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BOOK REVIEW

# Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture

## by Susanna L Blumenthal. Cambridge, Mass: Harvard University Press, 2016, 400 pp (£37.95 hardback), ISBN: 9780674048935

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*Law and the Modern Mind* is an evocative account of the relationship between consciousness and liability in American law in the period from the revolutionary era up to the end of the nineteenth century. Blumenthal has digested a wide array of materials – from court judgments and legal treatises to scientific and religious texts – to produce a powerful account of the role of 'the crucible of the courtroom' (p 274) in developing cultural understandings of individual autonomy and responsibility. Blumenthal mines the rich historical material she assesses for evidence of the changing ideas about consciousness and responsibility associated with the long nineteenth century, and makes a strong case for the centrality of law in the complex process of negotiating the self in post-revolutionary America.

The main premise of *Law and the Modern Mind* is that judicial discussions of the liability or independence of individuals whose mind was 'in issue' (p 2) and decisions about capacity and responsibility – to contract or make a valid will or seek a divorce – crystallised broad debates about nothing less than what it is to be human. As Blumenthal argues, unlike other groups contrasted with the 'fully autonomous individual' of law – minors, married women, and slaves (p 6) – the insane were a more fluid category, and had a more destabilising effect on legal principles. Harnessing the deep well of historical, cultural and economic research on the American republic – covering the multiple effects of rapid industrialisation, large scale immigration and a 'boom and bust' economy that marked this period – Blumenthal charts the multiple effects these profound changes had on the ideas of the self.

The central argument of *Law and the Modern Mind* is that, in this period, the American legal discourse around consciousness and responsibility reveals the demise of the 'law of persons' which had its roots in feudal society – where the status of people as subjects was fixed within a set of hierarchical relationships – and the rise of what Blumenthal calls 'the default legal person' (p 7), a figure sitting behind, and obscured by, the much more prominent legal figure of the reasonable person. According to Blumenthal, within a new order in which man was recognised as sovereign, individual choice rather than rank determined legal rights and duties (p 7), and the 'default legal person' was assumed to have capacity and to be responsible for the consequences of his acts (p 9). But, as Blumenthal argues, this meant that irrational, immoral or impulsive behaviour was rendered unaccountable, generating profound doubts about whether human beings were as 'morally free and mentally capable' as Enlightenment philosophers had made them out to be (p 11).

Jurists' responses to these challenges to make sense of, and draw lines around, legal responsibility was to generate a 'legal sense' of what it meant to be insane, coerced or incapable. This 'legal sense' was connected to but distinct from two other prominent discursive logics of the time, that of alienists or medical scientists, on the one hand, and that of the Common Sense school of philosophy (p 11), on the other hand. Common Sense philosophy – the Scottish philosophical school of Thomas Reid and others that grew out of the Enlightenment and that attempted to rationalise the authority of common

sense – revolved around the idea that it is moral sense or conscience that allows human beings to perceive right and wrong. This idea places human moral capacity alongside rationality in directing human conduct, and posited a close connection between mental states and self-discipline, and freedom and the capacity for self-government (p 53). Blumenthal argues that Common Sense philosophy provided a useful way of thinking about the self 'well suited to the practical challenges' associated with cashing out the political ideals that had animated the establishment of the republic (p 28). For Blumenthal, it is necessary to look behind the well-chronicled rise of objective forms of liability in this period, to expose and assess the religious and scientific influences on the work of judges and lawyers, on the basis that the rise of objectivism had 'deeper spiritual roots and higher ideological stakes' than has previously been assumed (p 16).

As Blumenthal argues, the newfound liberty of the American republic threw questions of individual consciousness and responsibility into sharp relief: 'the spectre of a will out of control and a people mad with freedom haunted the cultural landscape of the early republic' (p 20). In the context of a constant threat to freedom of the will, the former colonists enlisted a new word with which to talk about 'self-government as both a psychological and a political project': responsibility (p 21). Blumenthal suggests that the Common Sense school notions of balanced character and individual responsibility provided an intellectual resource for jurists of the time, offering 'scientific assurance that the obligatory rules of good governance lay within the human mind' (p 28), and allowing jurists to align the law of personal relations with a doctrine of equality – one that could sustain the deep inequalities of a social system built on slavery and the subordination of women and workers.

But, in Blumenthal's account, even as Common Sense philosophical precepts enjoyed a greater influence in America than Scotland, they failed to neutralise the threats posed by the insane and others. This was because the idea propounded by this school that freedom, rationality and morality were intimately related had the effect of eliding the distinction between sin and error (p 49), and rendering individuals responsible for everything or nothing. Supported by the medical jurisprudence of alienists, asylum superintendents and others, which as Blumenthal points out, fostered the growth of a market in expert evidence, 'enterprising lawyers' involved in capacity and responsibility matters pushed the boundaries around excusing conditions (p 86). For example, in civil cases in which insanity was argued to invalidate wills or contracts, the independence of even propertied white men (those who were presumed to be in control of themselves) was questioned, with insanity 'chipping away at the cultural ideal of self-making' (p 101). These sorts of cases attracted significant public attention, operating as sites where the cultural and political significance of consciousness and responsibility was negotiated, as 'the ideal of the sovereign self was tried and reconfigured across time' (p 103).

For this reader, the story told about the connection between speculative commerce, madness and the law of contract is particularly interesting. As Blumenthal writes, the law of contract was a normative system, disciplining actors to participate in the market capitalist society of the American democratic republic, meaning that contracts cases falling on the 'borderlines of capacity' provided 'a window on the corrosive and unnerving impact of burgeoning capacity economy' (p 171). Presented across four contexts that generated the largest number of capacity challenges – competency to contract, life insurance policies in which the insured commits suicide, applications for divorce and property transfers with the family – Blumenthal shows how jurists attempted to use contract to negotiate the degree of protection provided to the family from the individualism of the market, showing awareness of the economic and ideological impact of the market on patriarchal authority and norms of caregiving between generations (p 228).

*Law and the Modern Mind* draws on a rich dataset of trials and cases, stretching across different parts of the civil law, and various US jurisdictions, and betraying thorough and creative research and thinking. The 'problem of insanity in the age of reason and revolution' (p 266) was particularly challenging because it was regarded as having multiple causes, both within and beyond the self, and because it raised the perplexing question of degree, permitting a grey area between full competence and complete incompetence. Blumenthal concludes that, within legal discourse, 'the certitudes of Common Sense' could not be sustained, and a greater array of 'human perversity' had to be

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accommodated in the figure of the 'default legal person', with the law coming to adopt a presumption of sanity that, jurists came to recognise, rested on an 'unrealizable ideal of human autonomy' (p 281).

This book is an engaging and well-crafted account of the emergence of the legal notions of the self that suffuse the law in the current era. In her focus on parts of civil law, Blumenthal extends the analysis of legal personhood, which has been concentrated on the criminal law. Blumenthal takes seriously the manifold connections between legal principles and practices and the history of ideas, recognising the value of legal contexts and legal precepts for the articulation of notions such as those about autonomy and the self. Blumenthal's 'default legal person' is a *persona ficta*, an anthropomorphised version of then emergent standards and presumptions about individual responsibility that were formalising in law and procedure. But this device gives Blumenthal the foundation on which she builds fascinating connections to wider, extra-legal debates about consciousness, responsibility and personhood.

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