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Wondrous Depths: Judging the Mind in Nineteenth-Century America

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BLUMENTHAL, SUSANNA L. *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture*. Cambridge, MA: Harvard University Press, 2016.

Susanna L. Blumenthal's Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture *(2016) is a history of the self in nineteenth-century America. When judges considered a person's criminal responsibility or civil capacity in court, they created a body of legal and political thought about the self, society, the economy, and American democracy. This essay uses Blumenthal's book to explore recent work on law and the mind in Britain and North America, and argues that abstract questions about free will, the self, and the mind were part of the everyday jurisprudence of the nineteenth century. Debates about responsibility were also debates about the psychological consequences of capitalism and the borders of personhood and citizenship at a time of rapid economic, political, and social change.*

Historians of the nineteenth-century United States are in Herman Melville's debt. *Moby-Dick*, the 1851 story of Captain Ahab's pursuit of the white whale—interrupted or enriched, depending on one's perspective, by a meticulous account of the whaling business—supplies epigraphs and metaphors to scholars seeking to capture the peril and promise of American modernization. Susanna Blumenthal opens a later chapter of *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* with a quotation from near the novel's climax, when it becomes clear that the dangerous voyage must end with the death of "that hated fish" or Ahab's own destruction. "Is Ahab, Ahab? Is it I, God, or who that lifts this arm?" Ahab muses as Starbuck blanches, despairing of his dreams of Nantucket (Melville 1892 [1851], 504; 231). Scholars often read *Moby-Dick* as a capitalist fable. In his 2012 *Freaks of Fortune*, which begins with a quotation from *Moby-Dick*, Jonathan Levy explains that the spread of capitalism "brought the insecurity of the sea to the land" (Levy 2012, 2). Capitalism, he argues, required that all Americans adapt to taking the kinds of financial and personal risks that were once the province of seafarers and their underwriters, who knew that a freak storm could plunge them literally and figuratively under water. Those who could not adapt to this new world of chance risked insanity or death (Levy 2012, 312).

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Susanna Blumenthal takes up the question of how the legal system dealt with the psychological consequences of capitalist modernity. Forty years on the "pitiless sea," with its privations and uncertainties, drive Ahab mad (Melville 1892 [1851], 503). If even ordinary, land-loving Americans were newly subject to the same wearing, constant risk and bewildering freedom, who could be surprised if a few lost their minds? Blumenthal explores how understandings of self and sanity changed in the first century after the founding of the United States, and how judges and medical men worked to reconcile these new understandings with the structures of the common law.[1]

In *Law and the Modern Mind*, Blumenthal describes a case involving a contested will. George Moore, a bachelor and a drunkard, died in Kentucky in 1822, leaving property to an enslaved woman with whom he had a sexual relationship, but disinheriting his three brothers (105). Moore's brothers challenged the will, alleging that he was mentally incompetent and that he had also been a victim of undue influence and fraud. Both the trial court and the court of appeal found against the will, setting it aside on the ground that Moore's "concubine" had manipulated him and that he had evinced irrational hostility toward his brothers during his final illness (105–06). Blumenthal uses this case and others like it to showcase one of the central problems of jurisprudence—and of American social and political thought more generally—in the nineteenth century: how to determine a person's competence. Was George Moore mad, or did he hate his brothers? Was Moore's violation of racial taboos eccentric or insane? Nineteenth-century jurists confronted these questions in their everyday legal practice. Squabbles over wills, contracts, and liability were areas where judges elaborated concepts of the self by plotting the limits of self-governance. Jacksonian America toasted propertied, white men like George Moore. But liberty was a strong brew, and it could be abused. Judges stepped in to protect the body politic from the excesses of American liberty, determining where freedom became folly.

What do scholars like Blumenthal have in mind when they urge us to think critically about the legal history of the modern self? Generally, they are referring to the rise of liberalism over the course of the nineteenth century, and to the process through which the ideal of the self-governing, autonomous individual came to dominate Anglo-American cultural and political thought. Liberal concepts of self developed in

1. "Medical men" might sound antiquated or unduly marked by gender to some readers. I use it here and throughout this essay for two reasons. First, "medical men" was in common currency in the nineteenth century as a catch-all phrase that referred to medical practitioners with a wide variety of professional qualifications, from pharmacists to surgeons. For an example, see Greenwood (1882). "Medical men" is more accurate when referring to the varied group of medical, and forensic, practitioners who were active in debates about competence and the mind than the more contemporary, and at least implicitly narrower, "physicians." The preference for the flexible "medical men" is conventional among historians of medicine, especially those who write on periods prior to the twentieth century. See, for instance Temkin (2006 [1977]). Second, the gendered "medical *men*" reflects the almost exclusively male world of nineteenth-century medical jurisprudential expertise. Women did medical work, especially as midwives and herbalists, although they were excluded from formal medical education and professional associations until late in the century. However, it was male medical experts who published the most popular treatises on medical jurisprudence, served as superintendents of asylums (although they often relied heavily on the skills of female "matrons"), and offered medical testimony in court. When nineteenth-century American judges, who were universally male, imagined their medical interlocutors in debates about civil capacity and competence, these interlocutors were medical *men*. On women practitioners see, for example: Ulrich (1991); Sandelowski (2000); Golden (2001).

tandem with what historians often call the "mind sciences," precursors of twentieth-century psychiatry, psychology, and neurology. The model individual of the nineteenth-century English-speaking world was independent, reasonable, thoughtful, and, most importantly when it came to the law, knowable. The emergence of modern understandings of the self raised both metaphysical and epistemological questions about the nature of the mind and how it could be known. While the "self" might seem nebulous, historians have argued that it had profound consequences for common law jurisprudence and procedure. For instance, the belief that a person's mental state was a matter of fact that could be proven in court contributed to a shift away from constructive fault—blameworthiness based on imagining what an archetypal person would have known or felt—toward an emphasis on subjective fault, or what the individual defendant or litigant actually knew and felt. The idea that science could make the mind knowable contributed to the breakdown of psychological states into discrete subcategories (e.g. "negligence" versus "recklessness"), with important implications for determinations of legal capacity, liability, and criminal responsibility (Dubber and Farmer 2007, 43).

However, the rational, externally legible liberal mind was an ideal, not a norm. Rationality, restraint, and judiciousness were valuable but rare qualities, which propertied, white men were most likely to possess and keep. Even among these privileged few, many nineteenth-century thinkers believed that liberal self-possession required constant, taxing cultivation. Insanity was the most dramatic expression of a person's inability to master his mind—a task that was becoming, according to some, increasingly difficult. Modernity itself, which nineteenth-century Anglo-Americans understood as "civilization," could drive a person insane. The price of civilization's refinement and sophistication was "great and excessive mental action, more uncertain and hazardous employments, and consequently more disappointments, more means and provocations for sensual indulgence, more dangers of accidents and injuries, more groundless hopes, and more struggle to obtain that which is beyond reach, or to effect that which is impossible" (Jarvis 1852, 363–64). Moreover, although nineteenth-century judges and medical men tended to believe that a person's state of mind could be discovered, neither group assumed that this was always easy. Even if a person's sanity was a matter of objective fact, proving it in court was often a delicate matter.

Political and economic freedom meant greater exposure to risk, and not all would succeed or endure their failures with equanimity. Blumenthal's work is both a history of nineteenth-century America and an intervention in the growing law and society scholarship on responsibility. She is interested not only in exploring the evolution of abstract concepts of the self across the nineteenth century, but also in describing how these concepts percolated through legal and medical thought and courtroom practice. Capacity mattered in questions of marriage, inheritance, commerce, liability and insurance. A person's mental state was critical to courts' efforts to place blame and to ascertain the validity of transactions. And yet, as Blumenthal shows, faith in the ability of individuals to use their new freedoms wisely began to crumble just as that wisdom was needed most.

Meditations on the nature of the self were not the exclusive province of philosophers and novelists. In fact, judges are the primary actors in Blumenthal's story. They worked at the intersection of theory and practice, asked to grapple with medical and

metaphysical dilemmas and also to make prudent, efficient decisions in individual cases.[2] The body of jurisprudence they created fused philosophy and pragmatism, limning the contours of freedom in modern America. Blumenthal takes "the common run of common law judges" seriously as thinkers who did the "cultural work" that shaped everyday life in the long nineteenth century (290). Capacity cases, she writes, are "best understood as expressions of deep and abiding tensions and ambiguities in the liberal conception of self-possession" (108). This view sets her apart from scholars who have interpreted civil capacity cases primarily as "material conflicts," in which litigants and judges deployed the language of incapacity to camouflage their acquisitiveness and moralism (ibid.). Judges, Blumenthal argues, were engaged in a sincere and searching effort to craft a coherent vision of the modern self. In their legal decisions, nineteenth-century judges elaborated, she writes, "a conception of consciousness that worked to dispel the specters of solipsism and determinism that haunted the philosophical and literary discourse of the era" (17). Determinism—the notion that behavior is not freely chosen but determined by concatenations of often imperceptible forces—butted against liberal legal notions of responsibility premised on the possibility of meaningful choice. Solipsism, meanwhile, carried the unappealing implication that other minds might be inscrutable, including by juries and judges charged with evaluating the competence and liability of people in court. Judges sought to reconcile the growing scientific skepticism about individual autonomy with a political and legal order in which autonomy, and choice, were paramount. They developed a concept of mind that was fit for purpose, one that could facilitate new patterns of economic and social life while dampening the rudest shocks of American modernity.

Law and the Modern Mind has two parts, each describing a facet of judges' encounters with concepts of the mind. The first explores judges' engagement with Common Sense philosophy and, later, forensic medicine; the second considers how they applied their changing understandings of the self, or declined to apply them, in court cases. The first part of the book, "The Testimony of Consciousness," dissects the often-convoluted intellectual history of the jurisprudence of responsibility, emphasizing philosophical and medical influences on legal understandings of competence and reasonableness. Blumenthal supplements her analysis of medical and philosophical treatise literature with a knowledge of nineteenth-century legal scholarship gleaned from reading "virtually all the articles collected on HeinOnline relating to civil capacity" (318, n. 18). The second part of the book, "The Mind at Issue," takes up the metaphysical questions sketched in the first two chapters and shows how they played out in capacity cases involving wills, contracts and torts. In this section, Blumenthal distills over eight hundred published opinions she tracked down using the footnotes of treatise literature as well as databases of cases, newspaper collections, and periodicals. Most of the cases date from the last decades of the nineteenth century, when courtroom contests over insanity and free will were most common and contentious.

This essay reflects Blumenthal's structure, and identifies the contribution of *Law and the Modern Mind* to two distinct, but related, fields: sociolegal studies of the concept

2. Blumenthal's focus on judges echoes recent work in the history of the British Empire, which argues that administrators and petty officials, including judges, occupy a similar, and similarly crucial, role in translating abstract political and philosophical ideals into practice. See, for example: Benton and Ford (2016).

of responsibility; and the intellectual history of the nineteenth-century United States. *Law and the Modern Mind* is a history of the consequences of capitalism on the American mind, or at least the American concept of mind. Blumenthal explores how judges and medico-legal experts confronted the psychological consequences of freedom, and how they worked to adapt the American legal system to cope with the chaos and opportunity of modernity.

THE "SELF" AS A HISTORICAL SUBJECT

Jurists and legal theorists tend to treat abstract concepts of "self" as transcendent and unmoored from the time and place in which they were articulated. Even scholars who accept that understandings of personhood have changed over time often cling to evolutionary narratives in which the nature of the self is discovered rather than made. Nicola Lacey, in *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (2016), summarizes the problem. "[T]he impression is given," she writes, "that there 'is' a conception of responsibility whose structure awaits only historical progress and proper philosophical analysis in order to be fully revealed" (Lacey 2016, 8). This false impression conceals the degree to which the idea of legal responsibility, and the way that institutions try to ascertain it, are "normative and constructive"—as contingent and as embedded as any other sphere of social, intellectual, and political life (ibid.). Lindsay Farmer, Markus Dirk Dubber, Martin Wiener, James Whitman, and Arlie Loughnan, among others, have also argued that understandings of the self and legal approaches to managing liability are not inevitable, or the result of disinterested rational contemplation.[3] These sociolegal accounts of responsibility vary widely in their uses of history. "This is not, evidently, historical scholarship," writes Lacey of her work, but rather social science analysis fueled by historical research (Lacey 2016, 12). *Law and the Modern Mind*, conversely, is historical scholarship, firmly rooted in nineteenth-century cases and treatises. Although there is much in the book to interest legal theorists and social scientists, one of Blumenthal's achievements is her reconstruction and analysis of nineteenth-century legal and medico-legal debates about mental capacity.

While current sociolegal studies of responsibility are methodologically diverse, British criminal law, especially the law of homicide, occupies an outsized place in the scholarship.[4] Blumenthal's account stands apart in her attention to the United States and to civil law. Histories of legal insanity have, as Blumenthal observes, focused overwhelmingly on the sensational homicide trials of the nineteenth century. These cases generated vast archives, and captured the attention of the public and of experts in medical jurisprudence. Despite what she describes as our fascination with "the notorious trials of madmen who committed wanton murder," Blumenthal argues that civil

3. See, for instance: Lacey (2016); Dubber and Farmer (2007); Farmer (2016); Loughnan (2012); Wiener (1990). For two accounts that focus on the medieval period rather than on the nineteenth and twentieth centuries, see Kamali (2013) and Whitman (2008).

4. Charles Rosenberg's classic *Trial of the Assassin Guiteau* was an early exception in its treatment of nineteenth-century American understandings of criminal responsibility (Rosenberg 1968). Other works that consider criminal responsibility in the United States and Canada include Green (2014) and Loo (1996). I have written about responsibility in the context of colonial law in the Canadian North-West (Evans, 2018).

cases have "more subtle and far-reaching implications for common conceptions of mind, law, and personhood, shedding a broader and more diffuse light on the history of self-making and the language of responsibility that gave moral weight to this enterprise" (98–99). Civil cases are potent because they are mundane.[5] Judges, spectators, and others could imagine themselves losing their minds and writing an absurd will, signing a disadvantageous contract, or even committing suicide. This was the legal business of ordinary life, and it called on judges to develop a jurisprudence of capacity that could govern the norm rather than the exception, the daily grind rather than the emergency.[6]

Blumenthal traces British and Scottish philosophical and medical influences in North America, sensitive to the different trajectories taken by European ideas once they crossed the Atlantic. She begins with an exploration of the Common Sense school of Scottish Enlightenment philosophy, which "attained a position of cultural dominance" and became "hegemonic" in American thought in the late eighteenth century (42). Common Sense philosophers like Thomas Reid and James Wilson argued that "human beings were divinely endowed with rational faculties of intellect, volition, and moral sense, enabling them to shape their own destiny, in this world and the next" (4). The Common Sense vision of the self was optimistic. Man was virtuous, rational, and self-disciplined. This faith in the fundamental morality and autonomy of the individual resonated with Americans who had recently embraced democratic republicanism (Blumenthal 2008). Common Sense philosophy acquired a prominent place in university curricula and also in the law lectures studied by aspiring lawyers (53). Ambitious young men applied Common Sense thinking about human nature to their legal work, elaborating what Blumenthal describes as "a distinctly American jurisprudence" structured around the concept of the equal and autonomous individual (32).

In American Revolutionary discourse, "freedom" and "responsibility" had both political and psychological connotations. Responsible government required a responsible citizenry. But were Americans capable of the kind of self-discipline and moral uprightness that their new nation, and its new freedoms, demanded? Throughout *Law and the Modern Mind*, Blumenthal integrates the problem of the modern self—the issue of psychological citizenship—into American political history. At first, Blumenthal writes, Common Sense philosophy offered a concept of the individual that satisfied "the metaphysics of moral government" (22). Early republican jurists and judges reflected their political environment. They rejected status-based legal distinctions in favor of "free and knowing consent," reflecting the liberal humanism and democratic values of their time (4). Although there were differences among political factions,

5. Historians of criminal law might respond that criminal cases, especially those involving petty offenses, were also part of the texture of everyday life. The cases most likely to involve lengthy meditations on responsibility and the mind involved killings, and were often the subject of intense media scrutiny. These were not mundane events, for either participants or commentators. Still, not all murders that raised responsibility questions were "wanton" or all killers, notorious madmen. I also doubt that it was always easier to imagine one's heirs contesting a hefty bequest in court than it was to fantasize about killing a spouse's illicit lover. Judges might well have found cases involving revenge for infidelity or, in the colonial context, the killing of Indigenous people, quite "relatable." On spectacular trials as sites for the elaboration of formal and informal legal norms, see Umphrey (1999).

6. On the idea of the "jurisprudence of emergency" and how it has been used to justify the extension of authoritarian state control over legal and social institutions, with a focus on colonial and post-colonial India, see Hussain (2009) and Kolsky (2015).

Blumenthal argues that post-Revolutionary leaders agreed that "the essence of freedom lay in the capacity for self-government, which was now understood as a state of mind which might be proved or disproved in court" (53).

One of the most important contributions of *Law and the Modern Mind* to legal scholarship is Blumenthal's concept of the "default legal person," which she described at length in a 2006 law review article (Blumenthal 2006). The default legal person is a legal ideal representing the minimum degree of understanding and self-control that a person needs to possess in order to be considered legally responsible for his or her actions. This person, she explains, "stood at the borderline of legal capacity, identifying those who were properly exempted from the rules of law that were applicable to everyone else" (12). Blumenthal contrasts the default legal person against the better-known figure of the "reasonable man," especially as he was described by Oliver Wendell Holmes in his 1881 masterwork *The Common Law* (Holmes 1881). The reasonable man represents the person of ordinary prudence and knowledge against whom conduct is measured in court. "The failure to behave like the reasonable man," writes Blumenthal, "usually supplied grounds for imposing liability, while the inability to function like the default legal person tended to result in a suspension or mitigation of liability." The default legal person, she continues, "effectively delimited the universe of capable individuals who could be made subject to the prescriptive authority of the reasonable man" (ibid.).

There are many ways in which a person could fail to meet the minimum threshold for legal liability. At various points in the nineteenth century, in various ways, women, infants, enslaved people and the insane all were deemed to fall short. Medical jurisprudence, the precursor of modern forensic medicine, emerged in part to help judges and juries detect and assess mental incapacity more precisely.[7] The question of how to integrate developments in mental science into jurisprudence and legal practice exercised lawyers and medical men across the common law world. Although republicanism added potency to the nineteenth-century turn to the ideal of the autonomous individual, the conflict between liberalism and determinism in mental science rocked the wider Anglo-American world. Blumenthal focuses on the insane, who became increasingly difficult to identify in the courtrooms of the later nineteenth century. Medical experts in matters of the mind, who styled themselves "mad doctors," "alienists," and, later, psychiatrists, increasingly asserted their professional distinctiveness, establishing dedicated journals, presses, and professional associations. One of their primary projects was to expand the definition of insanity to include forms of cognitive and emotional disturbance that did not conform to the stereotype of raving, theatrical lunacy. As medical understandings of insanity shifted, legal definitions of insanity came under pressure. Litigants and their lawyers deployed medico-legal authorities, often as expert witnesses, in order to further their interests in court. The resulting "unruly jurisprudence of insanity," writes Blumenthal, "scripted and almost invited capacity contests that grew ever more unwieldy to those who sat in judgment" (62).

7. For a small selection of scholarship on the history and historiography of medical jurisprudence/forensic medicine, see Watson (2010); Burney and Pemberton (2000); Paul (1990); Burney and Pemberton (2011). On forensic science in the British empire, see Blum (2017). In addition to the works cited in footnote 4, on mental science and psychiatry in particular, see Eigen (2016) and Smith (1981). For my own brief overview of the literature on forensic psychiatry in Britain, see Evans (2016).

As medico-legal knowledge flooded their courtrooms, judges had to contend not only with a vibrant and rapidly developing medical literature but also with the new psychiatry's implications for the jurisprudence of responsibility. Determinism was emerging as a defining feature of nineteenth century science. Natural scientists and medical men favored biological and environmental explanations for the bodies and behavior of animals, including humans. This led some psychiatrists to describe insanity in physiological terms, as a product of brain disease acquired through some combination of heredity, brain injury, and vice. Scientific determinism left little room for free will in its conceptualization of the human subject. This could bring medical men into conflict with a legal system in which free and knowing choice was a precondition for liability. The controversial diagnosis of "moral insanity," first coined by English mad doctor James Cowles Prichard in 1833, captures the problem (Prichard in Forbes 1833, 12). According to its partisans, moral insanity corroded sufferers' moral sense while leaving their cognitive functions intact. Motiveless violence and remorseless cruelty were its hallmarks. Medical witnesses who argued in court that a defendant was morally insane, and therefore not criminal responsible, faced strident criticism for, as Joel Eigen writes, "trying to explain (away) the crime *by* the crime" (Eigen 2016, 6).

Nineteenth-century capacity cases often dramatized the clash between determinist and liberal humanist understandings of the self. However, Blumenthal rejects the idea, prevalent in histories of the insanity defense, that determinist doctors and free will-loving lawyers could be divided neatly into camps (Blumenthal 2008). She also resists the Foucauldian narrative of the "Great Confinement" and the attendant notion that power-hungry mad doctors cynically wormed their way into courtrooms (64; Foucault 1965, 1978).[8] Instead, she emphasizes the two professions' common religious and philosophical concerns, and their shared interest in reconciling common law jurisprudence and the new human sciences (60). Even psychiatrists who believed that criminality and eccentricity were the products of brain disease, and who advocated sweeping reform of legal approaches to responsibility, were reluctant to embrace a vision of the universe in which moral agency and individual autonomy had no place. One Scottish asylum superintendent, himself a believer in the existence of moral insanity, warned his colleagues at a meeting in 1885: "[I]f we were to allow [moral insanity] to be too influential in our minds, we would be thwarting justice, and cutting our own throats as men who were endeavoring to carry out scientific ideas: so that instead of carrying weight in the courts of law we would be laughed at" (Nicolson in Tuke 1891, 58).

Judges, meanwhile, kept abreast of developments in medical jurisprudence, and allowed psychiatric categories to influence their decisions. The House of Lords issued the *M'Naghten* 'rules,' the origin of the test for criminal insanity still used in most

8. "Mad doctors," like "medical men," might seem like awkward terminology to some readers. In the nineteenth-century Anglo-American world, a group of medical men who identified themselves as experts in the diagnosis of insanity and the care of the insane steadily forged a distinct professional identity. As Andrew Scull has noted, the terms "mad doctor" or "mad-doctor" were at first pejorative; medical experts in the mind preferred "alienist" or "medical superintendents of asylums for the insane" (Scull 1981, 6). Among historians of the mind sciences, including fields we would today describe as psychology, neurology, and psychiatry, the capacious "mad doctor" has become a preferred term when describing experts in the mind and brain in the eighteenth and nineteenth centuries. This avoids potential confusion and anachronism given the radical changes in professional identity, training and disciplinary boundaries that occurred during this period. See, for instance Porter (2004) and Andrews and Scull (2003).

common law jurisdictions, because new and expansive medical definitions of insanity were producing what they saw as unacceptably lenient results in criminal cases. However, *M'Naghten* reveals the penetration of medical knowledge into legal practice, rather than its excision from it. Although moral insanity remained contentious throughout the nineteenth century, mental diseases of many stripes were routinely mooted in Anglo-American courts, and judges, jurors and members of the public became increasingly fluent in the language of medical jurisprudence (Eigen 2016).

Nineteenth-century scientific materialism privileged earthly, physical explanations for medical and natural phenomena. But the world of medical jurisprudence was never robbed of mysteries. The relationship between mind and body, brain and self, remained largely in the realm of philosophy, rather than science. The later nineteenth-century reconceptualization of the self was a radical departure from the Common Sense ideal that had dominated American legal thought since the Revolution. However, like its predecessor, what we might call the "determined" self reflected the conditions and concerns of its age, which lawyers, doctors, and others could not help but share.

CAPITALISM AND CAPACITY

Historians of the United States often identify the "long nineteenth century," the period from roughly 1776 to 1914, as a time of growing, if intensely contested, freedom: freedom from British rule, freedom from the constraints of agrarian life, and, most dramatically, freedom from slavery. Urbanization, industrialization, and war upset traditional social and economic systems, remaking understandings of work, family, and nation. New freedoms were tempered by new restrictions, including the growth of state regulation and the expansion of coercive institutions like the penitentiary (Novak 2000; McLennan 2008). Old distinctions of status, especially those related to race and gender, persisted. Despite the many continuities between pre- and post-Revolutionary life, nineteenth-century Americans believed that they were living through an epochal civilizational shift, as did their counterparts in Britain and in the wider English-speaking world.[9] In *Atlantic Crossings*, Daniel Rodgers spies the culmination of the Western European and American experience of nineteenth-century industrial capitalism in the Eiffel Tower, which loomed over the 1900 Paris Exposition and stood for "the sharp, exuberant, often liberating, and (lest we forget) painfully disruptive revolution in human relations released by the marriage of machine technology to the social ethics of the marketplace" (Rodgers 2009, 10). The painful disruptions of rapid industrialization had unsettled nineteenth-century Americans, even as they gloried in the period's technological achievements. They worried about their ability to thrive in an uncertain world, and to rise to the challenges of market competition and incipient social democracy. Not all change, not all freedom, was welcome. Propertied, white men, especially, strove to prove that whatever else might change, their preeminence would not.

9. Historians of early America have argued that there were more continuities between the colonial and early-Republican periods than have traditionally been acknowledged. For example, see Tomlins (2010).

Nineteenth-century American freedom was often expressed through the language of law, especially civil law. Amy Dru Stanley, in *From Bondage to Contract*, writes that after the Civil War, "contract was above all a metaphor of freedom" that expressed hopes for a social order imposed "though personal volition rather than external force" (Stanley 1998, 2). However, contractual freedom was not an antidote to dependence and subordination; it did not imply that all should be equally free to sell their labor and build their lives. In fact, Stanley argues, employment and marriage contracts could bind women, people of color, and the poor in relations of dependence on men of authority (Stanley 1998, 10). Blumenthal, like Stanley, is interested in civil law's symbolic importance as a reflection of the power—really, the freedom—of individuals to order their lives, including their domestic and commercial relationships with one another. Narratives of dependence were twinned with the rhetoric of American freedom. In order for a man to truly be "free" and in full possession of his autonomy, he had to have a coterie of dependents, both within and outside his household. Men who could not provide for and command their dependents, because of madness, poverty, or racial disadvantage, were not truly free.[10] In Blumenthal's telling, a person's civil capacity required both internal and external mastery in the form of self-control and the control over others. She writes, "the supposedly sovereign—and by definition white male—heads of household failed to see how much their lordly status depended on their ownership and rule over slaves and other dependents, their sense of self inextricably bound up with the lesser persons they conceived of as not-Me" (269). She argues that the total, if unspoken, dependence of white male identity on the presence and subjugation of nonwhite, non-male "others" made their sense of self both fragile and intensely hypocritical. "Theirs was an illusory autonomy," Blumenthal writes, "built upon a false sense of their own independence. . . . Their conceptions of themselves were fatally flawed at their very core" (269).

In civil capacity cases, propertied, white men on the bench contemplated the contours of their own selfhood through the propertied, white male proxies who appeared before them in court. Blumenthal repeatedly returns to the question of *whose* "modern mind" was really at issue in these contests. It was, she notes, "the self-made *man* [italics original] whose capacity was typically challenged in these proceedings" (100). White women and people of color were less likely to own property than the white men whose cases clogged the civil docket. Moreover, and unlike white women and people of color, propertied, white men were assumed to be capable of managing their affairs. They set what Blumenthal calls the "mental baseline" for competence, imbuing the default legal person with qualities tied overtly to race, sex, and class (ibid.). When a propertied, white man deviated from the "aggressively self-confident white manhood" that dominated late-eighteenth and early-nineteenth century understandings of the self, becoming dependent and vulnerable, he revealed his incompetence (ibid.). In an effort to understand how men like themselves could slip into dependence, judges adopted an

10. There were other, more radical understandings of contract in nineteenth-century America. For example, "free love," a middle-class movement that first emerged in New York City in the 1850s, rejected both slavery and marriage as forms of bondage, instead promoting free love, individualism, equality, and private property. For free lovers, it was paramount that individuals remain free to enter, and to sever, a wide range of relationships at will (Spurlock 1988, 767–78). On the history of marriage, including free love, see Cott (2000, 68–75).

expansive approach to law of evidence. They hoped that reams of testimony by lay and, especially, expert witnesses would reveal the quality of the putatively insane party's mind, and explain whether, and why, he had lost it (99). The selfhood of other categories of person—women, the poor, and non-white people—went largely unexamined in American civil courts.

Blumenthal's focus on civil cases, rather than criminal ones, adds new vistas to the legal history of the mind, but at a price. White, propertied men dominated civil contests over wills and contracts in the nineteenth century, as they did bench and bar throughout the common law world. However, women and men, propertied and penniless, white and non-white, appeared as defendants, witnesses and victims in criminal courtrooms. Cases involving insanity and other capacity questions often produced fact-heavy and voluminous archives, especially in cases of alleged homicide and other high-profile, violent offenses. White women and Indigenous defendants, like their propertied, white male counterparts, inspired breathless newspaper reports, correspondence among legal and government authorities, and medico-legal treatises. The fact that judges could so easily see themselves reflected in the propertied, white men before them in American civil capacity cases sharpened, as Blumenthal shows, their anxiety at the prospect of their own dependency and incapacity. But what about cases involving people whose minds struck judges as alien and impenetrable—not as projections of their own selfhood, but as their antithesis?[11] Records of such cases offer a glimpse into how common law jurisprudence constructed the minds and determined the responsibility of those who, by definition, fell outside the boundaries of the default legal person. The debate over how to govern diverse populations under a legal order that doubted their competence exercised political, legal and medical authorities across the British empire, and followed similar contours in the United States. These criminal cases and the medico-legal debates they provoked are outside the ambit of *Law and the Modern Mind*. Blumenthal is scrupulously precise about the racial and gender dimensions, and limitations, of the capacity contests she analyzes, and the civil law light she sheds on responsibility is doubtless "broader and more diffuse" (99) than a criminal law perspective in important ways. However, it is necessarily narrower and more concentrated in others.

The new psychological medicine disoriented judges because of its internal inconsistencies and because it challenged conventional understandings of personal autonomy. Medical experts testified in all manner of cases, often on behalf of both parties in civil suits. The credibility of the discipline of medical jurisprudence suffered as it became apparent that there was no consensus among psychiatrists about diagnostic categories, aetiology or treatment protocols. Psychiatrists excoriated the legal system for failing to take account of medical understandings of mental disease. People labeled as insane protested their diagnoses, calling both psychiatry and the legal system into disrepute. Controversies over legal insanity spilled into the press, attracting widespread public attention (91–92). When faced with capacity cases and the practical implications of their metaphysical views, experts in medical jurisprudence, she writes, found themselves caught "between the realm of positive science and that of practical affairs" (95). They struggled to "confront the socio-political consequences of the new determinisms they

11. For my account of one such case, see Evans (2018).

had helped to disseminate" (ibid.). Judges were caught, too, between their commitment to free will and the persuasive power of psychiatry. Blumenthal argues that they "took a pragmatic tack, charting a via media between the extremes of voluntarism and determinism" (103). However, judges could not entirely shrug off the implications of determinism. "They remained concerned," she continues, "about whether there was indeed a responsible mind underneath it all because responsibility made no sense to them without it" (103).

Testamentary capacity cases raised questions about the line between perversity and insanity. At what point did a testator's capricious bequest become evidence of madness? In property cases, the personal often became political. Capricious testators, Blumenthal writes, "appeared especially threatening in a polity whose viability depended upon its citizens making the right use of their property rights" (112). Judges in testamentary capacity cases were pulled between their desire to vindicate the testator's autonomy, and their efforts to uphold what they saw as the fair and rational management of property. Judges also encountered cases in which testators were not merely foolish but cruel, even evil. Such cases tested the conceptual boundary, familiar from debates in criminal cases about moral insanity, between malice and madness. In response, judges adopted flexible, fact-sensitive understandings of insanity in individual cases that allowed them to make room for eccentricity while invalidating what they saw as excessively foolish, transgressive, or harmful wills. By the 1850s, Blumenthal writes that judges became increasingly strident in their objections to theories which seemed, to them, to round strangeness up to madness (132–34). By the end of the nineteenth century, judges had largely abandoned their hope of creating a legal definition of insanity that was coherent and compatible with both individual autonomy and scientific determinism. Instead, they elaborated what Blumenthal describes as "frankly pragmatic models of legal personhood, drawing a distinctly legal definition of sanity and human agency" (142).

In the later nineteenth century, the Common Sense model of the self gave way to a darker vision of human nature, in which weakness and vice were the norm rather than aberrances. For psychiatrists, this understanding of the self as fragile, riddled with hereditary vulnerabilities and assaulted by environmental temptations and traumas, reinforced their belief that insanity was widespread. All were susceptible, and the chaos and complexity of modern life only heightened the risk. Judges acknowledged human frailty, and were not immune to the more pessimistic strands of thought about the self. However, they rejected the notion that psychic fragility had resulted in ubiquitous madness, at least insofar as the law was concerned. Judges steadily narrowed the definition of insanity and expanded the scope of testamentary freedom (150). They doubled down on the presumption of sanity and the integrity of free will even as scientists became increasingly convinced that heredity and environmental factors determined human behavior. Blumenthal does not see this judicial reaffirmation of free will as ignorance or denial. Rather, she argues that judges deliberately crafted definitions of insanity, coercion, and incapacity that stood apart from medical or lay understandings (163). Whatever the medical or scientific "truth" of determinism, judges collectively decided that the law could not, and would not, give up its emphasis on consent, freedom, and choice.

The American Revolution, and the industrial one that followed, upended many of the structures of American life. New domestic relationships challenged old frameworks

for assessing testamentary capacity and the validity of contracts for care, prompting judges to reconsider the limits of love, family, and financial prudence. However, in these cases, the contracts and wills in question were not the cause of a person's incapacity, but evidence of it. In other cases, however, a person might go mad *because* of their use or misuse of civil law instruments. Could signing a contract drive a person mad? In a sense, Blumenthal shows, it could. Her chapter on "Speculative Mania in a Time of Contract" considers "the disorienting effects of capitalism both for individual minds and in everyday social intercourse" (170). The booms and busts of market speculation, as Blumenthal's chapter title suggests, were particularly dangerous. Americans who played the market were gambling with their sanity.

Historians of economic crises often deploy metaphors of madness in their titles, as in Charles P. Kindelberger's *Mania, Panics, and Crashes: A History of Financial Crises* (1978), and Carmen Reinhart and Kenneth Rogoff's *This Time is Different: Eight Centuries of Financial Folly* (2009). "Market rationality" is disrupted or disproved by financial "manias," "panics," "folly" and outright "madness."[12] For scholars, the idea of the irrational consumer provides a useful, if loose, foil for the putatively self-regulating and law-governed market. However, the connection in nineteenth-century psychological medicine and popular culture between volatile markets and volatile minds was not purely or even primarily metaphorical. Capitalism, and especially speculation, seemed to many to be literally pathogenic.

Some nineteenth-century Americans worried that their minds were not resilient enough to endure the dramatic booms and busts of capitalist life. This concern about the psychological consequences of participation in a volatile market was most acute with respect to speculation. The thrill of a windfall and the despair of a big loss could both produce madness. American physician Benjamin Rush, in the 1812 edition of his *Medical Inquiries and Observations Upon the Diseases of the Mind*, described how the infamous early eighteenth-century English "South-Sea Bubble" produced "extravagant joy" that drove many "successful adventurers" mad (not to mention the misery of those who lost everything when the bubble burst) (Rush 1812, 39).[13] Rush, echoing a common trope in nineteenth-century Anglo-American medical writing, argued that derangement was rare among "the uncivilized," but increasingly common in "commercial countries," particularly during periods of intense market speculation. Rush's use of "commercial" and "uncivilized" as opposites is telling. For many Americans, modernity, civilization and capitalism were synonymous; the "modern" mind was the capitalist mind, and the capitalist mind was vulnerable. Rush writes:

> In the United States, madness has increased since the year 1790. This must be ascribed chiefly to an increase in the number and magnitude of the objects of ambition and avarice, and to the greater joy or distress which is produced by gratification or disappointments in the pursuit of them. The funding system, and speculations in bank-scrip, and new lands, have been fruitful sources of madness in our country (66).

12. On market rationality, see Deringer (2015).

13. On the history of the South-Sea Bubble, see Paul (2010); Balen (2003); Garber (2001); Deringer (2018).

Scottish journalist Charles Mackay's influential *Memoirs of Popular Delusions*, first published in 1841, also shows the relationship between markets and madness in the nineteenth century. Mackay used a collection of historical episodes showing "the imitativeness and wrongheadedness of the people, [as well as] examples of folly and delusion" to advance his theory of crowd behavior, arguing that people "go mad in herds, while they only recover their senses slowly, and one by one" (Mackay 1841, 3). Beard fashions, dueling, and alchemy were among Mackay's examples of popular practices that seemed to lack a rational basis. Wild speculation, however, was the calling card of the madness of crowds. Mackay began his three-volume series with descriptions of three economic bubbles: the South-Sea and French Mississippi Bubbles, which both burst in 1720, and the seventeenth-century Dutch speculation in tulips that he called "Tulipomania" (Mackay 1841, 139).[14] Money, he wrote, "has often been a cause of the delusion of multitudes" (Mackay 1841, 2) The South-Sea Bubble was a "madness which infected the people of England" (Mackay 1841, 73); France suffered from "Mississippi Madness" (Mackay 1841, 3); Holland was overcome by a "frenzy" (ibid.).

It is tempting, from a twenty-first-century perspective, to interpret Mackay's references to mania, folly, and delusion as metaphorical, rather than medical. Sometimes, this is certainly correct. However, the line between literal and polemical uses of "mania" and related terms was porous in the nineteenth century. "Mania" was ubiquitous in European and American medical writing on insanity throughout the first half of the nineteenth century. English physician James Cowles Prichard, writing in 1837, described the forms of monomania, a category mania limited to a particular delusion or preoccupation, as "endless if we were to constitute as many different kinds as there are modes and varieties of hallucination" (Prichard 1837, 33). Various physicians attempted to divide mania or monomania into distinct subtypes, including the familiar pyromania, kleptomania, and homicidal monomania, and also more sinister and exotic varieties like "drapetomania," which one American physician defined as "the disease causing negroes to run away" (Cartwright 1851, 331).

As Blumenthal argues, nineteenth-century mad doctors' taxonomies "became part of the cultural lexicon," working to "naturalize and legitimate conventional ways of understanding and treating human difference and deviance" while also creating new understandings (273). The language of mania could describe the social order and make sense of moments of disorder, making it a particularly attractive addition to the capitalist lexicon.

Market logic reached a strange apotheosis in cases involving suicide and insurance. Historians of modern America have written at length about the importance of the rise of the insurance industry, and its expansion from a tool for offsetting the risks of sea voyages to an all-purpose instrument for managing the vicissitudes of everyday life.[15] Just as frenzied speculation could weaken the mind, some believed that wise participation in insurance schemes could strengthen it. It was common knowledge among nineteenth-century actuaries, for instance, that a retiree or his widow who collected pension annuities could expect a bump in overall lifespan (Finlaison 1874, 165). Rush noticed this, too, and suspected that this was the result of annuitants' "being exempted, by the

14. On "Tulipomania" see Dash (1999)
15. See, for example Bouk (2015); Horan (2011); Levy (2012).

certainty of their subsistence, from those fears of want which so frequently distract the minds, and thereby weaken the bodies of old people" (Rush 1805, I:430). However, insurance could also have perverse effects, injecting cold, capitalist accounting into matters of life and death.[16] Blumenthal writes about the case of one Catskills merchant named Hiram Comfort who jumped into the Hudson River in 1839, and his estate's struggle to recover on his life insurance despite the policy's "suicide exemption clause" (185–86). In a world of profound financial instability, life insurance companies touted their products as essential sources of security and certainty. Comfort's suicide, Blumenthal writes, "seemed to have taken the insurers' ethos of familial responsibility to its logical limit" (Blumenthal, 2016, p. 187).

Could suicide ever be a sane act? Some judges and others recoiled from the notion that suicide could be a rational—or, more gallingly, *ethical*—outcome of financial calculation. Beneficiaries hoping to avoid a suicide exemption clause argued that their loved one was insane and that the death was the product of mental disease, not a 'rational' choice to commit suicide. Even when insurers tried to exclude self-destruction, whether "sane or insane," they hit a metaphysical barrier. If a man ended his own life, was he still "himself" or was he somehow alienated from his self-hood? Blumenthal writes that these cases asked the court to consider "the question of what constituted the *self* in self-destruction" (188). The result was confusion. Many of the central questions in capacity cases called on judges to ruminate on the deepest, most intractable mysteries of human existence. The suicide cases were a stark illustration of the potential consequences of capitalism for individuals. "Though he seemingly took charge of his own destiny," writes Blumenthal, "this figure [the suicide] appeared a rather crazed confidence man who could be counted among the casualties of capitalism, a haunting emblem of an economic order in which everything could be bought and sold" (194).

If life itself could be bought and sold, what about love? Capitalism, industrialization, and urbanization upset traditional social structures and domestic life, calling into question the nature of intimate relationships between parents and children, and between spouses. Hendrik Hartog, in *Someday All This Will be Yours*, describes how care practices changed in the nineteenth century as geographic mobility and an expanded labor market drew young adults away from their childhood homes, leaving their aging parents to create new and often complex care arrangements (Hartog 2010). In a legal world where "work meant pay and home meant something else, sometimes love, courts struggled to fix identities that were multiple and contradictory" (Hartog 2010, 249–50). Hartog is primarily interested in the validity of agreements in which domestic care, still imagined as the province of love, was reconceived as paid work. In a chapter titled

16. The idea that participation in a capitalist economy could dull love and empathy was common. For example, it is not clear precisely when the adjective "calculating" acquired its connotations of shrewd self-interest or heartlessness, but this seems to have been a nineteenth-century linguistic development. A preliminary search revealed the phrase "cold and calculating" in an 1810 essay in *The Edinburgh Review*, with reference to the inability of even "the most cold and calculating politician" to deny the value of spending money on African "civilization" following Britain's abandonment of its slave trade in 1807 (*The Edinburgh Review* 1810, 487). By the late nineteenth century, references to "calculating" as a negative, personal quality engendered or worsened by capitalism abound. One extract from the *Labor Standard*, a socialist newspaper published in New York, is illustrative: "Individuals among the poor become helpless, hardened and desperate; hence we have beggars and criminals on the one hand, and equally hardened, cold, calculating and selfish millionaires on the other" (*Locomotive Firemen's Magazine* 1886, 734).

"The Consideration of Love," Blumenthal explores how these arrangements and other contracts among intimates raised capacity questions. While judges saw love as the most natural motive for testamentary bequests, love seemed to taint and distort other contractual relationships among intimates (199). Judges were uncomfortable with the idea that care work might be performed for money or by strangers, rather than as an act of filial devotion and they often attempt to insulate intimate relationships from the cold calculations of commerce. Partly, this was an expression of a moralistic desire to separate the domestic sphere from the world of business. It was also, however, a reflection of judges' suspicion that love prevented individuals from acting rationally in their own interest (199–200). In what Blumenthal describes as "an expanding market society of placeless men and women," judges struggled to make sense of new patterns of dependence (230).

If speculation, life insurance, and even love could cause madness, and if white men could no longer count on the continued dependence and care of their children, their wives, and their non-white workers, how could judges determine who was competent and who was not? Blumenthal describes the different ways that judges worked to reconcile freedom and incapacity in contract and wills cases, ranging across the domestic and commercial spheres. In some cases, new jurisprudential principles emerged to help judges navigate the choppy seas of nineteenth-century capacity litigation. In others, as in the case of suicide liability, decisions were so inconsistent that no coherent judicial approach ever coalesced (194).[17] Blumenthal rejects doctrinal just-so stories. At the end of her discussion of care contracts, she writes: "We look in vain for a settled rule" (230). Instead of seeking rules or principles, she directs us to conflicts: between reckless speculators and their good-faith business partners; between willful testators and their disappointed heirs; and between desperate policyholders and insurance brokers. These contests reflect the deeper tensions that defined self and social life in nineteenth-century America.

In the final chapter of *Law and the Modern Mind*, Blumenthal turns to tort law. As in the case of contract law, she argues that conventional doctrinal wisdom that minimized the importance of capacity issues in this area of law did not reflect courtroom practice. The purpose of tort law was to compensate litigants for damage, which some held did not require any engagement with the mental state of the person committing the harm. However, Blumenthal argues that many jurists and judges believed that people had to meet a basic mental threshold in order to be held liable for their actions (232). Here, she pulls back from cases and returns to legal treatises. Tort law, centrally concerned with questions of causation, coalesced as a distinct doctrinal realm in the last decades of the nineteenth century, precisely when scientific determinism began its assault on the notion that human behavior was ever truly chosen (239–40). American judges and jurists, she writes, "confronted the vast borderland between perfect sanity and raving lunacy," and "reconsidered the place of fault in the structure of civil liability and the extent to which causal responsibility necessarily implied the existence of a moral agent" (252).

17. Blumenthal argues that insurance companies, exhausted by litigation and uncertainty over the validity of suicide exclusion clauses, had mostly omitted them from their policies, or only excluded suicide for an initial period of between one month and five years, by the mid-1880s (191). Today, American life insurance policies typically exclude coverage for suicide only for the first two policy years (Priest 2016, n. 44).

The metaphor of the borderland was popular among Victorian mad doctors. England's Henry Maudsley, in a chapter of his 1874 *Responsibility in Mental Disease* titled "The Borderland," reflected, "[N]ature makes no leaps, but passes from one complexion to its opposite by gradations so gentle that one shades imperceptibly into another . . . Nowhere is this more true that in respect of sanity and insanity" (Maudsley 1874, 38). Nevertheless, American judges struck out for the psychological frontier, determined to erect what they understood to be a necessary, if necessarily imperfect, boundary between competence and incompetence. In its embrace of causal responsibility and its maintenance of a mental fault requirement in negligence, modern tort law, like other fields of civil and criminal law, bears the marks of nineteenth-century judges' desire to affirm the ideal of the free, responsible individual while still allowing some people to escape liability on the ground of mental incompetence.

Blumenthal's narrative ends at the turn of the twentieth century, which she argues was "marked by a rupture in thinking about selfhood and responsibility" (289). Nineteenth-century judges' anxious introspection gave way to a self-confident pragmatism. Despite the vigorous challenges of deterministic science, judges' faith in the autonomous individual, while shaken, endured. Medico-legal experts' credibility had been wounded by their public battles of the 1870s and 1880s over the definition of insanity. In a sea of scientific confusion, judges kept a steady hand on the tiller. For decades, they had heard and seriously considered medical objections to a naively optimistic vision of human beings as free, moral agents. It was time to turn their attention away from science, and back to law. They were, they felt, entrusted to craft a legal understanding of the self that comported with common law principles while making allowances for modern insights into the nature and causes of human frailty. As the new century approached, jurists charted a middle course, insisting that most people were sane, competent and free enough to make wills, sign contracts, and be held liable for their negligent acts, while acknowledging that some were not. The presumption of sanity was strong, but not unassailable; most choices were free, but not all.

Law and the Modern Mind is a jurisprudential ghost story. Throughout, Blumenthal describes determinism and the lack of autonomy it implied as a dark presence that loomed behind judges sitting in capacity cases. Metaphysical questions "lurked, sometimes disturbingly, in the background of American law reports and treatises" (3); determinism was a "specter" (164), as were solipsism (17) and materialism (134). The groups whose putative dependence undergirded white masculinity—women, non-white men, and children—cast "shadows" which "loomed ever more threateningly over white men" (100). In Blumenthal's telling, propertied, white men, including judges and the men who appeared before them in capacity cases, were running scared, pursued doggedly by dependency. "Fears of effeminacy and of dependency on employers" racked the nineteenth-century man (100), as did "fears of . . . enslavement to his own appetites and delusions" (9). The confidence of Common Sense philosophy, and its comforting vision of sturdy, puissant masculinity, gave way to the pessimism, anxiety, and ennui that defined the *fin-de-siècle*.

Judges and jurists did not see determinism purely as a philosophical puzzle, to be ruminated upon in obscure academic tracts. It was a sinister cosmic force that provoked emotional and psychological reactions among men whose social preeminence was already at risk. Although scientific determinism is the main villain in Blumenthal's narrative, there were other dangers in nineteenth-century social thought. The freedom that

Americans celebrated in the post-Revolutionary era posed "an ever-present threat" to their efforts to build a well-ordered, democratic polity (21). Capitalism was another danger. It was "corrosive and unnerving" (171) and "bewildering" (177), creating its own terrible creature, the "haunting emblem" of the suicidal policyholder (194). Often, these threats were internal to nineteenth-century jurisprudence. Blumenthal writes that jurists' "vocabulary of the self" could bolster white, male supremacy, but also undermine it. The movement away from the old status-based categories of the pre-Revolutionary era and toward an individual, psychological definition of the capable self generated a "continual threat to the integrity and stability of those asymmetrical relationships" (9).

Nineteenth-century judges were not the optimistic pioneers of Willard Hurst, confidently wielding law to facilitate the "release of human energy" by a dynamic, industrious populace (Hurst 1956).[18] Instead, judges sought to protect American jurisprudence from determinism so that they could use the law to cushion the blows that capitalism and democracy landed on traditional ideas of masculinity, self, and social life. Even in the heyday of medico-legal efforts to expand the definition of insanity to encompass what might once have been seen as eccentricity or venality, judges defended the notion that most propertied, white men, most of the time, were rational agents. At the end of *Law and the Modern Mind*, it seems they have succeeded. The pragmatic turn in capacity jurisprudence that marked the end of the nineteenth century diffused some of the tension and dulled the urgency of the contest between free will and determinism in judicial thought. The ghost of determinism was not banished from the courtroom, but judges felt freer to ignore it.

The pragmatic compromise that emerged at the end of the nineteenth century continued to mark jurisprudence and courtroom practice throughout the twentieth century. Thomas A. Green's *Freedom and Criminal Responsibility in American Legal Thought* (2014) describes how twentieth-century American legal thinkers worked to reconcile determinism and free will, particularly as dramatized in cases of serious crime. Although Blumenthal and Green explore different aspects of the legal debate about individual autonomy and choice, reading their books together provides a panoramic view of American jurists' engagement with the "free will problem" from Independence to the turn of the new millennium.[19] While legal controversies over determinism lost some of their potency in the twentieth century, questions about the limits of responsibility, the possibility of rehabilitation, and the justice of retributive punishment dogged legal theory and criminal justice policy. However, while jurists never entirely dismissed or ignored the determinism espoused by many scientific fields including, from the late nineteenth century, the

18. Hurst later advanced a somewhat darker view of legal history in *Justice Holmes on Legal History* (1964).

19. In addition to their different emphases on civil law (Blumenthal) and criminal law (Green), they each concentrate on slightly different registers of jurisprudential thought. Blumenthal is most interested in the intellectual work of average judges, and in how they broached capacity questions in the context of their daily courtroom practice. Green, on the other hand, analyzes the writings of legal academics who were experts in criminal jurisprudence and who explicitly engaged with the free will problem. Green suggests that we might understand this as the distinction between "legal" and "judicial" thought (Green 2014, 8, n. 4). As a result, Blumenthal devotes more attention to the way that areas of private law developed in response to the challenge of scientific determinism, while Green privileges the internal evolution of jurisprudential thinking about free will, rather than its effects on legal administration.

new social and behavioral sciences, "the law ultimately fought off the worst ravages of the disease" (Green 2014, 34). Ultimately, human beings' common sense understanding of themselves as choosing subjects, which Green calls "conventional morality" (Green 2014, 11), could not be dislodged. The result, in law as in other spheres of social life, was the incorporation of scientific insights about the medical, economic, and cultural forces that drive human action into a paradigm with free will at its core—a "marriage that provided a lasting, if uneasy, conceptual framework that has survived the decline, closer to our own day, of the rehabilitative ideal" (Green 2014, 34).

The enduring, if uneasy, relationship between free will and determinism in American law forged in the nineteenth century and tested throughout the twentieth, in which determinism remained the junior partner, persists today. Could it ever change? Scholars in the burgeoning field of "neurolaw" consider the potential impact of contemporary neuroscience, including technologies like neuroimaging, on legal understandings of responsibility and culpability.[20] These philosophers, ethicists and scientists working at the frontier of research about consciousness and personhood often reenact centuries-old debates with surprising fidelity. Henry Maudsley, in 1874, imagined a future in which medical technology would reveal, once and for all, the physical causes of mental disease. "The time will come," he wrote, "when by the invention of improved instruments of research the insensible movements of molecules will be as open to observation as are the molar movements of the heavens, and when those that come after us will not fail to discover the physical causes of derangements" (Maudsley 1874, 44). While some might argue that we are hurtling toward a future in which science will vindicate a hard deterministic perspective, others might draw a different lesson from Maudsley's observations. The movements of molecules are no longer mysterious and we can now peer inside a living human brain, but the free will problem remains. Perhaps it always will.

Blumenthal returns to *Moby-Dick* at the end of *Law and the Modern Mind*: "So man's insanity is heaven's sense, and wandering from all mortal reason, man comes at last to that celestial thought, which, to reason, is absurd and frantic; and weal or woe, feels then uncompromised, indifferent as his God" (Melville 1892 [1851], 391). Pip, a young African American crewman on the *Pequod*, has just been fished from the sea where, as he bobbed in the waves, his soul was "carried down alive to wondrous depths" where he "saw God's foot upon the treadle of the loom" (ibid.). When Pip tells his shipmates about his transcendent experience, they call him mad. He is mad. To perceive the workings of the universe, as Pip does during his near-drowning, is to lose one's ability to function in the earthly world. *Law and the Modern Mind* is an account of how nineteenth-century American jurists dipped their toes into "celestial thought" and metaphysical meditation, but retreated before they could be towed under.

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20. For an introduction to some of the key issues in neurolaw scholarship, see Morse (2011) and Greene and Cohen (2004).

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