it to giving “a trial of colours to a blind man.”<sup>21</sup> Likewise, when Wilson explained that “he could not agree that property was the sole or the primary object of Government and Society” because “cultivation and improvement of the human mind was the most noble object,”<sup>22</sup> he not only distilled the essence of the Scottish Enlightenment, but anticipated by some seventy odd years the similar view expressed by Mill in the epigram of *On Liberty*.<sup>23</sup> But one is hard pressed to find an idea as radical as Wilson’s

16. *Ibid.*, 119.

17. *Ibid.*, 120.

18. See, e.g., Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1798* (Columbia: University of Missouri Press, 1997); Shannon C. Stimson, “‘A Jury of the Country’: Common Sense Philosophy and the Jurisprudence of James Wilson,” in *Scotland and America in the Age of Enlightenment*, ed. Richard B. Sher and Jeffrey R. Smitten (Edinburgh: Edinburgh University Press, 1990), 193. Wilson’s most famous judicial opinion begins by quoting Reid. See *Chisholm v. Georgia*, 2 U.S. 419, 453 (1793) (Wilson, J.) (quoting Reid, *An Inquiry into the Human Mind*, 14).

19. See generally McCloskey, “Introduction,” in *Works of James Wilson*.

20. *The Records of the Federal Convention of 1787*, ed. Max Farrand (1911; New Haven: Yale University Press, 1966), 1:68.

21. *Ibid.*, 2:31.

22. *Ibid.*, 1:605.

23. “The grand, leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity.” John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (1859; Indianapolis:

elsewhere at the Convention, which sounds less like the received picture of the framers given to us by Progressive historians like Beard than it does the stated aim of the National Lawyers Guild: "that human rights shall be regarded as more sacred than property interests."<sup>24</sup>

All this suggests that one should be cautious before taking Wilson to be a typical jurist of his era or resting controversial generalizations on him. As for Hoffman, the case for finding an extensive debt to Common Sense in his writings seems plausible, but also somewhat equivocal. Reid and Beattie do occupy an important place in the introductory syllabus on moral and political philosophy in Hoffman's widely read *Course of Legal Study*. Yet the attention paid to them in his Notes is far outweighed by that given to others, including (in Hoffman's order of presentation) Cicero, Seneca, Aristotle, Paley, Smith, Burlamaqui, Rutherford, Montesquieu, and Grotius.<sup>25</sup> Moreover, the syllabus itself, which Hoffman clearly regarded as merely preparatory, is only the first of thirteen titles, the remainder of which focus on technical details of the law itself, rather than its metaphysical underpinnings. Admittedly, Hoffman's *Legal Outlines* may present a somewhat stronger case of Scottish influence. Even so, the same types of question one encounters with Wilson inevitably arise with Hoffman as well: how representative was his embrace of Common Sense, and what impact, if any, did it have on the day-to-day practice of lawyers and judges in the new republic? Again, these questions can be reframed as a skeptical challenge to Blumenthal's thesis: If the basic model of moral agency on which early American jurists relied can be found in Coke, Hale, and Blackstone, then to what extent was the problem of legal responsibility materially altered by Reid and his followers?

Consider finally a central premise of Blumenthal's argument: that the Scottish philosophers' model of a moral agent implied certain paradoxical

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Hackett, 1978), xxiv (quoting Wilhelm von Humboldt, *Sphere and Duties of Government* [1794; London, 1856]), 65.

24. See *The National Lawyers Guild: From Roosevelt to Reagan*, ed. Ann Fagan Ginger and Eugene M. Tobin (Philadelphia: Temple University Press, 1987).

25. See generally Hoffman, *Course of Legal Study*, 53–131. It is unclear how one should assess the fact that Reid and Beattie, along with the Bible, Cicero, Paley, and Hoffman's own *Legal Outlines* (1829), are included in the shortest of Hoffman's four courses of study. Howard Schweber contends that this division "reveals Hoffman's ranking of core, secondary, and tertiary texts in the presentation of his philosophy of legal science." Howard Schweber, "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education," *Law and History Review* 17 (1999): 421, 438. If this is correct, then it certainly lends weight to Blumenthal's claim that Hoffman specially commended the Common Sense school to aspiring lawyers. However, another possibility worth considering, which seems more consistent with Hoffman's own explanation of his distinct courses of study, is that they comprise introductory, intermediate, and advanced readings for students of different appetites and abilities. On this interpretation, Blumenthal's claim seems less convincing.

conclusions about legal responsibility, which later generations of American lawyers were forced to confront. Blumenthal evidently thinks there is something paradoxical or puzzling from a Common Sense perspective about the diversity of moral opinion, or the existence of irrational or evil actors, or the fact that individuals often act in defiance of the dictates of their moral sense.<sup>26</sup> “Having cast their lot with the Common Sense philosophers in the ‘formative era’ of American law,” she writes, “early republican jurists thus bequeathed to future generations of lawyers a problem of responsibility of no small proportions.”<sup>27</sup>

But what exactly is the paradox, and why should Common Sense adherents be troubled by it? Locke had made objections like these familiar as a result of his attack on innate practical principles in his *Essay Concerning Human Understanding*. Yet, already by the start of the eighteenth century, critics had rejected Locke’s arguments as based on mere confusion and fallacy. For a moral principle to be innate in Locke’s sense, it must be both operative at birth and consciously accessible. It must also command universal assent and determine uniquely the course of one’s actual behavior, even in the face of countervailing inclinations.<sup>28</sup> It is difficult to find a figure in the history of philosophy who affirms innate moral knowledge in *that* sense, which is why many observers came to agree with Shaftesbury that “innate is a word Mr. Locke poorly plays on.”<sup>29</sup>

Thereafter, British moralists often elaborated their theory of the moral faculty in a manner that responded directly to Locke’s criticisms. For instance, they argued that the concept of innateness was properly used in a dispositional sense to refer to cognitive capacities whose essential properties are determined by the mind’s inherent structure, but whose normal development takes time and must involve processes of growth and maturation.<sup>30</sup> They observed that the moral faculty’s operative principles need not be open to introspection, comparing moral cognition in this respect to “hearing, voluntary motion, digestion, and other natural actions.”<sup>31</sup> They took aim at Locke’s argument from diversity, arguing that, far from establishing the truth of moral relativism, the anthropological record implied a striking

26. See, e.g., Blumenthal, “Mind of a Moral Agent,” 118.

27. *Ibid.*, 158.

28. See generally John Locke, *An Essay Concerning Human Understanding*, ed. Alexander Campbell Fraser (1689; Oxford: Clarendon Press, 1894), bk. 1, ch. 2, §§ 1–27, 64–91.

29. Quoted in Alexander Campbell Fraser, “Introduction,” in *ibid.*, lxxii.

30. See, e.g., Francis Hutcheson, *An Inquiry into the Original of our Ideas of Beauty and Virtue* (London, 1725), “Preface”; Thomas Reid, *Essays on the Active Powers of the Human Mind*, ed. Baruch Brody (1788; Cambridge: MIT Press, 1969), 246–47.

31. Francis Hutcheson, *Illustrations on the Moral Sense*, ed. Bernard Peach (1728; Cambridge: Belknap Press, 1971), 106.



uniformity in basic human values, once proper allowances are made for the different circumstances in which human beings find themselves.<sup>32</sup> Perhaps most importantly, they emphasized the distinction between intuitive moral perception and actual conduct, taking the latter, but not the former, to depend upon free will and voluntary choice.<sup>33</sup> All of these arguments enabled antebellum academics like Wayland to dismiss the puzzles that Blumenthal identifies rather easily, albeit not always convincingly.<sup>34</sup>

Finally, a key point that Blumenthal neglects, as does John Witt in his elegant chapter on Wilson,<sup>35</sup> is that Common Sense philosophers also supplied positive scientific arguments for innate knowledge, based on observation and induction rather than introspection, whose intellectual worth has proved remarkably durable. Consider, for example, the following perceptive remark by Adam Ferguson:

The peasant, or the child, can reason, and judge, and speak his language, with a discernment, a consistency, and a regard to analogy, which perplex the logician, the moralist, and the grammarian, when they would find the principle upon which the proceeding is founded, or when they would bring to general rules, what is so familiar, and so well sustained in particular cases.<sup>36</sup>

This penetrating observation goes straight to the heart of modern cognitive science, one of the major intellectual developments of our time, which is still trying to solve the puzzles Ferguson describes.<sup>37</sup> It also forms the basis

32. See, e.g., David Hume, *An Enquiry Concerning Human Understanding*, reprinted in *The Scottish Moralists: On Human Nature and Society*, ed. Louis Schneider (Chicago: University of Chicago Press, 1967), 44–51; Adam Smith, *A Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie (1759; Oxford: Oxford University Press, 1976), 200–211; Dugald Stewart, *Of the Moral Faculty*, in *Scottish Moralists*, 53, 58.

33. See, e.g., Francis Hutcheson, *A System of Moral Philosophy* (Glasgow and London, 1755), bk. I, 91–93, reprinted in *Scottish Moralists*, 41–43; Reid, *Active Powers*, 253–66.

34. See, e.g., Wayland, *Moral Science*, 45–46. (“It is not pretended by the believers in a moral sense that man may not, after all, do as he chooses. All that they contend for is that he is constituted with such a faculty and that the possession of it is necessary to his moral accountability. It is in his power to obey it or to disobey it, just as he pleases. The fact that a man may obey or disobey conscience no more proves that it does not exist than the fact that he sometimes does and sometimes does not obey passion proves that he is destitute of passion.”)

35. See John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Harvard: Harvard University Press, 2007), 15–82.

36. Adam Ferguson, *An Essay on the History of Civil Society*, ed. Duncan Forbes (1767; Edinburgh: Edinburgh University Press, 1966), 34.

37. Indeed, linguists often describe the problem of language acquisition in terms strikingly reminiscent of Ferguson:

Here is what makes the child's acquisition of language even more remarkable. Thousands of linguists throughout the world have been trying for decades to figure out the principles

of much recent work in the psychology of moral judgment, currently one of the liveliest topics in the cognitive and brain sciences.<sup>38</sup> We risk seriously misunderstanding Scottish Common Sense and its place in the history of ideas if we overlook contributions like these, or remain satisfied to think of it merely as an unduly optimistic philosophy, which relied mainly on introspection to affirm the innate goodness of humankind, but which gave way to a more accurate theory of human nature as the nineteenth century unfolded. Certainly there is some truth to this description, but it is only part of the story, and a potentially misleading one.

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behind the grammatical patterns of various languages, the very same grammatical patterns that children acquire unconsciously. But any linguist will tell you that we are nowhere near a complete account of the mental grammar for any language. In other words, the entire community of highly trained professionals, bringing to bear years of conscious attention and sharing of information, has been unable to duplicate the feat that every normal child accomplishes by the age of ten or so, unconsciously and unaided.

Ray Jackendoff, *Patterns in the Mind: Language and Human Nature* (New York: Basic Books, 1994), 26.

38. See, e.g., Joshua Greene, "Cognitive Neuroscience and the Structure of the Moral Mind," in *The Innate Mind: Structure and Contents*, ed. Peter Carruthers, Stephen Laurence, and Stephen Stich (New York: Oxford University Press, 2005), 338; Matthias Mahlmann, "Ethics, Law, and the Challenge of Cognitive Science," *German Law Journal* 8 (2007): 577; John Mikhail, "Universal Moral Grammar: Theory, Evidence, and the Future," *Trends in Cognitive Sciences* 11 (2007): 143; Shaun Nichols, "Innateness and Moral Psychology," in *The Innate Mind*, 353; Rebecca Saxe, "Do the Right Thing: Cognitive Science's Search for a Common Morality," *Boston Review* (Sept.–Oct. 2005), 33.