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Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture. By Susanna L. Blumenthal. Cambridge, MA: Harvard University Press, 2016. 400 pp. $45.00 hardcover.

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Histories of the expansion of American freedom do not dwell upon the potential downside for the newly free. But if there is a downside story to be told, maybe it is that for self-making individuals the highs are higher, and the lows, in particular, are qualitatively different. In post-civil war America, the expansion of freedoms fuelled a surging sense of individual agency. Unexpectedly, however, cases of debilitating anxiety began to appear which doctors had not previously encountered. Irrational behavior and mental unsoundness caused by "too much liberty" were increasingly implicated in business and family legal disputes. The resulting civil capacity litigation is at the center of Susanna Blumenthal's *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture*. The book details the struggle of 19th century jurists to reconcile respect and liability for free choices with new scientific perspectives on the frailty of the human mind. This same high level aim, in the last decade has come to the forefront of psychologically informed approaches to policy-making, although the connection is not made explicit in the book. Well-designed laws, today's behavioral economists argue, ought to balance respect for our choices with recognition of our cognitive limitations. Their key strategy is characterized as *libertarian paternalism*: using law to establish generally beneficial defaults we can opt out of, or otherwise structuring choices to impede but not preclude us from making decisions unlikely to reflect our true preferences. More than a century ago jurists mulled over similar problems when confronted with litigants of uncertain mental soundness. They too converged upon the importance of default legal rules when capacity was at issue. In an important way, then, libertarian paternalism is the modern successor to the civil capacity jurisprudence chronicled in depth for the first time in *Law and the Modern Mind*.

In the Introduction and Part One, Blumenthal sets the scene in the heady, raucous days of rapid capitalist expansion in the second half of the 1800s and turn of the 20th century. Tales of fortunes easily made loomed large in the popular imagination, as did the reality of financial ruin for the many who succumbed to market speculation

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mania and lost. Cases of mental unsoundness and insanity were on the rise. Social commentators suggested too much freedom was to blame for the seemingly novel mental disturbances of the day. The disorders commonly noted on asylum intake registers included *dread of poverty, pecuniary concerns, stock speculations,* and the like. To avoid accountability for legal arrangements ranging from contracts to ill-advised marriages, an increasing number of civil litigants pleaded insanity. For the courts hearing these cases, there was no ready answer to the question of when mental deficiency ought to allow individuals to escape responsibility for their conduct. Blumenthal recounts the inadequacies of the existing common law rules on capacity and the limits of the judges' preferred methodology of introspection for settling questions of mental soundness. Sanity defied a single definition. The circumstances giving rise to capacity challenges varied too greatly.

In this doctrinal vacuum, Blumenthal details the emergence of a new field of inquiry and expertise: medical jurisprudence. Lawyers and doctors worked together with the aim of integrating into the legal system medical advancements in the diagnosis and treatment of unsound minds. Medical jurists believed psychological science could improve upon traditional means of identifying persons who were *non compos mentis*. Common law rules on insanity and responsibility, they argued, expected too much of human nature. In contrast, medical theories of the mind recommended updating the law to recognize gradations of mental unsoundness. This position proceeded from the observation that most cases of mental deficiency were best classified as *partial* madness. Those afflicted with partial madness did not exhibit a total deprivation of reason, the mark of the insane. Nevertheless, their rational capacities were impaired to their detriment. Many were gripped by domain specific madness and labeled "monomaniacs." Monomaniacs were notable for exhibiting symptoms including the misuse of time and money on schemes of financial speculation. It is not surprising, then, to learn critics of medical jurisprudence were concerned it was merely pathologizing, and thus excusing, vice. These concerns and others unfolded in debates across a wide range of capacity trials. The categories of cases considered in Part Two include commercial contracts, care contracts between family members, wills and estates, and torts. Litigants on both sides regularly brought in experts in medical jurisprudence to support their positions. A recurring conundrum for presiding judges was just how much "mind" a person should possess to be accountable for a given commitment or wrong. Such assessments were complicated. Internal mental states are not directly observable, unlike many physical pathologies. As a workaround, judges approximated a litigant's mental soundness based on reported behaviors. Often they relied upon evidence of a

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radical and unaccountable change in character. Judges developed a different strategy for cases where family members coveted the property of a parent entering the "second childhood" of old age. In these cases, the presumption of capacity was reversed for lifetime conveyances within families when transactions were on non-arm's length terms. A theme Blumenthal returns to, is the loosening of formal intergenerational obligations during this era. When disappointed heirs called wills into question, courts took the view that a testator's deviation from traditional family norms of inheritance was not sufficient to void the will on the basis of established testamentary incapacity. A testator's eccentric preferences would be honored where alternative explanations to incapacity could account for their choices. These examples hint at the multitude of judicial responses detailed in chapters three through seven.

The organization of the book by area of law may be a disappointment to readers who were hoping for a systematic assessment of the progress made on the cases' common philosophical questions. *Law and the Modern Mind* is more like a treasure trove of old photos than a family tree laying out a detailed genealogy of doctrine. On a bookshelf it belongs with histories of mind and capitalism such as Jonathan Levy's *Freaks of Fortune* (Harvard University Press, 2012) rather than philosophical works on mind and responsibility by Antony Duff. Blumenthal's purpose is to draw attention to civil capacity trials as important sites of cultural work. She succeeds resoundingly because of her extensive and artful interweaving of primary sources. Blumenthal positions her achievement, in the first instance, as a contribution to legal scholarship on insanity which has been preoccupied with criminal law. Yet, the overlap is minimal between the policy contexts where civil capacity and criminal insanity determinations come into play. On the other hand, while Blumenthal did not set out to write a history of "first wave" libertarian paternalist approaches to law, *Law and the Modern Mind* will particularly appeal to readers interested in behavioral economics for its unique historical vantage point on one of the field's central concerns: how law can hold citizens to their free choices while recognizing the bounds of human rationality.

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