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Book Review

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Susanna L. Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture,* Cambridge and London: Harvard University Press, 2016: pp. 400, $46.50 (cloth)

Leaves, Leaves, lean forth and tell me what I am.
–Theodore Roethke, "The Sequel," *The Far Field*

"There are three things that might be meant by 'the emergence of the modern mind': first, the emergence of modern ways of thinking about the universe; second, the emergence of modern conceptions of the mind; and third, the emergence of the mind itself with its distinctive human characteristics."[1] The very ambiguity of this attributive property, or definitional conundrum, hints at the difficulty of writing about the mind, and by necessary implication, human nature. Add to this that "the mind" is contested territory. Generations of theologians, philosophers, scientists and doctors, and jurists have fought over which discipline will control the definitional contours of "the mind." For the law, who controls the act of defining "the mind" and the scope of its definition is fraught with consequence. The presence of a capable mind, however defined, marks the boundaries of legal culpability in both criminal and civil law.

Into this thicket walks legal historian Susanna Blumenthal, and in a masterful study titled *Law and the Modern Mind,*[2] simultaneously both describes

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1. Colin McGinn, *Groping Toward the Mind*, N.Y. Rev. Books , June 23, 2016, at 67. Like the book reviewed here, the two books addressed in McGinn's review survey the emergence of "the modern mind." His review raises some of the same questions Blumenthal asks: "Was madness a matter of possession by demons and lapses into vice, and hence the province of theology and the clergy, or was it a matter for medical men trained in anatomy and physiology?" *Id*. Similarly, Blumenthal casts this as a dialogue between law and medicine, including the nascent field of psychology. As such, she is raising McGinn's second category—the emergence of modern, and arguably secular, conceptions of the mind.

2. Susanna L. Blumenthal, Law and the Modern Mind (2016) [hereinafter LMM]. Note that Blumenthal intentionally borrows the same title from Jerome Frank's Law and the Modern Mind (1930). As Frank did with his book, Blumenthal seeks to upset the apple cart of legal certainty. To the extent that they both look at the law as actually decided, rather than fit it into a particular legal theory, their books have a certain similarity. That is, both writers focus on the subjectivity of the law, and on individual cases and jurists. While Frank focused on the judge, Blumenthal looks at the judicial product in an attempt to see how the product

the battles among scientists, doctors, and jurists in the period following the Revolutionary War and up through the Gilded Age, and takes on traditional scholarship in legal history as to who this person or "mind" is. Her study not only provides an alternative account of the formation of American character, but also provides a series of detailed portraits of the various turning points in the formation of that character, and the legal determination of capable, accountable personhood.

This review essay will proceed in three parts followed by a conclusion that assesses the success and contribution of her work. The first section sketches her approach to legal history and her point of view. Professor Blumenthal takes on the monumental task of challenging the received wisdom of legal historians such as Willard Hurst. Second, this review will paint a condensed portrait of Blumenthal's methodology. Her book and its underlying analysis draw on a breathtaking base of source materials: Hundreds of cases, treatises, and biographical notes are woven into her observations. The careful depiction and analysis of these materials is central to establishing her thesis: that the traditional account of the development of American law, as a unitary response

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defines consciousness and a definition of legally accountable actors. Whether Blumenthal wishes to be seen as writing in that realist tradition, however, remains to be seen. That she resists categorization appears more clearly in her 1998 article; her description of Frank applies equally to herself:

> To create, Jerome Frank pronounced in *Law and the Modern Mind*, was emphatically the province and duty of the judiciary. Setting himself in opposition to the nineteenth-century legal tradition, Frank exposed the discretionary, unpredictable nature of the judicial process. He derided previous generations for their idealizing tendencies, which had led them to posit the existence of a superhuman, passionless judge—one who mechanically applied a stationary and certain set of legal rules to the cases brought before him. This vision of adjudication was nothing more than an illusion, Frank maintained, and persisting belief in it was explicable in psychological terms.

Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT. L. REV. 151, 152 (1998) (citations omitted). Her 1998 article also announces themes that underlie much of the book under review. As she stated in that article:

> The third and most recent line of historical scholarship questions the very utility of such labels as "instrumentalism," "formalism," and "realism," providing illustrations of their inadequacy as applied to a particular individual or historical era, and, in some cases, offering alternative terminology.
>
> This article extends the critique of these categories of analysis, demonstrating that judicial lawmaking was a constant from 1800 to 1930. What changed, it is contended, was the conception of the creative process entailed in the act of judging. At the turn of the nineteenth century, creative acts were still primarily associated with divine power. However, by mid-century, the power of creation was commonly attributed to human actors—"without necessary reference to a past divine event." This shift in usage can best be understood as a manifestation of the influence of romanticism in American culture.

Id. at 156 (citations omitted). In that article, she contested the views of G. Edward White as well as the legal historians who argued that this period demonstrated movement from "instrumentalism" to "formalism." The romanticism to which she refers is the shift from the sacred to the secular, and her study looks at the impact of this romanticism on American legal thought. Although her book does not speak in the same terms, one could regard it as the mature expression of that earlier article, with an expanded cast of characters.

to wealth accumulation and the growth of the industrial society, paints a false portrait of unanimity of opinion. Rather, she argues, jurists were faced with competing accounts of the mind and legal responsibility; more often than not they chose pragmatically among these accounts, so it is overly simplistic to characterize American legal developments as a unitary or linear march of progress. Importantly, in contrast to the usual approaches in the legal history literature that focus on criminal law, Blumenthal turns her attention to cases in the areas of wills, family law, contracts (particularly insurance contracts), and torts. Finally, the third part of this review will outline what is one of the most powerful, and, in my mind, important contributions of her book—an in-depth analysis of the intersection of law and medicine in the period under study. This analysis, as I will note, can be brought to bear on modern conversations involving law, genetics, and neuroscience.[3] Some lessons about the use of science in law that emerge from her study are worth repeating.

I. The Project: Taking on American Legal History

As I have noted, Blumenthal has, perhaps slyly, titled her book in the same manner as Jerome Frank, another leading legal historian who in 1930 authored *Law and the Modern Mind*. And in an acknowledgment of the connectiveness of history, she begins her book with a quotation from Oliver Wendell Holmes that nicely captures the central theme of her own work: "In a proper sense, the state of a man's consciousness always is material to his liability" (1).[4] Reviewing materials from the Revolutionary War and the Gilded Age, Blumenthal traces out how the insinuation of Enlightenment ideas in law and science informed legal thinking and in turn drew the contours of modern accountability and responsibility. Although she speaks at various points of the default legal person (DLP) and of Holmes's "reasonable man," she is actually, through studies of insanity, trying to outline the contours of who is, in the law of the time, the responsible, accountable "self." As she states, she "explores the problematic relationship between consciousness and liability in the history of American law . . . ." (2). As detailed below, Blumenthal has divided her work into two parts.[5] The first part of her book describes the intellectual underpinnings of the case analysis that informs the second part of her book.

3. The discussion in Part III will focus on neuroscience; the scope of this review and the author's own competence require this narrower gaze. Consider, also: "Genetics may yet threaten privacy, kill autonomy, make society homogeneous, and gut the concept of human nature. But neuroscience could do all of these things first." *The Ethics of Brain Science: Open Your Mind,* Economist, May 25, 2002, at 72, 72.

4. She notes that this is an odd statement for a jurist whose project was to move us from subjective to objective standards, creating the "reasonable man" (now, reasonable person) as the benchmark for legal liability. (1) The Holmes quote is from Oliver Wendell Holmes, *Privilege, Malice, and Intent,* 8 Harv. L. Rev. 1 (1894). Blumenthal, however, sees herself as reversing Holmes's emphasis on the reasonable person, instead looking at the default legal person standing behind Holmes's creation (12)

5. Blumenthal's book is drawn, in part, from her own previously published work. *See, e.g.*, *A Mania for Accumulation: The Plea of Moral Insanity in Gilded Age Will Contests*, *in* Making Legal History: Essays in Honor of William E. Nelson 181 (Daniel J. Hulsebosch & R.B. Bernstein eds.,

At the close of the Revolution, the key challenge to the success of this experiment in governance was the "mental competence of citizens, on their ability to exercise a 'rational liberty' " (5). As writings in almost any post-Revolutionary field demonstrate, creating a republic of free citizens,[6] governed by their consent and intelligence rather than by their status, was simultaneously liberating and disquieting. Many thinkers of the time, trying to channel this freedom, would look to the Common Sense philosophy of the Scottish Enlightenment, which provided a scientific confirmation of the divine conferral of rational faculties.[7] Into this setting Blumenthal places what she calls " 'the default legal person,' modeled in accordance with the Enlightenment 'science of man,' " (7)[8] and living in the shadow of Holmes's "average man." "In the everyday legal culture lying just outside the jurist's imagination, however, these exceptional persons were not so marginal. For even as Holmes wrote, American courtrooms were regularly confronted with capacity litigation."[9] Blumenthal, unlike Holmes, focuses on the "exceptional persons" who were the subject of capacity litigation in order to see what "free and independent man" would emerge from the chains of status and rank. She notes that this reversal of emphasis on the "default legal person" leads to four points of difference between her DLP and Holmes's average man:

1. The DLP marks the border of legal capacity, rather than a bundle of expectations for conduct.
2. While failing to behave reasonably led to liability, behaving like a DLP would typically led to a "suspension or mitigation of liability" (12).
3. The DLP is a descriptive model–he is the "precondition[] of liability," (12) while Holmes's reasonable man is prescriptive, determined by the limits of the law.

2013); *"Death by His Own Hand": Accounting for Suicide in Nineteenth-Century Life Insurance Litigation*, *in* Subjects of Responsibility: Framing Personhood in Modern Bureaucracies 98 (Andrew Parker, Austin Sarat & Martha Merrill Umphrey eds., 2011); *The Mind of the Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, 26 Law & Hist. Rev. 99 (2008); *The Default Legal Person*, 54 UCLA L. Rev. 1135 (2007) [hereinafter Blumenthal, *The Default Legal Person*]; *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 Harv. L. Rev. 959 (2006).

6. As noted below, Blumenthal makes it clear at various points that these citizens were white males, and generally property holders.

7. Although Blumenthal addresses the role that religion plays in the formation of the American "mind," it is not a major theme of her work. She notes that over time, legal thinkers moved from the constraints of Calvinism to a more liberal and broadly couched Protestantism. *Passim*, *but see e.g.*, LMM 22, 33–34. 42–44.

8. Her articulation of this concept is clearer in her article that informs this chapter. Using Holmes's "average man," almost as a foil, she points out that judges "could not see men as God sees them." Blumenthal, *The Default Legal Person*, *supra* note 6, at 1137 (quoting O.W. Holmes, Jr., The Common Law 108 (1881)).

9. Blumenthal, *The Default Legal Person*, *supra* note 6, at 1138.

4. Finally, the DLP has "no particular point of view of his own;" rather he moves "chameleon-like . . . from case to case"[10] (12).

Blumenthal documents the travails of the default legal person as he moves through the late eighteenth and nineteenth century in order to account for what judges were really doing in this period. She states, in her article:

> In effecting these transpositions, they [judges] suggested that the mental attributes one needed to be a competent legal actor depended upon the nature of the act involved—whether it was a will, contract, or tort. So, in the law of wills it was deemed to be essential that the default legal person had the cognitive and emotional capacity to remember and feel the family ties that bound him as he disposed of his estate, while in the law of contracts it was more important that he possessed the ability to make intelligent judgments on the basis of his own self-interest. Within the law of torts, however, he would assume several distinct forms. In some instances, he had to be able to form a malicious intent, but in others, he needed only to be capable of exercising prudence and foresight; in still others it was enough if he had the capacity to harm. Yet wherever he stood in nineteenth-century American common law, the default legal person embodied a mental threshold, serving to illustrate the preconditions of responsibility, so far as the law was concerned.[11]

Inherent in this approach is Blumenthal's challenge to conventional legal history, which she views as being told largely in "socioeconomic terms" (16). Rather than viewing doctrinal developments through the lens of economic development and the approach of the Civil War, Blumenthal prefers to look at the religious and scientific influences on the work of the law, believing that the concern for an "objective law" had "deeper spiritual roots and higher ideological stakes than previous scholars have recognized"[12] (16). For her, the person is not only an object of capitalist forces; she sees the person as subject to his or her own frailties as well as the fluidity of social, economic, and legal relationships at the time (16). This journey is not linear, as is typically depicted in legal history. Through the numerous capacity hearings she chronicles, she

10. This point becomes central later in her book; basically, the legal definition of capacity is contingent on the area of law, e.g., contracts, torts, through which the DLP traverses.

11. Blumenthal, *The Default Legal Person*, *supra* note 6, at 1140.

12. Thus, Blumenthal rejects the accounts of legal historians such as Morton Horowitz, Jerold Auerbach, and Grant Gilmore who see the formalism of the period as an outgrowth of the economics of the time. *See generally* Morton Horowitz, The Transformation of American Law, 1780-1860 (1977); Jerold Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (1976); Grant Gilmore, The Ages of American Law (1977). Robert Cover and William Nelson provide a competing account, focusing on the Civil War and jurists' attempts to look to rules of human behavior, values, and religion to justify changes in the law. *See generally* Robert Cover, Justice Accused: Antislavery and the Judicial Process (1976); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America,* 87 Harv. L. Rev. 513 (1974). Holmes, in *The Path of the Law*, in a sense combines both approaches of his contemporaries, drawing on economic analysis as well as the arguments of the anti-slavery formalists. Oliver W. Holmes, Jr., *The Path of the Law,* 10 Harv. L. Rev. 457 (1897).

wants to show the reader the "general lack of clarity about the operative norms of behavior in the household and the market" (16). In the end, not only does she paint a portrait of the preconditions of legal freedom (i.e., a definition of modern mind and personhood), but she also allows the law to make room for the preconditions of the American character as the courts stepped back from constraining behavior, "leaving individuals freer, in a certain sense, to act on their own ideas and impulses, however eccentric, perverse, or just plain foolish" (17).

Her model of legal history is set forth in Chapter 1, "Common Sense and Common Law" (26-58). In this chapter, she chronicles the fascination of American jurists with the ideas of the Scottish Enlightenment and its Common Sense[13] philosophy, especially those articulated by Thomas Reid (26-29). This philosophy, with its focus on the ability to self-make and improve one's character through rational processes, was especially appealing to the founding generation, concerned as it was with the freedom unleashed by the Revolution (42-44). Here Blumenthal begins to question more traditional legal history, that, she says, tends to focus on law releasing "creative human energy," chiefly toward the end of economic development (31). In her view, the traditional accounts have failed to look at prevailing philosophies of mind to plumb them for the ways in which they formed and constructed legal personhood. By contrast, "[t]he mental philosophers and their disciplinary techniques are placed front and center here" (31). The Common Sense philosophy of the Scottish Enlightenment, she argues, was central to the project of allowing the new citizens of the republic to develop the self-knowledge that would make self-mastery in the face of tremendous freedom possible(42-47). To that end, she focuses on James Wilson (1742-1798) who in 1766 brought Common Sense philosophy to America, and was part of the movement from a strict Calvinist approach of moral blameworthiness to, ultimately, a more forgiving liberal Protestantism (33-36). By focusing on Reid and Wilson, Blumenthal deftly but carefully demonstrates the rising hegemony of Scottish Common Sense philosophy, and how it challenged the idea that responsibility was purely cognitive or intellectual; that it could also be based on an "excess of passion rather than a defect of understanding, as it had long been defined at common law" (41).[14] Nonetheless, this view, based on science and religion, had a deep belief in the ability of people to pursue a virtuous life, contrasted with the Calvinist belief in "innate human depravity." Common Sense philosophers gave more room for human improvement through the exercise of "mental ability" (42-43). This focus on improvement fit nicely with the concerns about the vast freedoms given to citizens; exercise of our mental abilities would allow us to make the best use of the freedoms that had been afforded by the Revolution.

13. One interesting point that Blumenthal makes is that the exaltation of "Common Sense" becomes small-case "common sense" by the arrival of the Gilded Age.

14. Citing 3 Thomas Reid, The Works of Thomas Reid: With an Account of His Life and Writings 39-41 (Dugald Stewart ed., New York, Duyckinkck et al., 1822).

While Common Sense philosophy spurred a great deal of American self-improvement movements, the philosophy also had the seeds of its own demise because for jurists, Common Sense philosophy did not provide a clear division between depravity and disease (50). From this belief in the capacities of the mind for self-improvement and self-government emerged the default legal person, who had the capacity for self-knowledge and determination. Challenging but never fully displacing the British notion of personhood, "[t]he default legal person stood as the embodiment of widely shared assumptions about human agency and accountability, constituting a part of the common sense of the American legal profession in the nineteenth century" (55). Thus, "mental soundness" was a "legitimate means of discriminating between theoretically equal individuals for all sorts of legal purposes," because it supported the new American legal structure in which "mental ability rather than social status constituted the primary determinant of legal capacity and responsibility" (57).

What this philosophy could not always answer was whether the legal acts of individuals were a reflection of intentional self-determination, albeit eccentric, or of a disease, rendering them legally unaccountable (58). To this end, Blumenthal, in one of her most singular historical contributions, surveys the role that the medical jurisprudence of insanity placed in the law, in Chapter 2 of the first part of her book. As will be dealt with in more detail below, Blumenthal uses the writings of Dr. Benjamin Rush and the alienists to sketch out how medical expertise, in the form of treatises and testimony, contributed to the fleshing out of the default legal person.

The ambitious second part of her book is a veritable travelogue of adjudicated civil capacity cases that demonstrate her point that judges "muddled"[15] through determinations of personhood, as opposed to acting

15. William Rodgers, *Judicial Review of Risk Assessments: The Role of Decision Theory in Unscrambling the Benzene Decision,* 11 ENVTL. L. 301, 311-14, 311 at n.47 (1980-81) for the sources cited there on "muddling through". Rodgers' article is directed at judicial perceptions of the forms of reasoning used by administrative agencies in making decisions: classical, rational/formal, and the "theory of successive limited comparisons." He renames the third theory less elegantly as the "science of muddling through." Although he is applying this model to agency behavior, Blumenthal essentially, although in a more carefully documented manner, describes judges in the period studied as performing the same analysis. Rodgers argues, as does Blumenthal, that agencies and judges tend to use a "hybrid" approach to decision-making that combines features of the classical model (freewheeling proxy for the legislature) and the rational (the administrator identifies alternatives, projecting consequences to make the best decision; less political and more scientific). As this applies to Blumenthal, she is arguing that legal history has missed the boat in forcing judicial decisions into one model; rather, judges tend to decide pragmatically based on the evidence before them and the doctrine at issue rather than as against some grand philosophy. As Rodgers would say, "decisionmaking is a process of strategic adaptation over time, incremental advance, and partial resolution . . . . Decisionmaking by the muddlers is a process that bends with the breeze, rolls with the punch, runs for daylight. It works by fits and starts, by floating proposals, by reworking them to blunt anguished objections, by amendment over time." *Id.* at 312. Obviously, nineteenth-century jurists are not modern governmental agencies but as described by Blumenthal their dilemma is much the same—given the shifting sands of science and medicine, how does one make an incapacity decision in the case before the

from some grand philosophy. As developed in greater detail below, Blumenthal surveys an amazing number of cases to demonstrate how judges dealt with the contending philosophies laid out in the first part of the book. Again and again, judges struggled with drawing a line between sane and insane, capable or not accountable.

II. Methodology: Speaker for the Dead and the Insane

In *Speaker for the Dead,*[16] Ender Wiggin, in an act of atonement, undertakes a life mission to "speak" the truth about the dead as he performs their eulogy—the good, the bad, and the ambiguities of each person's existence. "Who was this speaker, and how did he know so much about things he could not possibly have known?"[17] In a like manner, the dead speak through Blumenthal, telling us the tale of how modern American legal consciousness was born. The success of the new republic rested on its citizens, and their moral agency. In this case, she brings to life, in an unvarnished fashion, at least four groups of actors who inform the development of consciousness (or legal capacity), and conferrals of agency, from 1750 to 1900. The first group, the focus of her study, is the litigants in estate, contract, family law, and tort cases that provide the gist of her book, and from which her thesis is tested and proved. The second group contains populations that are typically disenfranchised in legal scholarship: married women and slaves. In fact, one of the remarkable contributions of her book is to acknowledge that the shaping of the American mind takes place in the shadow of the disenfranchisement of these two groups. A third group of actors

court at a particular moment in time? The beauty of Blumenthal's analysis is that she shows, through her case vignettes, nineteenth-century jurists "muddling through."

16. Orson Scott Card, Speaker for the Dead (1986, 1991)[The author is using the 1991 "author's definitive edition.]. Those who are familiar with Card's book Ender's Game (2006) know that Ender Wiggin, the main character in that book, was responsible for the genocide of an entire species. What is less well-known is that *Ender's Game* was intended as a character study or prequel for what was intended to be Card's main work in *Speaker for the Dead*. *See* "Introduction" at ix to xxii. Relevant also to the power of Blumenthal's work is this note of similarity between her close analysis of cases and the work of the Speaker:

> The Speaker had done a monstrous thing, to lay these secrets before the whole community. They should have been spoken in the confessional. Yet Peregrino had felt the power of it, the way the whole community was forced to discover these people that they thought they knew, and then discover them again, and then again: and each revision of the story forced them all to reconceive themselves as well, for they had been part of this story, too, had been touched by all the people a hundred, a thousand times, never understanding until now who it was they touched. It was a painful, fearful thing to go through, but in the end it had a curiously calming effect. The Bishop leaned to his secretary and whispered, "At least the gossips will get nothing from this—there aren't any secrets left to tell."

Id. at 269. This comparison, between *Law and the Modern Mind* and *Speaker for the Dead*, is meant with respectful seriousness. While the former is styled as a legal history, there is also a sense, like the latter, that it is an anthropology, and that she lays bare the lives of the litigants, medical experts, and jurists of the eighteenth and nineteenth centuries. That is, she lets history speak for itself from the cases rather than imposing an interpretive framework from one of the legal history theories.

17. Card (1991 ed.), *id*. at 263.

depicted in her careful study are the judges of the relevant period, who speak through their decisions in the cases that are discussed. Finally, as addressed in the next section, Blumenthal immerses the reader in a conversation between jurists and the emerging medical doctors who study the mind. In this section, the primary focus will be on the parties and the jurists in the cases, as this is the method by which she proceeds. Brief attention will also be given to the picture she draws of married women and slaves, who exist on the fringes of her narrative.

The second unique feature of her approach is a focus on cases that employ a challenge to one party's sanity, or legal capacity. Blumenthal's methodology is to track how jurists and the medical personnel who testified in the courts defined insanity and therefore legal incapacity (the DLP). Unlike many works of legal history that focus on the criminal sphere, Blumenthal's book focuses on the civil sphere in specific realms: challenges to wills, contracts voided for a lack of capacity, and divorce and tort liability where family members often contested the agency and psychological capacity of their loved ones. In moving from 1750 to 1900, she shows the reader how the law creates room for the eccentricities of the modern American character as it set the contours of legal capacity.

Her focus on insanity is revealing, and part of her project is to reveal the "modern mind" and the contours of legal responsibility. By a type of "reverse engineering," she uses the courts' demarcation of capable personhood from insane to describe which people were legally moral agents. The study traces the many conflicting attitudes toward insanity in eighteenth- and nineteenth-century law: Was insanity a disease? Or, rather, was it a sign of moral depravity? Was it only to be defined by one's ability to be rational? Or would it consider moral inclinations and sentiments? This focus is against the backdrop not just of the courts' struggle with these cases, but also of the medical professions and the rise of the asylum. At the same time, she diagnoses the fundamental anxiety of the new republic: How can the law confer, and yet contain, so much freedom? That is, the American revolutionary project could be a success only if citizens could live up to the idea of ordered liberty. Success would be a moral, political and legal endeavor.

A. The Estate Cases

One of the singular contributions of Blumenthal's book is her analysis of myriad capacity cases. "The analysis offered in the chapters that form Part 2 is based upon over 800 published (usually appellate) opinions" (318 n.18).[18] This strength, however, also makes it difficult to summarize her book because these cases form the heart of the book; it is hard to pick one, especially since she

18. She adds: "Many of these cases were identified in the same way a nineteenth-century lawyer might have investigated the matter: by mining the notes of leading works on the medical jurisprudence of insanity as well as legal treatises devoted to discrete doctrinal areas." (318 n.18)

surveys several areas of the law. This section will look at her first case summary as an example of her method of analysis.

"By all accounts, George Moore was a dissolute bachelor who drank himself to death" (105).[19] So begins Blumenthal's first account of an incapacity case. Moore had executed a will that disinherited his three brothers, but provided for his female slave, who was also described as his concubine.[20] Not surprisingly, the three brothers of this childless man contested his will, arguing incapacity, undue influence, and fraud. They presented testimony about a fever that resulted in animus toward his brothers, while the will's proponents called witnesses "who maintained that when this document was made Moore displayed sufficient intellect to competently dispose of his estate" (105). Both the trial court and the appellate court ruled against the will because it appeared that Moore's concubine, to be emancipated upon his death, appeared to exert undue influence over him, and that his feelings against his brothers was seen as "a derangement in one department in his mind" (106). The basic facts of the case laid out, Blumenthal uses this narrative to regale the reader with the arguments on rehearing of proponents' counsel, Joseph Cabell Breckinridge, who railed against the "new medical psychology" employed by the contestants that made it difficult to tell the difference between "sin and disease" (106). Blumenthal uses this case to note that "the issues . . . posed recurred with disturbing regularity in the decades that followed, as litigation about 'unnatural dispositions' seemed to crowd court dockets in every state" (106).

The differing positions about incapacity established, Blumenthal uses each case as an entry point to analyze the context of the decision. In this particular case, she sees the decisions as evidence of "a concern that liberty might degenerate into licentiousness, particularly in a country that had repudiated so many of the traditional props of social order . . . ." (107). Canvassing the treatises at the time of the decision, she points out that the principles "of testamentary freedom and natural justice seemed perpetually in conflict, forcing judges to confront the fact that liberty and morality did not necessarily lead all men in the same direction" (107). The stage set, she uses the next two chapters to illustrate the way in which testamentary capacity battles staked out claims between conventional morality and freedom. But she also goes deeper to use these cases as exemplars of her thesis that these cases "are best understood" as exposing the "tensions and ambiguities in the liberal conception of self-possession." By presenting so many cases, followed by close and searching analysis, she describes how traditional legal history has "overstated the coherence and stability of the behavioral norms invoked" in this period (108). Her analysis not only carefully dissects each case in its historical context, but also seeks to reveal a vision of the human will in the civil context by looking not only at the cases but at the ideas of "[t]he new band of

19. This is the first account in the first of her case analysis chapters.

20. Johnson v. Moore's Heirs, 11 Ky. (1 Litt.) 371, 371–72 (1822), referenced at LMM, *supra* note 2 at 105 n.1. The ensuing description is drawn from *id*. at 105–07.

medical men specializing in the diagnosis and treatment of mental alienation" who "promised a scientific basis for judgment" (109).[21] It is the latter two foci that make her book unique among legal history texts; she focuses on civil cases, and introduces in a co-equal way the role of medical personnel in shaping the law of capacity.

B. The Disenfranchised: Women and Slaves

As noted, those who suffered from monomanias, delusions, and other infirmities of the mind were excluded from legal personhood as the outcome of contested litigation. But the definition of legal personhood doesn't begin and end with a finding of insanity. It is a credit to the broad ambit of Blumenthal's scholarship that she also considers, in each chapter, the status of slaves and married women. She acknowledges from the outset that most of these cases involved white men of property (8).[22] That this was the case, that white maleness was the baseline precondition of "presumed competence," meant that "any sign that they had been unmanned could serve as the basis for claiming incapacity" (100). As noted above, many of her case studies shine a light on slavery and/or the role of women.

III. Past as Prologue: Science and Law, Then and Now

> **Antonio**: . . . Who's the next heir of Naples?
>
> **Sebastian:** Claribel.
>
> **Antonio:** She that is Queen of Tunis; she that dwells
> Ten leagues beyond man's life; she that from Naples
> Can have no note, unless the sun were post—
> The man i' the moon's too slow—till new-born chins
> Be rough and razorable; she that—from whom
> We all were sea-swallow'd, though some cast again
> And by that destiny to perform an act
> Whereof what's past is prologue, what to come,
> In yours and my discharge.[23]

One theme of this review essay, and undergirded by Blumenthal's study, is that the fundamental question of who is a responsible agent has always vexed those in the law (as well as those in religion, philosophy, and science). By what theory of mind, in any given period of history, does the law determine that

21. The question of the will, she notes, has long pre-occupied legal historians who study the criminal law. *See, e.g.*, Thomas Andrew Green, Freedom and Criminal Responsibility in American Legal Thought (2014).

22. From the beginning, she notes that the jurists of the period say liberty as consistent with a patriarchal hierarchy that meant a male head of household co-existing with slavery. Whiteness was the "default" race (8). "Since few white women and even fewer non-white women or men owned and controlled property, this bias stands to reason, even as it forces us to reckon with how many property holders perceived themselves or were perceived by others to be incapable of rationally managing their possessions" (100).

23. William Shakespeare, The Tempest act 2, sc. 1.

we are responsible agents? And to what extent should the sciences (including medicine) be part of that effort? What should be the nature of the partnership between law and science? Although this book is clearly intended as a work of legal history, Blumenthal's book can be read to also speak to contemporary debates in science and law, particularly in genetics and neuroscience.[24] Describing the work of scientists and medical personnel during that age is a key part of her study, and may be one of the most important contributions that her books make to legal (and medical) history.

Some readers of this review essay may have owned, as a child, a View-Master. This toy was a modern descendant of the stereoscope, and one of its best salespeople was Oliver Wendell Holmes, Sr. (88). Invented in 1838, the stereoscope allows the viewer's eyes to see two separate images that are then fused into one image in the brain, giving the image depth and richness.[25] Relying on the underlying metaphor of the stereoscope, Blumenthal tells the entwined contributions of medicine and law to the burgeoning nineteenth-century understanding of insanity, and, like the stereoscope, gives the reader a much deeper and complex understanding of the role and definition of insanity in shaping American culture and law, and its view of human nature. Her account is told largely through the stories of Francis Wharton, a writer of treatises on medical jurisprudence, and John Ordronaux (1830-1908), a doctor with a law degree and a pioneer in asylum oversight who worked with lawyers to craft a better legal regime governing insanity.

Wharton, she writes, promised, like the stereoscope, to bring the focus of law and medicine into convergence. Unfortunately, she notes, Wharton's study of "over 800 appellate decisions" showed more divergence than convergence regarding the law of insanity (90). By the 1870s, this conflict between legal authorities and medical experts was apparent to the public in both criminal and civil capacity trials. Public skepticism about the soundness of law or medicine rose as insanity trials became fodder for newspapers, in which medical experts frequently disagreed with one another and lawyers appeared to hire "forensic psychologists [who] would say anything for a price" (90-91). These disputes were confounded by differing views about method between lawyers and doctors. Doctors saw the disagreement as a way of testing and advancing science, while lawyers saw the disagreement as a fruit of adversarial culture and looked down on "scientific disagreements as signs of moral

24. This section of the review will focus on neuroscience, although the issues regarding accountability that arise in genetics are just as telling.

25. *Stereoscope*, Wikipedia, https://en.wikipedia.org/wiki/Stereoscope (last updated Aug. 16, 2017, 7:24PM), https://perma.cc/NV2M-73TV. That entry also details Holmes's refinement of the stereoscope:

> In 1861 Oliver Wendell Holmes created and deliberately did not patent a handheld, streamlined, much more economical viewer than had been available before. The stereoscope, which dates from the 1850s, consisted of two prismatic lenses and a wooden stand to hold the stereo card. This type of stereoscope remained in production for a century and there are still companies making them in limited production currently.

Id.

corruption" (91). And like today, all felt that the adversarial jury trial distorted the presentation of scientific evidence about insanity (92-93).

> Against this backdrop, Blumenthal uses the story of John Ordronaux, and his rise and fall as the lunacy commissioner for the state of New York as the lens for this dispute. Ordronaux was active in the movement to codify the law of the insane as well as to reform and centralize oversight of asylums. He labored to "minimize" the differences between law and medicine, pointing out that while medicine viewed insanity as a departure from one's natural mental condition arising from bodily disease, the law saw it more narrowly as determining whether particular conduct was free (and therefore culpable), or involuntary (and nonculpable) (92-93). He also, presciently, noted that these same "physical laws" affected "the judgment process itself" (93). Similarly, because Ordronaux felt confined to the information about the mind presented by our senses, and that " 'no two minds are alike, either in health or in disease,' " Blumenthal describes him as coming "perilously close" to suggesting that evaluation of sanity was subjective, something that his detractors raised also (93-94). But in the end, she notes: "Judging competence thus proved a profoundly contentious matter, as it became painfully obvious that there was no 'common sense of science'—no agreed upon standard that could be used to distinguish the true from the false expert, let alone to decide who was actually insane."[26]

As the century moved on toward the Gilded Age, advances of science became increasingly materialist and determinist.

But Blumenthal is very sympathetic to the knot that medical jurists in fact tied for themselves. In attempting to codify something that was admittedly "invisible and irreducibly mysterious" (98), medical personnel merely set the boundaries of argument at trial rather than settling disputes. In a brilliant segue to Part 2 of her book, Blumenthal summarizes the impact that medical knowledge had on incapacity trials. As will be familiar to the modern litigator, she describes litigating incapacity as a fact-intensive enterprise "with 'voluminous' transcripts . . . the norm" (99), as it was hoped that the details could supply what was hidden from view. Shifting to the real object of her book, she notes that as the middle class became subject to the vagaries of the market and reliant on the self-made man, who himself was being undercut by industrial capitalism (99), it was this "self-made *man* whose capacity was typically challenged in these proceedings" (100). In these challenges, "psychological medicine supplied a putatively scientific explanatory framework as well as an extensive arsenal of words and phrases for conveying how and why they fell below the threshold of the default legal person" at the moment of alleged incapacity (100). In her account, then, capacity trials showcase the fears and concerns of nineteenth-century Americans about their own self-making (100-01). These accounts also are the fodder of her challenge to traditional accounts

26. This subjectivity, Blumenthal notes, became a problem for both law and medicine (94).

of "law and the conditions of freedom in nineteenth-century America" (102).[27] Responsibility was frequently contested (102), and placing the mind at issue was a "Pandora's Box" that, in marking the difference between capacity and madness, either became meaningless as too narrow, or tarred everyone with a touch of madness. In this, she opines, "judges took a pragmatic tack" between voluntarism and determinism (103). By the end of the century, "Common Sense" had lost its claim to being capitalized—there was no objective way to compare individuals, and judges had to pragmatically make their way through the differences (103). Ultimately, by the end of the 1800s, all agreed that "rationality is not the norm"; rather, the monomania of speculation would be the "main show in town" (104).

Her focus on medical experts is deepened in her subsequent case studies. For example, in Chapter 3 ("Unnatural Dispositions"), she not only shows the working of Common Sense philosophy (113), but also introduces the reader to the medical jurisprudence of alienists. At the beginning of her period of study, an emerging group of medical experts who styled themselves as "alienists" came to the fore (109). They questioned traditional common-law notions of *non compos mentis,* or insanity, complaining that the courts' use of the concept was applied inconsistently (3). Not surprisingly, this emerging medical science was widely used in the cases that she so carefully describes.[28] In case analysis, she shows how not only jurists were befuddled on the shoals of sin, disease and depravity, but so too were medical jurists (114-17). The medical experts often contested legal outcomes, and she uses this to show that it was not only in criminal law that jurists and medical experts had to find a boundary "between disease and depravity" as society became more secularized as well as medicalized (117). The cases in her two chapters about wills, then, show not only a growing secularization of legal doctrines and a wider ambit for eccentricity and freedom, but also the development of early psychology as it addressed manias, delusions, and self-alienation as alternative explanations to sin or depravity for human behavior. Her point, and mine, is that this history, especially given the contemporary focus on neuroscience,[29] can show us the choices that a judge makes in each individual case have a bearing not just on the rights of the litigants, but also on the definition of human nature, free will, American culture, and the limits of science's role in the courtroom. Each case is a picture of how we as a society navigate the bounds of freedom and

27. This is also a none-too-veiled reference to James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956).

28. She defines their use of alienation as follows: "This term of art denoted a loss of reason that might be partial or total, entailing an estrangement or dispossession of the self, such that the sufferer was no longer in his or her right mind" (3).

29. Perhaps the most salient difference between nineteenth- and twentieth-century psychology and modern neuroscience is that rather than deducing insanity from outward manifestations of behavior, we can now, with imaging technologies, both structural and functional, look inside the brain. Although, as will be noted below, these technologies are not without their limits, both scientifically and legally, it should come as no surprise that many of the basic questions about freedom and the operation of the human will stay the same.

responsibility. And, as it pertains to contemporary developments, in which neuroscience challenges the "folk psychology" of the courtroom, her history allows one to see the contested terrain in which folk psychology developed.

These debates, about the role of science in the courtroom, have not changed. That said, two developments change the framework of the debate. The most salient scientific difference now is that modern imaging technologies allow us to look into the black box of the mind. On the legal side, some of the evidentiary conundrums have been resolved in the adoption of evidentiary standards for the admission of expert evidence about mental conditions.[30] Modern neuroscience and law, however, continue to ask the same questions: What is consciousness? Capacity? Who is responsible? Are we determined, or do we have free will? But it is important to see the historical connections between the accounts of medical jurisprudence in Blumenthal and today's debate about free will, because the latter are the direct descendants of the former and may well have as great an impact on American law and the definition of the default legal person as they did in earlier times. That is, the default legal person lives.

On the scientific side, new imaging technologies mean that the brain is not quite the black box that it was in the eighteenth and nineteenth and even twentieth centuries.[31] Technologies such as functional magnetic resonance imaging and electroencephalograph allow scientists to "see" both structure and function in the brain. In many cases, they have allowed us to understand that there are, indeed, many types and causes of insanity and to see that many types of insanity are organic.

New cases, like the ones depicted by Blumenthal but taking place in the late 1900s and early twenty-first century, reveal contemporary thinking about the default legal person. Consider, for example, litigation about adolescents. Is the adolescent a legally capable adult? In what circumstances? For example,

30. *See*, *e.g.*, Fed. R. Evid. 702 regarding experts, interpreted in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). *Daubert* replaces the *Frye* standard [Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)] in the federal courts. Both standards, however, provide the presiding judge with a set of tools for the admission of expert evidence. Although both look to the reception of the science in its relevant community, the *Daubert* test goes further in announcing a set of factors that the judge, as gatekeeper, must consider before admitting an expert. If this test had existed in the nineteenth century, it may have resolved some of the debates.

31. Neuroscience is a relatively new area of study; its involvement with the law is even newer. To date, there is only one casebook in this area: Owen D. Jones, Jeffrey D. Schall & Francis X. Shen, Law and Neuroscience (2014) [hereinafter Jones et al.]. Teaching from this casebook inspires the subsequent discussion and comparison. For those who seek further information, I recommend two sources. First, Francis X. Shen, *Keeping Up with Neurolaw: What to Know and Where to Look*, 50 Court Rev. 104 (2014) (a three-page guide to bibliographic and other resources). Second, the comprehensive website for the MacArthur Foundation Research Network on Law and Neuroscience, http://lawneuro.org/, contains, among other features, an exhaustive bibliography of articles and books on the topic. *Law and Neuroscience Bibliography*, Macarthur Found. Res. Network on L. & Neuroscience, http://lawneuro.org/bibliography.php (last visited 30 August 2017).

in *Roper v. Simmons*,[32] the Supreme Court, in light of evidence about adolescent brain development, concluded that a juvenile offender could not be put to death for a capital crime because of maturational differences between the adult and adolescent brain. This decision, like many of Blumenthal's cases, was informed by medical and psychological expertise.[33] But again, as with Blumenthal's cases, this is contested territory. (Consider, in *Roper*, the dissent of Justice Scalia that questioned the science in this case and its use.[34]) A danger exists here, though, that perhaps we did not face in the nineteenth century. Modern neuroscience and medicine have the potential, as yet not reached, of demonstrating every person as having a unique mind. Do we face a day in which our variability, both genetically and neurologically, is so diverse that we all will require capacity hearings? That is, perhaps we are in danger that we are all unique, so that lines may be meaningless?

As Blumenthal aptly points out throughout her book, the question of will versus determinism bedeviled nineteenth-century psychologists and jurists. Although our terminology has changed—now it is determinists, compatibilists, etc.—the debate has not. Moreover, these new technologies have not resolved the debate about free will. Medical jurisprudence, now as then, is all over the board on whether we are determined or have free will.[35] But more importantly,

32. 543 U.S. 551 (2005). Along these same lines, *see also Graham v. Florida*, 560 U.S. 48 (2010) (a juvenile offender cannot be sentenced to life without parole in a nonhomicide crime, again relying in part on psychological evidence).

33. *See, e.g.*, Brief for the American Psychological Association, and the Missouri Psychological Association as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447.

34. As the casebook authors, Jones et al., *supra* note 73, point out, there is the additional empirical difficulty of when is it appropriate to use group-averaged data in an individual case—the G2i problem. Similarly, consider the objections of law professor Stephen J. Morse, in *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note,* 3 Ohio St. J. Crim. L. 397 (2006), who suggests that the addition of neuroscientific evidence adds little beyond what parents and others can already "observe" about adolescents. *Id*. at 409-10. Others have pointed out that the same psychologists have argued that female adolescents, on the other hand, can make mature decisions about abortion, pointing out that this type of reflective decision draws upon different areas of the brain and a different social context than impulsive, peer-based decisions to engage in criminal behavior. *See, e.g.*, Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 Am. Psychologist 583 (2009). This difference, however, is not counter to Blumenthal's argument—indeed, part of her argument is that capacity varies depending upon doctrinal context. The same point seems to be emerging in modern uses of neuroscience.

35. Compare the following, all excerpted in Jones et al., *supra* note 73, at 121-47 (Chapter 5: *Behavior and Responsibility—Views from Law and Neuroscience,*: Patricia Churchland, *Do We Have Free Will?*, New Scientist, Nov. 18-24, 2006, at 42; Stephen J. Morse, *Neuroscience and the Future of Personhood and Responsibility*, *in* Constitution 3.0: Freedom and Technological Change 113 (Jeffrey Rosen & Benjamin Wittes eds., 2011); Jerry A. Coyne, *You Don't Have Free Will,* Chron. Higher Educ., Mar. 23, 2012, at B6; Hilary Bok, *Want to Understand Free Will? Don't Look to Neuroscience,* Chron. Higher Educ., Mar. 23, 2012, at B8; Owen D. Jones, *The End of (Discussing) Free Will*, Chron. Higher Educ., Mar. 23, 2012, at B9; Michael S. Gazzaniga, *Free*

modern neuroscience suggests that categories such as the reasonable person or the DLP may prove, increasingly, irrelevant. Some writers in this area, particularly Joshua Greene and Jonathan Cohen, of the "trolley problem" imaging studies, have suggested that perhaps the issue is that modern science may not leave room for concepts of personhood as traditionally understood in law and philosophy.[36] In their view, although this is contested, the person is "disappearing," as modern science can pinpoint the causes of behavior.[37] In this light Blumenthal's study takes on tremendous import in showing us how we have traveled from notions of free will into conceptions of determinism that emerge from the nascent psychological sciences of the late nineteenth century.

Conclusion

In 2017, Susanna Blumenthal's book deservedly won the Merle Curti Award for intellectual history from the Organization of American Historians. My abbreviated summary does not do justice to her meticulous research or to the sweeping breadth of her work. As I read in another review of a different

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Will Is an Illusion, but You're Still Responsible for Your Actions, Chron. Higher Educ., Mar. 23, 2012, at B7; Paul Bloom, *Free Will Does Not Exist. So What?*, Chron. Higher Educ., Mar. 23, 2012, at B10.

36. *See, e.g.*, Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 Phil. Transactions Royal Soc'y Biological Sci. 1775 (2004). They state:

> We argue that current legal doctrine, although officially compatibilist, is ultimately grounded in intuitions that are incompatibilist and, more specifically, libertarian. In other words, the law *says* that it presupposes nothing more than a metaphysically modest notion of free will that is perfectly compatible with determinism. However, we argue that the law's intuitive support is ultimately grounded in a metaphysically overambitious, libertarian notion of free will that is threatened by determinism and, more pointedly, by forthcoming cognitive neuroscience . . . . We argue that new neuroscience will continue to highlight and widen this gap. That is, new neuroscience will undermine people's common sense, libertarian conception of free will and the retributivist thinking that depends on it, both of which have heretofore been shielded by the inaccessibility of sophisticated thinking about the mind and its neural basis.

Id. at 1776.

Greene further develops his work in Moral Tribes: Emotion, Reason, and the Gap between Us and Them (2013). As with the nineteenth century, most of the scholarship in neuroscience has focused on criminal law. *See, e.g.,* Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System,* 359 Phil. Transactions Royal Soc'y Biological Sci. 1787 (2004). More recently, two leading scientists have written book-length studies about humans, violence, and neuroscience: Steven Pinker, The Better Angels of Our Nature: Why Violence Has Declined (2011); Robert M. Sapolsky, Behave: The Biology of Humans at Our Best and Worst (2017).

37. Of course, such arguments are still subject to the naturalistic fallacy, a.k.a. the is/ought problem. For example, Amanda Pustilnik quite aptly points out that even though we know a great deal about the mechanism and operation of pain in the human organism, the concept of "pain" still has heuristic value as a label that notes the existence and level of moral and legal objections to certain types of behavior. Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 Cornell L. Rev. 801 (2012).

work: "For a full account, you need to read the book."[38] I hope that this book will be read by more than her fellow legal historians, because scholars from all the doctrinal areas on which she touches could benefit from her insights about the formation of the modern mind, and responsibility, in the disparate disciplines of tort, contract, estates, wills, etc., all richly covered in her book.

Blumenthal presents a convincing and compelling legal history of a critical and formative period of American history. Rather than characterize it in sweeping generalizations, as prior generations of legal historians have done, she drills down into an amazing database of cases and treatises to show us what judges, litigants, and medical experts thought they were doing—that is, she allows them to speak for themselves rather than imposing a particular view of history on them. In doing so, she liberates them from the confines of traditional scholarship and paints a rich, multidimensional portrait of the development of the modern American character. Her unique focus on consciousness, broadly construed, means that she focuses not just on the law and the capacity decisions she so deftly summarizes, but also on the co-extensive philosophical, religious, and medical debates of the time.

As the United States wrestled with notions of freedom, and moved toward an industrial society, she shows us how modern Americans were not only self-made, but all too often unmade in their pursuit of wealth and freedom. With regular references to the status of married women and slaves, she also shows a slow movement to enlarge the category of default legal person. While it is difficult to capture 150 years of the history she covers in this review, be assured that by her last torts-based chapter, she is demonstrating to the reader the contested basis of Holmes's "average man" as a juridical construct, and preparing one for the continuing debates that would be staged over liability, responsibility, freedom, and consciousness in the twentieth and twenty-first centuries. Her nuanced study of the precursors of modern American law allow the reader to more fully understand and appreciate the tensions and inconsistencies in the treatment of capacity and consciousness; those tensions exist today because they existed yesterday.

Although she writes about the period from 1750 to 1900, I have attempted above to extend the salience of her argument to the modern contested terrain of neuroscience and law. Because the same fights are still taking place, the lessons in Blumenthal's text are even more important. While the major contribution of her book is a careful and successful challenge to legal history orthodoxy about the formation of the American mind, she also teaches at least three lessons as we go forward. First and foremost: Science is useful for the formation of legal doctrine, and consumers of science should be aware that the science may be as contested as the law. In fact, we ignore it at our peril. And, invoking the image

38. James Gorman, *Challenging Mainstream Thought About Beauty's Big Hand in Evolution*, N.Y. Times (May 29, 2017), https://www.nytimes.com/2017/05/29/science/evolution-of-beauty-richard-prum-darwin-sexual-selection.html?_r=0 (reviewing Richard O. Prum, The Evolution of Beauty: How Darwin's Forgotten Theory of Mate Choice Shapes the Animal World—and Us) (2017)).

of the stereoscope, it may not always be possible to conform two different notions of "truth" into one unified picture given the different aims of law and science. Second, I suspect that the judicial pragmatism that she depicts, the muddling through, is as alive today as it was over a hundred years ago. Although channelized through the Rules of Evidence and *Daubert*, contested litigation about legal capacity still draws heavily on scientific expertise, and judges show a careful and cautious approach to the use of that science. Finally, I think that one of her most valuable insights is that the application of science in these cases is not transsubstantive. Going hand in hand with the pragmatism she reveals, the medical jurisprudence tends to lead to differing results and/or analyses in each doctrinal area. It would be fascinating, say, a hundred years from now for a legal historian of Blumenthal's bent to look at capacity cases in the twenty-first century.

My minor qualms with the book are largely structural. As is the case with many scholarly books, the practice of using endnotes rather than footnotes is frustrating. This is especially true for legal scholarship in which the footnote is an art form; it often does more than identify a source—it helps to develop an argument. Second, and more pointedly, this book is based upon a decade of research and published law review articles. At times, a lack of editing for consistency means that some of the clarity is lost. Given the depth of detail Blumenthal uses to make her argument, this is an important point. For example, at times, references to the legal scholars she is critiquing are oblique rather than explicit.[39] A better job of transitioning her articles to book form would have improved the ease of grasping her argument.

These points should not, however, obscure the majesty of what she has accomplished in revealing, without imaging equipment, no less, the modern American mind.

Leaves, Leaves, lean forth and tell me what I am. Indeed.

39. An example involving Willard Hurst supports this point. At page 30 of her book, she states: "One of the most durable narratives in the history and historiography of nineteenth-century America has cast the law in the role of providing 'the conditions of freedom.'" In the endnotes associated with that discussion, note 11 references the work of Hurst, as well as Morton J. Horwitz, Lawrence Friedman, etc. One might have been tempted to insert into this sentence, "as Hurst would say" before "the conditions of freedom" to signal to the reader the provenance of this phrase. This is a very small point, but for the uninitiated, it would be a helpful clarification. Similarly, another reference to "law and the conditions of freedom in nineteenth-century America" appears at page 102, and is not footnoted. Again, for the newcomer to this literature, a fuller explanation of the received wisdom and clearer references to their work, in either the text or the footnotes, would have been appreciated.