NOTES

COMMON SENSE AND LEGAL SCIENCE

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INTRODUCTION

> SCI'ENCE, *n*.
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> 1. In a general sense, knowledge . . . the comprehension or understanding of truth or facts by the mind. . . .
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> 2. In philosophy, a collection of the general principles or leading truths relating to any subject.
>
> – Webster's Dictionary (1828)[1]

THE notion that law can be reduced to a science that yields truths as certain and universal as those of the physical sciences seems so implausible that efforts to characterize law in that way tend to strike most modern readers as either naïve or dogmatic. Because nineteenth-century American legal theorists did describe law as a science, some modern scholars have interpreted nineteenth-century "legal science" as an attempt by a legal elite to obscure the inherently political nature of legal doctrine. Other scholars have defended the ability of legal reasoning to yield necessary and certain conclusions, but both groups of scholars assume that achieving legal certainty was the goal of legal science and disagree only as to whether such a goal was intellectually justified. This Note will challenge that assumption by suggesting that many nineteenth-century legal theorists aspired to transform law into a science not simply because they desired legal certainty, but because they desired legal knowledge. These theorists conceived of themselves as legal scientists because they believed they could discover legal principles through the same inductive, empirical methods that yielded discoveries in the natural sciences.

Most historical accounts of nineteenth-century American legal science can be roughly categorized as either "externalist" or "internalist" in their interpretive approach. On the one hand, externalist accounts look beyond the law itself and argue that jurists and legal theorists sought to characterize law as a science in order to establish its study as an independent academic discipline and its practice as an esteemed profession. In doing so, such jurists elevated

[1] Noah Webster's American Dictionary of the English Language (San Francisco, Foundation for American Christian Education 1828) (emphasis omitted).

their own social and professional status as the law's best expositors and authorities.[2] One of the best known accounts of this kind can be found in Professor Morton Horwitz's landmark study *The Transformation of American Law 1780-1860*, in which the development of legal science is explained as part of a conservative attempt to frustrate any doctrinal change that might have had redistributive effects.[3]

Professor Horwitz argues that by the end of the eighteenth century, legal thinkers had already begun to abandon the idea that judges simply "found" law, and to acknowledge that the role of judges was little different from that of legislators.[4] Once freed from metaphysical constraints, he argues, judges embraced their role as policymakers and started enacting economic and social policy through court decisions that benefited the emerging commercial class as well as the jurists themselves.[5] When they eventually succeeded in recasting private law doctrine to serve their own interests, these jurists froze the doctrine and reverted to legal formalism. According to Professor Horwitz, this return to formalism occurred at roughly mid-nineteenth century.[6]

The rise of legal science among nineteenth-century treatise writers, then, can be best understood as part of the legal profession's effort to legitimize both the doctrines themselves and the treatise writers' roles as objective or neutral interpreters of the law.[7] Professor Horwitz explains that though there were "major advantages in creating an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable,"[8] in the end "[e]xcept for the identification of 'science' with systematization and classification . . . there is no coherent content or methodology to be found in these persistent claims to the scientific

[2] See, e.g., G. Edward White, The Marshall Court and Cultural Change 1815–1835, at 144–45 (Oxford Univ. Press abr. ed. 1991) (1988) (arguing that in describing law as a science, the nineteenth-century legal commentators enhanced their own status and power as the authoritative interpreters of the law).

[3] Morton J. Horwitz, The Transformation of American Law 1780–1860 (1977).

[4] Id. at 14–15.

[5] Id. at 253–54.

[6] Id.

[7] Id. at 253.

[8] Id. at 254.

character of law."[9] His account suggests that the development of legal science was motivated by a desire to mask the inherently political nature of legal doctrine.

Internalist accounts, on the other hand, emphasize the endurance of specific forms of legal reasoning over time and suggest that such endurance owes to the law's intellectual integrity. An example is Professor M.H. Hoeflich's *Law & Geometry: Legal Science from Leibniz to Langdell*.[10] Professor Hoeflich begins his article with a quotation that illuminates his purpose: '"It should not be forgotten that law has an intellectual as well as a social history.'"[11] He also makes it clear that the content of this intellectual history consists primarily in one specific form of reasoning. He explains that the dominant pre-Langdellian, legal-scientific model was "deductive" and "based upon mathematical method."[12] He continues, "[I]t is the notion that legal reasoning is syllogistic; that law is, like geometry, a deductive science."[13]

Both types of accounts, then, share the assumption that by describing law as a "science," legal theorists sought above all to characterize legal rules as mathematically derived and therefore necessary.[14] They disagree only over the extent to which the sought-after certainty ultimately masked political choices. Framed in this way, the internalist account seems woefully deficient, largely because one cannot derive first principles through syllogistic, "geometric" reasoning. Instead, performing a syllogism always requires stipulating a major premise. Therefore, without any account of how the legal scientist might coherently derive first principles, the externalists' claim that doctrinal developments are best explained as the result of bare political forces appears fairly plausible. That is, even

[9] Id. at 257.

[10] M.H. Hoeflich, Law & Geometry: Legal Science from Leibniz to Langdell, 30 Am. J. Legal Hist. 95 (1986).

[11] Id. at 95 (quoting J.H. Baker, English Law and the Renaissance, 44 Cambridge L.J. 46, 47 (1985)).

[12] Id. at 96.

[13] Id.

[14] For one of the earliest indictments of legal science as a quest for certainty, see Jerome Frank, Law and the Modern Mind 95–96 (1930) ("The emphasis in legal science was the exact reverse of that in natural science: it was not on observation of the particular but on the attainment of universals which were above and independent of experience. Not novelty, but fixity, was the goal. . . . With the lawyers, the reign of Reason became a new Absolutism.").

if legal science had more methodological coherence than Professor Horwitz attributes to it, if it consisted merely in the strict adherence to syllogistic reasoning, as Professor Hoeflich argues, Professor Horwitz's central thesis remains intact: Only when judges and theorists had crafted legal rules that benefited them directly did they begin to concern themselves with ensuring their "scientific" (that is, rigidly formalist) application.

This Note will offer a quite different internalist account of legal science. It will suggest nineteenth-century legal theorists believed legal science could indeed enable them to derive first principles. Though most treatments of legal science have focused on the legal theorists' reverence for the certainty that deductive reasoning yields, such deductive rationalism was only one of its elements. There was also a strand of legal science whose essential feature was not syllogistic reasoning, but rather empirical observation and careful inductive reasoning. This Note denies neither that political and economic interests contributed to the rise of legal science nor that many legal formalists praised the scientific nature of legal analysis for its ability to yield deductively certain conclusions. Rather, its aim is to suggest that the understanding of this period of American law can be enriched if some of the intellectual dilemmas such legal theorists faced are better understood. In particular, this Note will suggest that the rise of legal science cannot be fully understood unless it is seen at least in part as a response to a genuine epistemological crisis that had cast doubt on humans' ability to acquire knowledge about the world. In developing an "inductive" strand of legal science, many theorists were earnestly building a new way of thinking about legal rules, one that drew on a particular group of highly influential Scottish philosophers. These theorists believed that they could discover natural legal principles just as Newton had discovered the laws of nature.

This Note will consist of five parts. Part I will distinguish between what I call the deductive and inductive strands of legal science and will suggest that the latter strand has been neglected or too quickly dismissed by modern scholars. Part II will offer a brief account of the epistemological crisis out of which the inductive strand grew and the response to it put forth by the Common Sense (or Realist) school of philosophers. This will require tracing the debates over the foundations of human knowledge, beginning in

the seventeenth century with René Descartes and concluding with Thomas Reid and his student Dugald Stewart in the late eighteenth and early nineteenth centuries. Part III will review the literature that has shown the influence of the Scottish Common Sense school, led by Reid, on American social and political thought. It will then suggest that this school also directly influenced American legal theorists in the early Republic. Part IV will illustrate how this inductive strain of legal science was used to try to solve real legal problems by examining in some detail Gulian Verplanck's *Essay on the Doctrine of Contracts*.[15] The analysis of Verplanck's work will illustrate clearly why externalist accounts of legal science such as Professor Horwitz's are incomplete. The Note will conclude in Part V with some reflections on the connection between nineteenth-century legal science and the use of social science in legal theory today.

I. DEDUCTIVE AND INDUCTIVE LEGAL SCIENCE

In his posthumously published *Life of the Mind in America,* Professor Perry Miller surveys the "legal mentality" of nineteenth-century America and devotes substantial attention to the rise of legal science.[16] Professor Miller's account defies easy categorization as either internalist or externalist, in part because he does not explain in detail *why* legal science arose.[17] Still, at one point Professor Miller notes an important tension within legal science—that between induction and deduction: Does the scientific method consist in generalizing legal principles from particular cases and facts or does it consist in deriving particular doctrines from more general legal principles?[18] This distinction may seem to be rather dry and

[15] 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 (Arno Press 1972) (1825).

[16] Perry Miller, The Life of the Mind in America (1965).

[17] For a critique of Professor Miller's tendency to equivocate "between the symbolic and causal planes," see Lawrence M. Friedman, Head Against the Head: Perry Miller and the Legal Mind, 77 Yale L.J. 1244, 1249 (1968).

[18] Miller, supra note 16, at 159–60. Technically, deduction refers to the process of reasoning in which the conclusion of an argument is contained within (and therefore follows necessarily from) its premises. It is often used by writers, however, including by many of those discussed in this Note, in the looser sense of deriving particular results from general rules or principles. In contrast, the inductive method describes the

technical, but the two methods call for quite different intellectual dispositions and goals: While deductive reasoning assumes certain general propositions in order to derive limited conclusions, the inductive method sticks to particulars but with the hope of formulating more tentative but universal truths. The former yields certainty whereas the latter yields discovery. Although Professor Miller recognizes the existence of these two elements of legal science, he does not develop his insight. Instead, he offers the reader a somewhat elusive conclusion: "They were victims of their age and situation, and proved incapable of resolving their dilemma."[19]

How may we explain, or at least better understand, the crux of this dilemma? We must first recall that Professor Hoeflich is not wrong to note a strand of deductive rationalism in the tradition of legal science. One can find many statements from leading legal commentators of the period praising the simplicity, clarity, and mathematical precision of legal science. Professor Hoeflich cites Hugh Swinton Legaré, David Hoffman, and Daniel Mayes as nineteenth-century legal commentators who conceived of law within a "geometric paradigm."[20] Professor Miller also cites proponents of this view, such as Theodore Dwight, who put the case succinctly: "'[N]o science known among men is more strictly deductive than the science of a true Jurisprudence.'"[21]

One finds confirmation of this desire for legal clarity and certainty in the zeal with which many of nineteenth-century legal commentators extolled the virtues of, and stressed the need to rely upon, the European civil law tradition. Unlike the common law with its mass of particular cases, the civil law, derived from the ancient Roman Law, was a distillation of clearly-written first principles from which rules could be easily deduced. The popularity that the civil law tradition enjoyed among these commentators has been well documented by Professor Peter Stein.[22] In the civil law, Stein points out, writers such as Hugh Swinton Legaré (himself a Roman

elucidation of general principles from repeated examination of particular cases. Induction is the standard method of empirical sciences.

[19] Id. at 159.

[20] Hoeflich, supra note 10, at 113–15.

[21] Miller, supra note 16, at 161 (quoting Theodore Dwight at Columbia in 1858).

[22] Peter Stein, The Attraction of the Civil Law in Post-Revolutionary America, 52 Va. L. Rev. 403 (1966).

law scholar) believed they had found the "philosopher's stone" which enabled law to become "the most exact and the most complicated of the moral sciences."[23] Some of the most influential treatise writers, such as Justice Joseph Story and Professor James Kent, he notes, were also "enthusiastic civilians."[24]

This deductive strand of legal science is only one strand, however, and the scholarly attention given to it has resulted in a skewed understanding of how and why legal theorists hoped to transform law into a science. After all, the obvious defect of the deductive method is that it cannot derive first principles. This explains why the civil law tradition was more frequently drawn upon in legal education than in legal practice.[25] For although the deductive method might be effective for teaching law, it was clearly insufficient for advancing legal thought and improving upon legal practice. Perhaps more important, it did not seem to accurately capture the phenomenon of actual judicial decisionmaking. This point was well articulated in an 1861 article in the *North American Review* entitled "Law a Perfectible Science."[26] Far from claiming that judges do or must deploy abstract principles to produce necessary results, this article insisted that legal science entailed the discovery of moral and legal truth through the process of deciding concrete cases:

> When a new case presents itself, we are able, (whether the rule be utility, or common sense, or conscience,) by the action of our own mind, to perceive what is just; and we are prone to think that we decide the case by some rule of justice known to us before, when in fact we are making discovery of a truth previously unknown. In moral and in legal science, then, as well as in natu-

[23] Id. at 428 (citing 2 Writings of Hugh Swinton Legaré 104 (Mary S. Legaré ed., Charleston, S.C., Burges & James 1845)).

[24] Id. at 426–27.

[25] See Stein, supra note 22, at 423 ("Though its impact on the legal practitioners was disappointing, the campaign for civil law had more success in the field of legal education."); see also Roscoe Pound, The Formative Era of American Law 163 (1938) (noting that "[t]he civil law is a law of the universities. Its oracles have been law teachers. The common law is a law of the courts. Its oracles have always been judges").

[26] Law a Perfectible Science, 93 N. Am. Rev. 330 (1861).

> ral, the truth of Bacon's remark must be admitted, that "our only hope is in genuine induction."[27]

This is inductive legal science. Oliver Wendell Holmes, Jr. famously said that "[t]he life of the law has not been logic: it has been experience,"[28] but as the above passage suggests and as will be shown below, he was not the first to suggest that experience trumped logic in the realm of legal analysis. Indeed, before Justice Holmes was writing, legal theorists had identified the central principle of the inductive method: the idea that judges intuit the outcomes in particular cases and only then draw out new principles for their decisions. For the author of "Law a Perfectible Science" quoted above, legal principles only came to have concrete expression in cases themselves. Justice, he noted, could not be perceived in the abstract; instead it "can actually exist only as a quality of the transactions of which it may be affirmed. Just as a color, of which, as of justice, we can form an abstract conception, can exist only as a quality of some object."[29] The judge's role, therefore, was to discover those properties of human nature—of human "transactions"—that could only be gleaned from careful observation of particular instances.

If this is right, Professor Hoeflich is wrong to suggest that Christopher Columbus Langdell, who as professor and then dean of Harvard Law School famously introduced the "case method" to legal education in the 1870s,[30] was the first to contribute the "empirical dimension" to legal science.[31] As the passage above demonstrates, the inductive method was present in legal thought long before Professor Langdell began teaching. To be sure, Professor Langdell's emphasis on the empiricist technique as embodied in the case method was a *pedagogical* innovation, but it was not an innovation in legal science as such. Rather, this empirical, inductive method of legal science was already prevalent in nineteenth-century legal theory. In order to understand why legal theorists believed they had both the ability and the need to conceive of them-

[27] Id. at 339.
[28] Oliver Wendell Holmes, The Common Law 1 (Dover 1991) (1881).
[29] Law a Perfectible Science, supra note 26, at 339.
[30] Neil Duxbury, Patterns of American Jurisprudence 14–20 (1995).
[31] Hoeflich, supra note 10, at 120.

selves as scientists, we must first try to recreate the intellectual climate in which they lived.

II. RADICAL SKEPTICISM AND COMMON SENSE

Recreating such a climate first requires examining the intellectual history of some of legal theorists' philosophical assumptions. In the late seventeenth century, the status of all knowledge—not just legal and moral knowledge, but knowledge of the natural world as well—was undermined by the epistemological attacks of several philosophers. This Part briefly explains how that attack was leveled and shows how a few Scottish philosophers sought to restore confidence in our ability to discover truth about the world by insisting upon the epistemic validity of our own "common sense." Without such a restoration of confidence, American legal science would not have been possible. Part III will trace the influence of these philosophers on American legal theorists, but this Part first examines what brought on the epistemological crisis and how the "Common Sense" school sought to resolve it.[32]

A. Radical Skepticism

The crisis in knowledge began with René Descartes's radical skepticism. In his *Meditations*, Descartes explained that he spent much of his life accepting many opinions about the world that turned out to be false and that he therefore became suspicious of

[32] The argument in this section parallels an interpretation developed by Professor James Gordley. Professor Gordley argues that much of modern contract doctrine was originally formulated as a set of corollaries to Aristotelian and Thomistic conceptions of moral virtue and that it depended on an ancient metaphysics of "forms" or "essences." Once these philosophical assumptions were called into question by Descartes, Locke, Hobbes, and other philosophers in the seventeenth century, Professor Gordley argues, legal theorists continued to support the doctrines themselves but could no longer justify them by reference to the moral and metaphysical assumptions on which they had been built. See James Gordley, The Philosophical Origins of Modern Contract Doctrine 6–8 (1991). Whereas Gordley concludes that legal theorists abandoned any attempt to fit doctrine within a more comprehensive philosophy and instead claimed to be interpreting positive law, this Note argues that many legal theorists believed they could reestablish the philosophical coherence of legal doctrine by grounding it in a conception of "legal science" based on an empiricist epistemology of common sense.

their source: his own senses.[33] He then set out to establish a firm foundation for knowledge by doubting everything he perceived through his senses—including the existence of his own body—and accepting only that which he could be certain was true.[34] Descartes eventually concluded that the only truth about which he could be absolutely certain was that he existed.[35] The basis for this claim was that even in the process of doubting everything he thought he knew, he was at least aware of an "I" that was doing the doubting.[36] Exactly what Descartes's "I" consisted in is a matter of some dispute,[37] but for the purposes of this Note what matters is the standard by which Descartes judged the reliability of such knowledge and the means by which he hoped to attain it. To count as truth, knowledge could not rest in feelings or mere perceptions; instead, it had to appear as clearly and certainly as mathematical propositions.[38] For Descartes, this standard was not impossibly high because he believed that the entire natural world was capable of being known and explained through mathematically deduced principles.[39]

Like Descartes, John Locke sought to arrive at certain knowledge of the world, but he was not convinced that Descartes's method would enable him to do so. Far from doubting all that he knew through perceptual experience, Locke insisted that such experience was the only basis of knowledge. He famously explained in his *Essay Concerning Human Understanding* that the mind, empty of experience, was like "white Paper, void of all Characters, without any *Ideas*; How comes it to be furnished?. . . To this I answer, in one word, From *Experience*: In that, all our Knowledge is founded; and from that it ultimately derives it self."[40] Once the mind is "furnished" with ideas—either through sensation of the ex-

[33] René Descartes, Meditations on the First Philosophy, *in* A Discourse on Method: Meditations and Principles 64, 74 (John Veitch trans., Everyman 1994) (1641) ("All that I have, up to this moment, accepted as possessed of the highest truth and certainty, I received either from or through the senses.").

[34] Id. at 79.

[35] Id. at 80.

[36] Id.

[37] John Cottingham, Descartes 42 (1999).

[38] Id. at 41.

[39] Id. at 5.

[40] John Locke, An Essay Concerning Human Understanding 104 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1689).

ternal world or reflection upon the internal operations of our mind[41]—it constructs knowledge by assembling simple ideas into more complex ideas. For instance, as one Locke scholar has explained, we can understand the concept of homicide only by putting together the simpler, discrete ideas we have of a human being, a dead human being, and the concept of causation.[42]

For Locke, observation was the primary means of attaining knowledge. Although certain truths appeared to be "self-evident" or intuitive, they did not, as they had for Descartes, come to us in the form of abstract principles.[43] Their self-evidence instead appeared in the form of particular and concrete truths. Locke illustrated this with a simple example: "For I ask, Is it not possible for a young Lad to know, that his whole Body is bigger than his little Finger, but by virtue of this Axiom, that *the whole is bigger than a part* . . . ."[44] Locke answered that such axioms or principles were not necessary for the acquisition of *any* knowledge, so they certainly could not serve as the foundation of *all* knowledge. Such axioms, he argued, were valuable only for *teaching* knowledge or science.[45] Principles served not as starting points but as conclusions.[46]

If all our knowledge of the external world consists of ideas that are "furnished" through experience, how can we verify that our ideas accurately reflect what in fact exists in the external world? David Hume addressed precisely this question in *A Treatise of Human Nature*.[47] Hume accepted the premise of Locke's argument—that our knowledge of the world derives from our experience—but he reached a quite different conclusion. Hume argued that our experience consisted at its most fundamental level in *perceptions*, all of which were either *ideas* or *impressions*.[48] Impressions were delivered through our senses and included all of our "sensations, passions and emotions," whereas ideas were "faint im-

[41] Id. at 105.
[42] J.L. Mackie, Problems from Locke 115 (1976).
[43] Locke, supra note 40, at 591.
[44] Id. at 640.
[45] Id. at 600.
[46] See Mackie, supra note 42, at 107.
[47] David Hume, A Treatise of Human Nature (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739).
[48] Id. at 1.

ages of [impressions] in thinking and reasoning."[49] The distinction Hume had in mind was the difference between seeing a tree and forming a mental image of one.[50] The difference between the two is entirely one of degree, not kind. When we see a tree, therefore, we have no more certainty that it exists than we do when we simply imagine one; we simply experience the image of the tree that we see more intensely than the one we imagine. Further, to believe the truth of an idea for Hume simply meant that the idea had become more vivid or intense for us.[51]

The skeptical implications of his reasoning were clear. As humans, we could neither have any basis for verifying the truth of our claims about the external world, nor have any justification for making predictive or inductive claims because doing so required going beyond immediate phenomena.[52] Nor were our moral beliefs justified, since such beliefs derived not from reason but from a "moral sense" that made us feel "satisfaction" in the face of virtue and "uneasiness" when confronted by vice.[53] Hume therefore concluded that we "have no choice left but betwixt a false reason and none at all."[54] Indeed, the human mind was, for Hume, "nothing but a bundle or collection of different perceptions, which succeed each other with an inconceivable rapidity, and are in a perpetual flux and movement."[55] Hume admitted that these skeptical conclusions brought on something of an emotional crisis,[56] but his solution was simple: he stopped thinking about them. The moment he did, the dread evaporated.[57]

B. Common Sense

Hume's solution, however, did not satisfy everyone. In particular, it did not satisfy Thomas Reid, a contemporary of Hume who

[49] Id.
[50] Harold W. Noonan, Hume on Knowledge 61 (1999).
[51] Hume, supra note 47, at 96.
[52] Id. at 88–89.
[53] Id. at 470–71.
[54] Id. at 268.
[55] Id. at 252.
[56] Id. at 269 ("Where am I, or what? From what causes do I derive my existence, and to what condition shall I return? . . . What beings surround me?").
[57] Id. ("I dine, I play a game of back-gammon, I converse, and am merry with my friends . . . .").

was a professor of Philosophy at the University of Glasgow and who became one of the leading exponents of the Common Sense school of philosophy.[58] Reid felt the full force of Hume's challenge but was determined to reject its skeptical implications. He attempted to build a new foundation for human knowledge. In effect, he sought to rescue philosophy from the philosophers.

Reid began his *Essays on the Intellectual Powers of Man* by challenging one of the core assumptions on which both Locke and Hume had operated—that the mind was essentially passive. "The mind" he wrote, "is, from its very nature, a living and active being. Every thing we know of it implies life and active energy; and the reason why all its modes of thinking are called its operations is, that in all, or in most of them, it is not merely passive, as body is, but is really and properly active."[59] Reid rejected entirely Locke's use of the word "idea" to describe the fundamental units of experience that we receive from the external world. For Reid, the whole notion of such an idea was "a mere fiction of philosophers."[60] He preferred to use the common meaning of idea, as in the sense of *having* an idea—that is, *thinking* of something. Specifically, for Reid, *judgment* was an essential component of all human thought. Forming even the simplest abstract idea, he maintained, required the active affirming or negating of something (a process that defined judgment) since in order to conceive of *X* one has to determine that which is *X* and distinguish it from *not X*.[61] Hume had rejected the whole idea of man being "active" in this sense because action presupposed causation, and causation was nothing but the word people used to describe the "constant conjunction" of two impressions.[62] To reject Hume's skepticism on this question, Reid looked to language:

> When one being, by its active power, produces any change upon another, the last is said to be *passive*, or to be acted upon. . . .

[58] Philip de Bary, Thomas Reid and Scepticism: His reliabilist response 2 (2002).

[59] Thomas Reid, Essays on the Intellectual Powers of Man 5 (James Walker ed., Cambridge Univ. Press 1850) (1785) [hereinafter Reid, Intellectual Powers].

[60] Id. at 9.

[61] Id. at 318.

[62] Hume, supra note 47, at 89–90.

> It would be very strange indeed, if mankind had always used these words so familiarly, without perceiving that they had no meaning; and that this discovery should have been first made by a Philosopher of the present age.[63]

The contrast with Hume, Locke, and Descartes in philosophical method is marked. Each of those philosophers had asserted certain highly demanding criteria for knowledge and then asked whether we could know the things we thought we knew. In contrast, Reid asserted that there were some things we did know and then asked, given what we know (as reflected, for instance, in our language and everyday intuitions), what should our criteria for knowledge be?[64] Thus, Reid argued that there were certain things we must take as self-evident in order to advance our knowledge. He called these the "First Principles of Contingent Truths."[65] One such principle is "that the thoughts of which I am conscious are the thoughts of a being which I call MYSELF, my MIND, my PERSON."[66] Another principle is "[t]hat there is life and intelligence in our fellow-men with whom we converse."[67] Because in particular instances these beliefs "force assent" (since we could not conduct our lives without believing them to be true), these instances serve as data from which we can make such generalized claims about knowledge.[68] In other words, just as the natural scientist discerns the laws of nature by careful observation and induction to general truths, so the philosopher may discern the true basis for knowledge by observing the actual judgments that people make every day and then generalizing principles from them. It is for this reason that Reid's brand of philosophical thought has been dubbed "Common Sense" philosophy. Reid recognized that we may not be able to attain knowledge of the world with the certainty Descartes demanded, but insisted that such a standard was inappropriate.[69] Given that we all successfully rely upon our common intuitions in our daily lives, he argued, the

[63] Thomas Reid, Essays on the Active Powers of Man 13 (René Wellek ed., Garland 1977) (1788) [hereinafter Reid, Active Powers].
[64] De Bary, supra note 58, at 38.
[65] Reid, Intellectual Powers, supra note 59, at 358 (italics omitted).
[66] Id. at 358, 360 (italics omitted).
[67] De Bary, supra note 58, at 33.
[68] Id. at 36.
[69] Id. at 30.

burden of proof ought to lay with the philosophers who seek to prove that such intuitions systematically deceive us.[70] According to Reid, since skeptics like Hume denied we could know *anything* with any certainty, they were unable to meet such a burden in a way consistent with their own argument.

Reid explained that common sense could serve as a foundation for moral knowledge as well. He agreed with Hume and other Scottish philosophers that humans possessed a "moral sense,"[71] and he believed that emotions played an important role in our moral judgments.[72] Nevertheless, unlike Hume, who believed that moral beliefs consisted in nothing more than intense feelings, Reid conceived of the "moral sense" as a faculty that enabled humans to perceive something external to them that actually existed. Just as our eyes enabled us to see objects and our ears enabled us to hear sounds, so too our moral sense enabled us to distinguish between right and wrong, virtue and vice.[73] In other words, Reid believed that moral truths were not merely contingent upon how humans experienced pleasure and pain, but instead were *necessary* truths.[74] Our conscience, or "moral sense," enabled us to perceive the truth of certain moral principles, such as "no man ought to be blamed for what it was not in his power to hinder."[75]

Most importantly, Reid believed such truths could be best discerned through our common intuition rather than a complex philosophical reasoning. One need not have a theory of vision to develop a "good eye" for art. Similarly, a theory of morality is unnecessary for sound moral judgment.[76] This is not to say that for Reid such judgment required no cultivation or education—he insisted it clearly did—but he maintained, "Moral conduct is the business of every man; and therefore the knowledge of it ought to be within the reach of all."[77] According to Reid, it would be just as absurd to take the existence of moral failings, errors, and disagreement as evidence that no moral truth exists as it would be to

[70] Id. at 31.
[71] Reid, Active Powers, supra note 63, at 237.
[72] Id. at 244.
[73] Id. at 242–43.
[74] Reid, Intellectual Powers, supra note 59, at 379–80.
[75] Id. (emphasis omitted).
[76] Reid, Active Powers, supra note 63, at 386.
[77] Id. at 251.

conclude from the existence of errors in speculative matters that no truth exists in the realm of natural philosophy (or as it would be called today, science).[78] In both natural and moral philosophy, then, Reid insisted that we ought to use our common-sense judgments as starting points for philosophical inquiry.

Reid's student and disciple, Dugald Stewart, embraced his teacher's notion that common sense was a source of self-evident principles. The epistemological foundation having been established, Stewart probed more deeply into the process by which he believed speculative knowledge could be advanced in natural philosophy and the moral and political sciences.

Both Professor Stein and Professor Hoeflich cite Dugald Stewart as an influence on nineteenth-century American legal theorists, but both mistakenly characterize that influence as one that emphasized the mathematical precision of law.[79] To be sure, in his *Elements of the Philosophy of the Human Mind*, Stewart at one point remarked upon the precision of the Roman law tradition: "In those branches of study which are conversant about moral and political propositions, the nearest approach which I can imagine to a hypothetical science, analogous to mathematics, is to be found in a code of municipal jurisprudence . . . ."[80] He then quoted an extensive passage in which the philosopher Gottfried Leibnitz had praised Roman lawyers as second only to Greek geometricians in their "force and . . . subtlety."[81] Stewart, however, refused to endorse this view. Rather, he wrote, "I have quoted this passage merely as an illustration of the analogy already alluded to [that is, the unity of a mathematical system of jurisprudence]. How far this unity is exemplified in the Roman code, I leave to . . . more competent judges."[82]

More importantly, Stewart then criticized efforts to achieve mathematical precision in the realm of the moral and political sciences. He began by clearing up a common misperception. The cer-

[78] Id. at 254.

[79] See Stein, supra note 22, at 431; Hoeflich, supra note 10, at 108–09.

[80] Dugald Stewart, Elements of the Philosophy of the Human Mind 426 (Boston, James Munroe & Co. 1843) (1814).

[81] Id.

[82] Id. at 427. He also noted in a footnote that an English lawyer "distinguished for his acuteness" had described the Roman law as "an enormous mass of confusion and inconsistency." Id. It should also be noted that Hoeflich quotes the Leibnitz passage in full as if they were the words of Stewart. Hoeflich, supra note 10, at 108–09.

tainty that mathematics was able to achieve, he explained, derived from two of its features: the clarity of its definitions and the fact that such definitions served as its first principles.[83] Stewart argued that mathematics differed from other sciences with respect to the first feature (the clarity of its definitions) only as a matter of degree. The latter feature (the use of such definitions as first principles), however, alone sufficed to ensure the certainty evident in mathematical demonstrations.[84] In other words, mathematics could achieve certainty only because it was a *hypothetical* science, whose first principles did not have to conform to any actual facts about the world and could instead be stipulated by the mathematician. A system of positive law (or "municipal jurisprudence," as Stewart called it) was, for Stewart, a perfect example of such a science—one built entirely upon an "artificial or conventional body of knowledge."[85] A system built on such knowledge could be more complete than could be "in the present state of our information any science . . . which ultimately appeals to the eternal and immutable standards of truth and falsehood, of right and wrong."[86] Stewart's discussion of municipal jurisprudence therefore explicitly contrasted a system based on eternal principles of right and wrong with one that could achieve mathematical, deductive precision.

What, then, is the process by which such knowledge may be advanced? Certainly not through logical deduction. Stewart held the deductive method in such low regard that he sought to dispute its status as the paradigm of reason. He began a long chapter entitled "Of Reasoning and of Deductive Evidence" by challenging Locke's distinction between "intuition" on the one hand (felt certainty or self-evidence) and "reason" as demonstrative or deductive reasoning on the other.[87] Stewart insisted instead that reason *was* intuition:

> If I do not greatly deceive myself, it will be found, on an accurate examination of the subject, that, of the different elements which enter into the composition of reason, in the most enlarged accep-

[83] Id. at 428.
[84] Id.
[85] Id. at 426.
[86] Id.
[87] Id. at 393–94.

> tation of that word, the power of carrying on long processes of reasoning or deduction, is in point of importance, one of the least.[88]

Just as Reid had looked to the common use of words as evidence of the truth of causality and human agency, Stewart looked to the common use of the word "reason" to elevate the status of the intuitive judgments of ordinary people. Such judgments could serve as a source of knowledge and truth superior to the methods long esteemed by philosophers.

Stewart argued that the kind of practical reasoning that a person used to govern the affairs of his life—how much money to save, what to buy when, how to provide for one's children—relied on judgments that consisted of rapid and intuitive predictive hypotheses about the consequences likely to follow from certain factual circumstances.[89] What gave us confidence in such judgments was the fact that we had observed that similar facts had led to similar consequences in the past. Just as the astronomer observed the stars to predict certain events, so too did success in private life depend on similarly predictive judgments based on experience. Both the astronomer and the ordinary man attempted to ascertain the "order of nature" that regulated the physical, animal, and human world.[90] For Stewart, then, progress in the natural as well as the moral sciences was hindered not by faulty reasoning, but by the difficulty of ascertaining the correct and relevant facts.[91]

C. Summary

A summary of the arguments described in this Part may be useful. First, Descartes questioned all received opinion and cast into radical doubt all knowledge derived from the senses. Next, Locke insisted that, contrary to Descartes, experience mediated through "ideas" was our *only* source of knowledge. Hume then drew out the implications of Locke's theory to the deeply skeptical conclusion that, since all our knowledge derived from our "impressions" of the world through experience, we could in no way verify that our

[88] Id. at 497.
[89] Id. at 397–98.
[90] Id. at 462–63.
[91] Id. at 496.

knowledge was real or true. All human judgments—including moral judgments—were reduced to the status of feelings, and inductive reasoning could not lead to truth. Finally, both Reid and Stewart attempted to respond to Hume's skepticism (without refuting him directly) by re-grounding our knowledge in common experience.

Here it may be helpful to separate out three related, but distinct aspects of Reid and Stewart's respective arguments, each of which will be reflected in the thought of American legal theorists. First, they both argued that what counts as self-evident first principles for reasoning should be enlarged to include the conclusions of common sense—the common judgments of ordinary people. This was expressed most clearly by Reid, and it was meant to serve as a new foundation for knowledge in metaphysical and moral speculations. Second, Stewart argued that the proper method for advancing knowledge or science in the natural or the human realm was not the rigorous deduction of mathematicians (or Roman lawyers), but rather an inductive method that permitted us to draw general conclusions from repeated observation of specific facts. Although this view was most explicitly articulated by Stewart, it was also held by Locke and Reid (though not by Hume). Finally, both Reid and Stewart argued that common practices and understandings—such as those expressed through language—could serve to verify our claims to knowledge.

III. COMMON SENSE AND AMERICAN LEGAL SCIENCE

The method of inductive reasoning articulated by the Common Sense school proved extremely useful for American legal theorists, who otherwise lacked a philosophical framework in which they could develop and refine legal doctrine.[92] This Part notes the enormous influence that the Common Sense school enjoyed generally in nineteenth-century America and suggests that its influence on American legal theorists, though less documented, was equally profound.

[92] See Gordley, supra note 32, at 6–8.

A. Common Sense in America

The influence of the Scottish Enlightenment—of which Hume, Reid, and Stewart formed a central part—on American social, political, and religious thinkers is widely known and has been well documented.[93] Although debates over the proper foundations of knowledge were far removed from most people's daily concerns, for the generation of American intellectual and political leaders who had survived the Revolution and taken part in the founding of a new country, the skeptical attack on knowledge described above was unquestionably unsettling. As Professor Meyer noted, "it was disturbing to think that the philosophers themselves—those who presumably are dedicated to the love of wisdom—were not even sure about the independent existence of the external world and of the objects people take most for granted, much less of such things as moral law, the soul, the life everlasting, and God!"[94] American intellectuals were thus drawn to the Common Sense school because those philosophers reassured them that what they believed to exist was in fact real and true. The Common Sense school also had additional democratic appeal in its privileging of the viewpoint of the common man.

The Scottish Common Sense philosophers, such as Stewart and Reid, were more than popular in the young Republic: they were institutionalized in it. Throughout much of the nineteenth century, the works of these philosophers stood at the peak of undergraduate college curriculums at the major northeastern universities. Each of these schools organized its undergraduate curriculum around a one-year course that prominently featured the Scottish school.[95] The course was typically called "Moral Philosophy," but its scope was in fact much broader than its title would suggest today. It included, among other subjects, Natural Philosophy and

[93] See Henry F. May, The Enlightenment in America 337–62 (1976); Donald H. Meyer, The Democratic Enlightenment 182–98 (1976); Morton White, Science and Sentiment: Philosophical Thought from Jonathan Edwards to John Dewey 55–68 (1972); Daniel Walker Howe, Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution, 31 Comp. Stud. in Soc'y & Hist. 572 (1989); D. H. Meyer, The Uniqueness of the American Enlightenment, 28 Am. Q. 165, 169 (1976).

[94] Meyer, The Democratic Enlightenment, supra note 93, at 188–90.

[95] May, supra note 93, at 346–47.

Natural History, Natural Theology (or "Evidences of Christianity"), Mental Philosophy or Psychology (which included the works of Reid and Stewart discussed above), as well as what we would today call Moral Philosophy.[96] In the words of one historian, "Common Sense philosophy reigned supreme in American colleges."[97] In the words of another, by "the mid-nineteenth century virtually all educated Americans were trained in the principles of moral philosophy."[98] These ideas were so entrenched in the elite culture of the time that Perry Miller claimed that for nearly a half century Common Sense philosophy was "the official metaphysic of America."[99]

Though historians of philosophy tend to be fairly critical of this era in American philosophy,[100] they recognize that the philosophical methods emphasized and cultivated in this period were rigorous and had a significant and positive intellectual impact. Professor May points out, for instance, that much of this philosophy helped legitimize the demands of social reformers,[101] and Professor Schneider notes its liberalizing impact on evangelical churches.[102] Professor Meyer offers a sympathetic explanation for the popularity of the Common Sense philosophers in America: "[T]hey seemed to do what Locke had originally set out to do: They made a case for philosophical sanity, freeing thought from the chains of scholastic logic but not, in the process, losing their link with reality."[103] It was for precisely this reason that Common Sense philosophy helped build a new foundation for legal science—a legal science based not on the geometric deduction from first principles, but on the inductive methods of empirical science.

[96] Id. at 347–48.

[97] Id.

[98] Meyer, The Democratic Enlightenment, supra note 93, at 195.

[99] Perry Miller, Introduction *to* American Thought: Civil War to World War I ix, ix (Perry Miller ed., 3d prtg. 1957).

[100] See, e.g., Herbert W. Schneider, A History of American Philosophy 217 (1946) ("In short, what made Scottish common sense so vermiculate was the use of philosophical reason as a moral sedative, which was administered in our colleges in excessive doses by the clergy in the hope that it would be an antidote to the powerful stimulants of the experimental sciences.").

[101] May, supra note 93, at 349.

[102] Schneider, supra note 100, at 219–20.

[103] Meyer, The Democratic Enlightenment, supra note 93, at 191.

B. Common Sense and Inductive Legal Science

The most direct link between the Scottish Common Sense philosophers and American legal thought can be traced through Justice James Wilson. Justice Wilson, one of the Framers of the United States Constitution as well as one of the first justices of the United States Supreme Court, was born in Scotland and studied at Edinburgh.[104] In a series of lectures to law students that he delivered in 1790 and 1791, Justice Wilson made frequent and extended references to, and reliance upon, the works of his former countrymen, Reid and Hume, as well as those of Locke.[105] Historians have noticed this influence, but most commentators have focused on Justice Wilson's use of "moral sense" theory.[106] They have paid less attention to how Justice Wilson incorporated Common Sense empiricism into a theory of legal epistemology. How might the inductive, empiricist methods developed by Locke, Reid, and others aid one's understanding of legal theory and practice? Justice Wilson articulated an answer to this question in a passage that is worth quoting in full because it so completely and explicitly captures the inductive strand of legal science:

> In all the sciences, says my Lord Bacon, they are the soundest, that keep close to particulars. Indeed a science appears to be best formed into a system, by a number of instances drawn from observation and experience, and reduced gradually into general rules; still subject, however, to the successive improvements, which future observation or experience may suggest to be proper. *The natural progress of the human mind, in the acquisi-*

[104] White, supra note 93, at 62.

[105] James Wilson, The Works of James Wilson 206–52 (James DeWitt Andrews ed., Chicago, Callaghan and Company 1896) (1791).

[106] See, e.g., May, supra note 93, at 348–49; see also White, supra note 93, at 62 (noting that Justice Wilson adopted a view of moral principles similar to that of Hume). Professor White makes much of Justice Wilson's embrace of the theory of moral sense as evidence of his democratic sympathies, as opposed to Reid, who supposedly rejected moral sense theory entirely. But the contrast is overblown. As we saw above, Reid only rejected moral sense theory insofar as it suggested that moral truths were contingent rather than necessary. Like Hume, he believed that the kind of reason required to discern such truths, which he was content to call a "moral sense," was common to almost all men. As will be shown below, Justice Wilson followed Reid in conceiving of the "moral sense" as a faculty that enabled man to discern an objective moral order.

> *tion of knowledge, is from particular facts to general principles. This progress is familiar to all in the business of life; it is the only one, by which real discoveries have been made in philosophy; and it is the one, which has directed and superintended the instauration of the common law. In this view, common law, like natural philosophy, when properly studied, is a science founded on experiment*. The latter is improved and established by carefully and wisely attending to the phenomena of the material world; the former, by attending, in the same manner, to those of man and society. Hence, in both, the most regular and undeviating principles will be found, on accurate investigation, to guide and control the most diversified and disjointed appearances.[107]

In this passage Justice Wilson identified the three central features of an inductive science: first, an emphasis on observation and close attention to particulars as the primary means of acquiring knowledge; second, the claim that advancing knowledge consists of generalizing from particular facts to general principles; and third, the implicit notion that the use of such a method in the practical "business of life" corroborates its truth-yielding capabilities. Most significant, though, is Justice Wilson's explicit comparison of the process of common law decisionmaking to the methods of natural science. The two types of science differed in their subject matter—the former attended to "man and society" while the latter concerned the "material world"—but both required the same methods: ceaseless observation, experimentation, attention to facts, and careful induction. More importantly, both enabled perception of the laws of nature.

In one of his early lectures on "General Principles of Law and Obligations," Justice Wilson emphasized the close connection between human laws and natural law. He explained that all laws could be categorized as either divine laws or human laws. The former included the laws of nature "by which the irrational and inanimate parts of the creation are governed" (that is, physical laws) as well as "[t]hat law, which God has made for man in his present state; that law, which is communicated to us by reason and conscience, the divine monitors within us."[108] Professor Horwitz has ar-

[107] Wilson, supra note 105, at 458 (emphasis added).
[108] Id. at 92.

gued that this description of natural law as communicated by "conscience" suggests that Justice Wilson subscribed to a "will theory" of law that denied that law derived its authority from God.[109] Horwitz, though, seems to confuse an epistemological claim with a metaphysical one. Like Professor Reid, Justice Wilson believed that each human being *perceived* moral truth through his consciences, but this does not imply—and Justice Wilson did not believe—that one's conscience or "moral sense" was the *source* of moral value. Indeed, Justice Wilson made clear the dependence of positive law on natural law: "Human law must rest its authority, ultimately, upon the authority of that law, which is divine."[110]

Nor did Justice Wilson merely leave the matter with this vague assertion of the existence of natural law. Instead, he specified concretely wherein that connection with human law lay: "Of that law, the following are maxims—that no injury should be done—that a lawful engagement, voluntarily made, should be faithfully fulfilled. We now see the deep and the solid foundations of human law."[111] To be sure, these statements or "maxims" of "human laws" are too general to help draw legal conclusions in any particular circumstance. That, however, is not their purpose. Rather, Justice Wilson explicitly tried to ground some basic principles of private law (specifically, those relating to the fields we would now categorize as tort and contract law) in a divine law. Moreover, he believed that such a law, though abstract and general, was discernable through the careful inductive analysis of concrete cases.[112]

Justice Wilson then went further and tried to articulate a basis for these legal principles in the very nature of man's mental powers. He suggested, for instance, that in dividing the mind's abilities into apprehension, judgment, and reasoning, philosophers had neglected a whole category of human faculties that could only be employed in society.[113] Some mental operations, he said, "necessarily suppose a communication with some other intelligent being . . . when he enters into an engagement by a promise or a contract; these acts imply necessarily something more than apprehension,

[109] Horwitz, supra note 3, at 19.
[110] Wilson, supra note 105, at 93.
[111] Id.
[112] See id.
[113] Id. at 257.

judgment, and reasoning."[114] Professor Reid's influence is clear. As we saw above, Professor Reid had asserted as a "contingent first principle" that "there is life and intelligence in our fellow-men with whom we converse."[115] Justice Wilson argued that by observing the legal transactions we could discern the same fundamental truth about human nature—specifically, its inherently social character. Thus, he insisted if you remove man from society, "you destroy the basis on which the preservation and happiness of human life are laid."[116] In short, Justice Wilson sought to transform law into a science of man in which the study of legal cases yielded knowledge of man's true nature.

This emphasis on experience and observation as essential components of legal science continued well into the nineteenth century. For many legal theorists, the Common Sense theory of knowledge seemed to offer a way to avoid the dangers of both skepticism and dogmatism. It enabled them to trust their moral intuitions as valid and yet did not require them to follow slavishly ancient authority. In an 1824 treatise on the jurisdiction of the federal courts, legal commentator Pierre Du Ponceau defended the common law in terms similar to those of Justice Wilson's, but suggested that its attractive features were of relatively recent origin:

> The civil jurisprudence [of the common law] was a complex system in which the Judges lost themselves in refinements and distinctions without end. The method of reasoning by induction, which Bacon recommended and exemplified, and which the celebrated Stewart and the philosophers of the Scotch school have so elegantly elucidated, was then unknown, or not understood; the logic of the schools prevailed, and everything was discussed by syllogisms . . . .[117]

Justice Joseph Story made a similar point in a lecture entitled, "The Value and Importance of Legal Studies."[118] Justice Story de-

[114] Id.

[115] De Bary, supra note 58, at 33.

[116] Id. at 266 (internal punctuation omitted).

[117] Pierre S. Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States 108–09 (Arno Press 1972) (1824).

[118] Joseph Story, The Value and Importance of Legal Studies, *in* The Miscellaneous Writings of Joseph Story 508 (William Story ed., Da Capo Press 1972) (1852).

scribed how the common law had endured even though some of its topics involved difficult and highly abstract questions from which "it has sometimes been in danger of being enslaved by scholastic refinements, by the jargon of the old dialectics, and the sophisms of over-curious minds."[119] He therefore advised his students to "unlock all the treasures of history for illustration, and instruction, and admonition. [They] will thus see man, as he has been, and thereby best know what he is. [They] will thus be taught to distrust theory, and cling to practical good."[120] Importantly, though, this did not mean an abandonment of abstract thought. Indeed, his message was just the opposite: The student must "drink in the lessons and the spirit of philosophy."[121]

What kind of philosophy? Justice Story quickly specified his meaning: "that philosophy, which dwells, not in vain imaginations, and Platonic dreams; but which stoops to life, and enlarges the boundaries of human happiness."[122] In other words, Justice Story sought a philosophy of common sense, which accepted our basic practices and intuitions and used them as a guide for the future, just as we use the natural sciences.[123] Justice Story explained that "law is a science, which must be gradually formed by the successive efforts of many minds in many ages" because it "seeks to measure the future by approximations to certainty, derived solely from the experience of the past . . . it must forever be in a state of progress, or change, to adapt itself to the exigencies and changes of society."[124] Legal science may thus be seen not as a system of geometric

[119] Id. at 508.
[120] Id. at 528.
[121] Id.
[122] Id.
[123] In another speech, Justice Story specifically praises "the common sense of Reid" and "the incomparable elegance of Dugald Stewart." Id. at 356. So, too, does David Hoffman, another prominent treatise writer. Hoffman included in his *Course of Legal Study*, a bibliography and lesson plan for aspiring lawyers, both of Reid's essays on the powers of the human mind as well as Locke's *Essay Concerning Human Understanding*. He says of these philosophers in his notes to Reid's work:

> Of all writers, ancient and modern, none has been so rational on the subject of metaphysics as Dr. Reid; and there is more substance and good sense in the few volumes published by him and his disciple Stewart, than is to be found any where else, in perhaps ten times the compass.

David Hoffman, A Course of Legal Study, Addressed to Students and the Profession Generally 111 (Arno Press 1972) (1836).
[124] Story, supra note 118, at 507–08.

deduction, but as a method for "measuring" society in an effort to learn how to better meet the needs of a rapidly changing world. In other words, legal science can be seen as a social science.

These claims should not be overstated. Neither Justice Wilson nor any other legal theorist of his or Justice Story's time conceived of themselves as social scientists in anything like the current use of the term. Not only have the words "empirical," "experiment," and even "observation" taken on new, more refined, and more rigorous definitions which have explicit criteria for their use in the social sciences, but the entire metaphysical worldviews of Justices Wilson and Story's era and our own are completely different. Whereas modern social science is arguably premised on the assumption that human behavior is reducible to material or physical forces, Justice Wilson contrasted "the material world" to "man in society" precisely because he did *not* view man as a purely material being.[125] Instead, he and other legal theorists of the late eighteenth and early nineteenth centuries believed there was an objective underlying moral order to the universe.[126] Today we tend to contrast the assumptions and methods of empirical social science with those of a philosophical or religious worldview in which the existence of such a moral order is a given. To understand nineteenth-century legal science, however, we must see that legal theorists of this period did not perceive a conflict. They did not merely insist upon the existence of moral truths knowable only *a priori*, but instead sought to discover through observation and inductive reasoning, the essential nature—the principles or the properties—of the human and natural world.

[125] Wilson, supra note 105, at 458.

[126] See Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism 49–83 (2000). Professor Feldman offers an interpretation of nineteenth-century legal thought similar to the one presented here, one which he describes as a mix of Baconian jurisprudence with Plato's theory of Ideas. Id. at 53–54. The characterization is a useful one, but despite the constant references to Bacon one finds in this era, the philosophical influence that the Common Sense philosophers enjoyed in the United States at this time suggests that they were a more direct intellectual influence than Bacon.

IV. GULIAN VERPLANCK AS INDUCTIVE LEGAL SCIENTIST

How did this form of legal science work in practice? This Part shows how one famous nineteenth-century legal theorist employed the inductive method in order to solve a real and difficult legal dilemma. In his *Essay on the Doctrine of Contracts*, Gulian Verplanck attacked the doctrine of *caveat emptor*[127] and set forth his own theory of how the law should treat the exchange of information among parties to a bargain. A close analysis of Verplanck's argument clearly shows how he applied the methods of reasoning developed by the Scottish Common Sense school to legal theory. Doing so will reveal clearly the deficiency of Professor Horwitz's interpretation of Verplanck and will enable us to see more generally why externalist accounts of legal science fail to capture essential features of legal science.

A. Gulian Verplanck

Gulian Crommelin Verplanck was born into a wealthy and prominent New York family in 1786 and eventually became one of nineteenth-century New York's leading intellectual and political figures.[128] Verplanck was, at various times in his life, a lawyer, businessman, U.S. Congressman, state senator, poet, and theology professor.[129] Though he was raised by politically conservative grandparents (his mother died when he was three), after graduating from Columbia College in 1801 and being admitted to the bar in 1807, he eventually joined the Republican Party.[130] By 1824, when he was elected to the United States House of Representatives, Verplanck was a Jacksonian Democrat, but he soon denounced Jackson and joined the Whig party in protest of Jackson's opposition to the Second Bank of the United States. Throughout his career, Ver-

[127] Literally, "buyer beware," this doctrine holds that the seller of a good does not have an affirmative obligation to reveal apparent defects in an article of sale.

[128] For an engaging account of New York political and intellectual life in the era in which Verplanck played such a pivotal role, see Edward K. Spann, Ideals and Politics: New York Intellectuals and Liberal Democracy 1820–1880 (1972).

[129] Id. at 16–17.

[130] 22 American National Biography 331 (1999). Verplanck graduated from Columbia at the age of fourteen, apparently making him the youngest person ever (at least as of 1951) to graduate from Columbia. Robert W. July, The Essential New Yorker: Gulian Crommelin Verplanck 11 (1951).

planck supported an eclectic array of political causes. He advocated improved protection of authors' copyrights, the establishment of special schools where immigrants would be taught in their native language (a very controversial position at the time), and active government involvement in hospital and prison reform.[131] In addition to these public causes, he also found time to write political satire, literary criticism, and even a work entitled *Essays on the Nature and Uses of the Various Evidences of Revealed Religion* in 1824.[132] For this Note, Verplanck's political and intellectual career is important insofar as it suggests both his sensitivity to the intellectual climate of his time as well the difficulty of reducing his thought to any one-dimensional political ideology.

B. An Essay on the Doctrine of Contracts

Verplanck wrote his *Essay on the Doctrine of Contracts* in 1825 as a sustained philosophical attack on the doctrine of *caveat emptor*, and it has become one of the classic works of nineteenth-century legal scholarship.[133] Although Verplanck ultimately lost this doctrinal battle (as the popularity of *caveat emptor* continued to rise in the United States in the mid-nineteenth century) this does not lessen his interest for this Note.[134] Here, it is necessary to show only how Verplanck applied Common Sense philosophy to a difficult legal dilemma: In common transactions of goods, how much equality ought to be required with respect to both the knowledge of the parties and the value of the goods exchanged?

Verplanck began his essay with a discussion of the facts of one specific case: *Laidlaw v. Organ*.[135] The case involved a merchant in

[131] 22 American National Biography 331–32 (1999); July, supra note 130, at 215–16.

[132] 19 Dictionary of American Biography 253–54 (Dumas Malone ed., 1936). Interestingly, this brief biography of Verplanck mentions that this work "condemns the *a priori* method and is based upon inductive reasoning . . . [and] is one of the earliest works in America influenced by the Scottish school of common-sense philosophy." Id. at 254.

[133] Verplanck, supra note 15. See Horwitz, supra note 3, at 181–83; see also White, supra note 2, at 95 (listing Verplanck's essay as one of the dozen or so influential legal commentaries published in antebellum America).

[134] Verplanck's approach, however, did receive considerable praise at the time from laymen or lawyers, including John Jay and Henry Wheaton. July, supra note 130, at 209–10. See infra note 184.

[135] 15 U.S. (2 Wheat.) 178 (1817).

New Orleans who had received early intelligence that a treaty had been reached at Ghent that would bring an end to the War of 1812 with the British. The merchant knew full well that the treaty would lead to a rapid increase in the price of tobacco due to the end of the British trade blockades. Realizing that virtually no one else was yet aware of the news, the merchant bought 111 hogsheads of tobacco at the current low price from a seller who had not yet heard of the treaty.[136] The question presented by the case was whether the merchant-buyer had a duty to communicate the news of the treaty to the seller. John Marshall's opinion for the Court was brief and its reasoning practical: "The court is of [the] opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits."[137]

Such considerations of expedience, however, did not satisfy Verplanck because the outcome struck him as profoundly unfair. But on what basis could he justify a contrary result? Verplanck explicitly stated his starting point: "I believe, most of those who, without much speculation or deliberate reasoning, form their moral judgments from their *unstudied impressions of right and wrong*, will find [the decision] somewhat revolting to their notions of sound morality."[138] Still, he did not rest with this assertion. To persuade his readers that they shared this intuition, he described a concrete example with which he suspected they were familiar. "In truth," he explained, "no better proof of the universal agreement of the decisions of untutored moral feeling in such cases, need be required, than is furnished by the indignation which is so frequently excited by any intentional overcharge of the retail tradesman."[139] Thus, Verplanck established at the outset that he would base his argument neither on abstract theories of justice nor on positive law, but rather on "unstudied impressions" and "untutored moral feeling." As it had been for Professor Reid, Verplanck's starting point was his own ordinary moral intuition.

For Verplanck, though, the question of how much information a seller should be obliged to divulge to a buyer was not easy to answer. He was, after all, a businessman, and he recognized that most

[136] Id. at 178.
[137] Id. at 195.
[138] Verplanck, supra note 15, at 5 (emphasis added).
[139] Id. at 7.

people held a contrary "common sense" view that a merchant ought to be able to make use of his talents, knowledge and, expertise when conducting business.[140] Verplanck thus found himself confronted with a dilemma that extended far beyond the specific circumstances of *Laidlaw v. Organ*, or even the doctrine of *caveat emptor*. To solve it, he would need to discover "a few fixed and broad rules, founded in nature, conscience, and reason" designed to help resolve the question of the "*nature and degree of equality required in contracts of mutual interest*."[141] Already, then, we can discern Verplanck's goal; he would try to elucidate the fundamental principle that governed such transactions.

Of course, if legal authorities had unanimously expounded a resolution to this question, Verplanck would likely have had neither the need nor the confidence to pursue such an endeavor. But this was hardly the case. Verplanck had surveyed the case law and concluded that although the "harsh maxim" of *caveat emptor* had become the norm in American courts, anomalies persisted. In insurance law, for instance, the insured party was required to reveal to the underwriter all the material facts related to the object insured. Why, Verplanck, asked, did the law protect insurance underwriters—who were, after all, professional risk-calculators—but not the far less sophisticated purchasers of ordinary goods?[142] Similarly, equity court practice did not square with the doctrine of *caveat emptor*. Although few courts continued to hold a contract unenforceable due only to inadequacy of consideration, many used inequality of exchange as evidence of fraud, which often led to the same practical outcomes.[143]

Verplanck thus saw deep contradictions in common law practice. The conclusion he drew from the existence of these contradictions reveals much about Verplanck's intellectual assumptions. He asked, "If all the parts, so discordant in theory, can harmonize in practice, it must be because one part affords the general rule, the others the exceptions—what then is the general principle, where the deviation?"[144] Verplanck never doubted that there *was* a princi-

[140] Id. at 9.
[141] Id. at 14.
[142] Id. at 36–44.
[143] Id. at 49–54.
[144] Id. at 57.

ple; he only doubted that it had been found. More important, conflicting doctrines in practice were evidence that it had not been discovered. To use an analogy that Verplanck did not himself use but which illustrates his point, the fact that there are competing and contradictory claims as to the freezing point of water would not make one doubt that a freezing point exists, but only that other variables must be obscuring some results (such as varying degrees of the water's purity or the differing atmospheric pressures). Where else could Verplanck find such a principle? Like so many others of his time, Verplanck first looked to the civil law tradition.

Professor Stein cites Verplanck as paradigmatic of nineteenth-century legal commentators in his decision to borrow from the civil law, but what he does not mention—and what makes Verplanck's analysis particularly interesting—is that Verplanck ultimately rejected the civil law principles.[145] He did praise the Roman law for being "reasoned out from first principles," giving them "the method and dignity of science, and the unity of system."[146] Even in his praise, however, Verplanck subtly undermined the authority of the Roman law: "Its rules were invariably either deduced from the universal principles of natural law, or from the common sentiments, sympathies, and feelings of mankind."[147] To the extent such sympathies had changed over time—as Verplanck suggested they had—Roman law ought not necessarily remain authoritative.

At the highest level of abstraction, Roman law declared that "good faith is essential to all bargains."[148] The civilian Pothier had fleshed out what this broad principle demanded in practice. Verplanck cites Pothier as requiring that, "[i]n all contracts of mutual interest, good faith not only forbids falsehood, but also *all concealment of every thing which he, with whom we bargain, has an interest in knowing, in relation to the matter which is the subject of contract*."[149] But Pothier then pointed out that although such a principle ought to be followed "in foro conscientiae, as a rule of private duty," it was nevertheless "little observed in our courts."[150] For

[145] Stein, supra note 22, at 425–26.
[146] Verplanck, supra note 15, at 60.
[147] Id. at 61.
[148] Id. at 67.
[149] Id.
[150] Id. at 72.

Verplanck, this gap between principle and practice revealed that the doctrine "however beautiful in speculation or elevating in sentiment," must not be "in unison with the true nature of man."[151] In order to find the precise source of its error, Verplanck looked to an even more basic principle underlying Roman law, "that every inequality of price, every sale of a thing for more than it is worth, is void in conscience."[152] In other words, according to Roman law, a sale had to be an exchange of equivalents.

It was at this very fundamental level that Verplanck directed his attack on the civil law. Not only did contracts of mutual interest not require the equality of value, Verplanck argued, they *precluded* such equality. Since people transacted for the sake of profit, no exchange would ever be perceived by either party as an exchange of exact equivalents.[153] Verplanck looked to common experience for evidence of this claim. When we buy shoes from the shoemaker, Verplanck argued, it may at first seem that we are exchanging equivalents, but if that were true, would we not expect that the shoemaker would gladly buy back a pair of the shoes he had sold you? But of course he would not be willing to buy them back. Therefore, the shoemaker clearly views the price you paid for the pair as worth more than the shoes themselves.[154] Thus, Verplanck concluded, the principle which underlay the civil law doctrines on exchange was "diametrically opposite to the moral judgments we every hour silently pass on the fairness of men's dealings with each other."[155]

Having relied upon his "common sense" or moral intuition as a basis for attacking some core principles of the two main legal traditions, Verplanck then reassured his readers that his intentions were not those of the skeptic. Rather, since his original interest in this matter had not been one of "idle or theoretical curiosity," but one that had grown out of his own actual experience—the "business of life"—his readers could be assured that his motives were genuine.[156] "My honest object," he said, "has been to show the great im-

[151] Id. at 74.
[152] Id. at 85.
[153] Id. at 89.
[154] Id. at 90–91.
[155] Id.
[156] Id. at 100.

portance of the subject, the true nature of its difficulties, and the lights which law and theoretical ethics furnish towards its solution."[157]

Verplanck's first step in reasoning was to pick out what he perceived to be the fundamental issue: What is price? In other words, when transacting with a party, "[w]hat is the exact measure of that justice which we may claim as a matter of strict right" from the other party?[158] He insisted that the answer to this question would not be found in "metaphysical definitions or logical distinctions," but rather in "the plainer truths of political economy."[159] Still, he explicitly refused to look to the theories of economic experts, such as Ricardo's labor theory of value. Instead, he would rely upon the "common reasoning by which men are governed in matters of traffic."[160]

Verplanck then distinguished between two kinds of bargains: a *simple* bargain was either one transacted in a primitive society or one in which the article was unique.[161] In either case, the bargain was for a good that did not have a market. In such a bargain, the price of the good was purely subjective; that is, it consisted entirely in each party's desires and "peculiar notions of . . . interest."[162] Therefore, there was no such thing as an inadequate price for the good. In more common, *ordinary* bargains, which were transacted in modern society for basic goods, however, there were two factors which determined the price of an article: the subjective desires of the parties and a "common set of facts" that went into determining the market price.[163] This common set of facts included both extrinsic facts—those which affected market supply and demand—and facts intrinsic to the article itself, such as those features which made the article fit for the "ordinary purposes" for which it was commonly used (for example, flour for baking, horses for riding,

[157] Id. at 99–100.
[158] Id. at 106–07.
[159] Id. at 106.
[160] Id. at 107.
[161] Id.
[162] Id.
[163] Id. at 111.

and so forth).[164] For these market goods, Verplanck argued, the price was almost always in flux.[165]

Verplanck then sought to discover in what precisely *fraud* consisted. We could all agree, he explained, that affirmatively lying or concealing a defect in a product was fraudulent, but when did the mere omission of an act constitute fraud? One area of law that did treat omission of information as an act of fraud was the doctrinal category which governed the contractual obligations of trustees to their beneficiaries and attorneys to their clients; that is, relationships of confidence. The rationale for the rule in this context lay in the fact that the superior knowledge of the lawyer or trustee was a "condition precedent to the whole business."[166] Therefore, any contract with such a person contained within it an implied condition that he would be forthright with his knowledge.[167]

Verplanck was then ready to make his crucial inductive step. "Enlarge this plain principle," he insisted, and "extend and apply it to all contracts of sale."[168] Verplanck argued that there ought to be a comparable duty on the seller of any ordinary article to be honest with the buyer about the article that he sells to him. How should that duty be made concrete? Here is where his earlier analysis of price did its work. Verplanck's answer was that while the seller had an obligation not to take advantage of those objective "common facts" that go into the formation of the market price, he did not have an obligation to, nor could he possibly, inform the buyer about all those features that might affect the buyer's idiosyncratic, subjective desires.[169] A bargain, Verplanck argued, implied an indirect assertion by one party that a certain state of affairs which typically governs the market price of a good in fact holds, while at the same time it also consisted in an implicit reliance upon such an assertion on the part of the other.[170] Applied to the facts of *Laidlaw v. Organ*—the case with which his analysis began—this principle would hold that since everyone knew that a treaty would lead to a

[164] Id. at 112–13.
[165] Id. at 114.
[166] Id. at 117–18.
[167] Id. at 118.
[168] Id. at 119.
[169] Id. at 120.
[170] Id. at 121.

rapid increase in price, any party who had knowledge that the treaty had been signed, as opposed to mere speculations as to its possible occurrence, must divulge that information in a transaction. There existed an implied understanding that changes in factors affecting market price would be communicated to the other party.[171] Verplanck, however, did not stop there. He also insisted that while he had demonstrated one application of this distinction between private and common components of price in the context of bargain and sale, such a principle could in fact be extended to cover all commutative contracts in which one party compensated another for the fulfillment of a promise. The principles of "good faith and sincerity," he therefore concluded, "are of the broadest application" and could be applied to exchanges of property, payment for services, and insurance contracts.[172]

This discussion has examined Verplanck's argument in some detail in order to show inductive legal science at work. Taking a step back and viewing the structure of his argument as a whole, its features become even clearer. Verplanck began with a single case whose outcome he intuitively felt was unjust. He then hypothesized what the principle behind it might be, but found that principle to have been contradicted in other areas of the law. He then looked to a different tradition where he found an opposing principle equally contrary to his intuition—a fact he illustrated through the use of concrete examples drawn from everyday experience. From there, he set out to build an entirely new theory of contractual obligation with respect to the sharing of information, basing his starting assumptions not on natural law, nor on grounds of expedience, nor on theories of political economy, but rather on a "common sense" moral intuition, the truth of which he again sought to demonstrate through specific examples. He then extrapolated and extended the principles that his intuitions had revealed in certain specific instances in order to establish the validity of his principles in all areas of contract law.[173]

[171] Id. at 123–24.

[172] Id. at 135.

[173] In Verplanck's words, "By merely generalizing into universal provisions what has already been decided in numerous particular cases, [his principles] may be embodied in the language of our own system . . . ." Id. at 217.

Perhaps most importantly, in the end Verplanck denied he had invented anything new. Rather, he wrote that "all this is nothing more than the giving method and formal expression to the reasoning which conscientious and thinking men have already in their minds in a less definite shape."[174] For Verplanck, his project was one of discovery, not invention. He explained that his goal was to "state principles, not to propose laws. Whilst I feel the most perfect certainty as to the truth of these doctrines, I am very far from being equally satisfied with the verbal precision of my own rules."[175] This notion of "feeling" the moral truth of something derived from Hume's notion of a "moral sense," but like Professor Reid (and unlike Hume), for Verplanck such a "feeling" stemmed from the discovery of something that was external to him—that is, of an objective and natural moral order.

Thus, we can now see clearly in Verplanck all the central features of the inductive method: first, the use of common sense or intuition about concrete experiences as a starting point; second, the isolation of common features that unify those particular instances under a general principle and the extension of that principle to other areas of the law; and finally, the claim that this process of reasoning—and the knowledge it yields—is verified by its correspondence to the reasoning employed in the actual business of life.

C. Horwitz on Verplanck: Reassessing Legal Science

This account of Verplanck's efforts to construct a basis for legal doctrine stands in contrast to the interpretation Professor Horwitz puts forth in his influential work, *The Transformation of American Law 1780-1860*.[176] In discussing Verplanck's work, Horwitz acknowledges that his theory played an important part in the development of contract law, but he largely views Verplanck's role negatively. Though he admits that Verplanck was "boldly independent of other theorists of the market economy,"[177] Professor Horwitz nevertheless insists that Verplanck "confined fraud to a range sufficiently narrow to permit the contract system to reinforce existing

[174] Id. at 222.
[175] Id. at 221.
[176] See Horwitz, supra note 3, at 181–83.
[177] Id. at 182.

social and economic inequalities."[178] He thus interprets Verplanck's work in a highly politicized context as an effort to maintain the socioeconomic status quo. For Professor Horwitz, the intellectual strategy Verplanck employed most effectively to accomplish this goal was the distinction between common facts and subjective opinions. In Professor Horwitz's words, "Since only 'facts' are *objective*, fairness can never be measured in terms of substantive equality."[179]

This Note has sought to challenge this type of interpretation generally, and the reason becomes particularly clear in the case of Verplanck. It is precisely the act of throwing quotation marks around the word "facts" that most handicaps our ability to understand the predicament in which Verplanck and others found themselves. This Note has examined Verplanck's arguments in some detail in order to try to show that he believed he faced a real dilemma. On the one hand, he felt a strong conviction that current legal doctrine was unjust—and therefore contrary to the natural moral order—but on the other hand, it was difficult for him to know why or to have much confidence in his own judgment. American society was in a period of rapid social and economic change, one in which prices were constantly in flux, and neither of the core principles of the two major legal traditions offered consistent, let alone *just*, guidelines for defining what constituted fair commercial practice with respect to price setting. Thus, articulating which facts ought to be considered legally relevant to a transaction represented a formidable legal and moral puzzle.

The Scottish Common Sense philosophers had given legal thinkers such as Verplanck a new epistemological foundation from which they could criticize and improve upon existing legal doctrine by re-establishing the philosophical legitimacy of relying on one's own moral intuitions (an effort begun by Locke, but derailed by Hume). More important, the inductive method validated the coherence of extrapolating from such intuitions moral and legal principles that could then be applied to future cases. In reality, this method of reasoning has ancient roots in the thought of Plato and Aristotle, but the metaphysics on which those philosophers had

[178] Id. at 183.
[179] Id. at 182–83 (emphasis added).

grounded their philosophical reasoning could no longer be taken for granted after the attacks leveled on them by Descartes, Locke, and Hume.[180] The great hope of legal science lay precisely in such exploratory and edifying philosophical reasoning. Legal theorists of the nineteenth century believed they could uncover natural properties of human behavior and conduct (for example, making promises and exchanging goods) the discovery of which—like Newton's discovery of the forces of gravity—would enable them to guide the progress of human society.

It is certainly true that a formalist commitment to the rule of law was a powerful strand in nineteenth-century jurisprudential thought, especially in the second half of the century, when an analytic (positivist) jurisprudence grew in influence.[181] And no doubt Horwitz has this strand in mind when he characterizes the central legal dilemma of the nineteenth century as one which poses "morality" against "the rule of law."[182] Similarly, other scholars have characterized the dilemma faced by judges during this time as one between the "heart" and the "head," in which judges had to choose between coldly applying the law required on the one hand or bending the law to do justice in a particular case on the other.[183] To be sure, such a dilemma was real, but the mistake lies in identifying such formalism with the legal science of the earlier treatise writers such as Verplanck. Such identification suggests that a faith in the "scientific" nature of law necessarily served as a methodological corollary to a rigidly formalist legal positivism. As has been shown, in fact the opposite was true in the case of Verplanck.

[180] See Gordley, supra note 32, at 6–8.

[181] See Pound, supra note 25. at 100.

[182] See Horwitz, supra note 3, at 258.

[183] This metaphor of the heart and the head comes originally from Professor Miller and has been picked up by other scholars. See, for example, Peter Karsten, Heart versus Head: Judge-Made Law in Nineteenth-Century America 8–15 (1997) for the argument that, contrary to Horwitz's thesis, judges sometimes went with their hearts rather than their heads. See also Comment, *Swift v. Tyson* Exhumed, 79 Yale L.J. 284, 305–10 (1969) (employing Professor Miller's dialectic between the "Mind" and the "Heart" and applying it to Justice Story's opinion in *Swift v. Tyson*, 41 U.S. 1 (1842)). That commentator recognized the limit of this analogy: "[L]aw, even if a science, was a 'natural science,' identified with and drawing legitimacy from the notion of natural law, the moral basis of Christianity." Id. at 308 (citing Miller, supra note 16, at 192–98).

Moreover, although this Note analyzes in detail only the work of Verplanck, the articulation of such methods can be seen in other prominent legal theorists, such as Justices Story and Wilson. The reception of Verplanck's essay in the legal community confirms the view that his approach was perceived in his own time to be paradigmatic of legal science. Thus, Henry Wheaton wrote of Verplanck's essay in the *North American Review* that "investigations of this sort must always be attractive to those who regard law as a science founded on reason, and not merely resting on positive institution and the authority of precedents."[184] Just as Dugald Stewart had, here Wheaton explicitly described a system of positive jurisprudence as the antithesis of a true moral or legal science.

Horwitz, though, fails to capture this meaning of legal science. Instead, by projecting onto Verplanck his own modern epistemological assumptions—that true principles governing the natural world exist and are knowable, but that such moral principles do not exist and are not so knowable—Horwitz obscures the philosophical coherence of legal science and in doing so renders implausible any account of its development that accords ideas a central role. This Note has sought to make more plausible such an account by showing how different the philosophical assumptions of nineteenth-century legal theorists were from our own. Thus, while Professor Horwitz notes Verplanck's "impressive analytic talents,"[185] he does not see that these talents—specifically, the ability to discern common features among apparently different cases and to formulate principles based on those features—were precisely what made Verplanck a model legal scientist. In the end, the great hope of legal science lay not in its demand for certainty for its own sake, but rather in the possibility of genuine discovery—of principles of law as true and universal as those of natural science.

CONCLUSION

Looking back from the perspective of the twenty-first century, such an aspiration may seem at best naïve and at worst deeply misguided. Law seems so obviously full of politics and values that we

[184] Henry Wheaton, Verplanck's Essay on Contracts, 13 N. Am. Rev. 253, 258 (1826).

[185] Horwitz, supra note 3, at 180.

are justifiably suspicious of those who try to deny as much. At the same time, though, the aspiration of legal science has not died easily. Throughout the last century and into the present one, we have seen legal theorists continue to embrace the social sciences in the hope that the careful observation of human behavior will guide us in finding legal solutions to our many problems. Today, many modern social scientists still believe they can discover properties of human nature or behavior which, when revealed, will allow us to better direct the course of our society. In that sense, this Note suggests that these social scientists are in part legacies of this older generation of legal scientists, of which Justice Wilson, Justice Story, and Verplanck formed a significant part.

Of course, many modern social scientists might deny such a close connection. They might point out that if the older generation believed they could use empirical methods to derive moral principles, they cannot be justly compared to modern social scientists who work within a naturalistic world view and for whom, therefore, the existence of "moral facts" no longer seems intelligible. That difference is no doubt real, but the older generation was not naïvely unaware of such moral skepticism. As this Note has shown, they confronted it directly in the work of David Hume. But whereas the older generation followed Professor Reid in believing it necessary to reject Hume's radically skeptical conclusions, most contemporary social scientists tend to prefer Hume's own solution: they simply choose not to think about it.