

### Law And The Modern Mind: Consciousness And Responsibility In American Legal Culture

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## Review

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**Blumenthal, Susanna L.** *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture*. Harvard University Press, \$45.00  
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### Mental Capacity and Legal Responsibility in American History

Early U.S. jurisprudence with respect to consciousness and responsibility was marked by fundamental contradictions. Both the Revolution and the founding of the Republic were premised on a belief that the people were capable of self-government. On the other hand, this assumption did not extend to slaves, who were under the control of their masters; or to women, who were under the power of their husbands while married and were denied the franchise in any event. The Union victory in the Civil War and the ensuing Reconstruction Amendments to the Constitution brought African-Americans within the class of persons who were, at least formally, granted a seat at the table of self-government, although that seat was often little more than a legal fiction. Women continued to be denied a seat at the table until the twentieth century.

In her new book, legal historian Susanna Blumenthal explores another locus of contradiction in early American law: courtroom disputes and jurisprudence relating to mental capacity. Blumenthal's book builds on the earlier work of Milton Green, a legal realist writing in the 1940s. In a series of law review articles, Green had called attention to a seeming disconnect in American jurisprudence between a stated preference for objective standards and the actual application of subjective tests that asked questions about state of mind that were impossible for judges to answer. Blumenthal takes this analysis to a deeper level by situating the evidence within a historical framework and connecting developments in jurisprudence to broader trends in the development of political and intellectual thought and the evolution of American society. Her study shows how nineteenth-century American jurists "wrestled mightily with what were truly existential dilemmas, even as they insisted law was a 'practical' science."

(289)

Among her many insights, Blumenthal identifies ways in which the Civil War marked a turning point in the evolution of capacity litigation and jurisprudence. According to Blumenthal, the traumatic experience of the Civil War undermined the faith of Gilded Age judges in their ability to make sense of the functioning of the human mind. In Blumenthal's words, these judges "expected that medical experts and laymen would disagree about where to draw the line between sanity and insanity," and "displayed a marked solicitude for the eccentric will, some even positively associating it with human autonomy." (162) The Civil War also produced a new category of capacity litigation, as a generation of grieving war widows "seeking to communicate with the dead contributed to the increasing popularity of Spiritualism," which in turn produced difficult legal questions about the line between eccentric religious beliefs and insane delusions. (197-198)

Blumenthal concludes her book by suggesting that historians should take legal records more seriously as a source of insight into the American intellectual tradition. As an example what such records might be able to reveal, Blumenthal's excellent book is a great place to start.

*Joshua C. Tate is an Associate Professor of Law at Southern Methodist University's Dedman School of Law. He is the author of numerous articles including "Personal Reality: Delusion in Law and Science" Connecticut Law Review (forthcoming 2017).*