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Spiritualism and Will(s) in the Age of Contract

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Abstract

Spiritualism was one of the most salient cultural phenomena of late-nineteenth-century American life. The belief of considerable numbers of respectable citizens that they could communicate with the dead via an entranced medium called into question both popular and scientific conceptions of rationality, volition, and freedom. In turn, these changing ideas about the mind challenged American law's commitment to its belief in free and reasonable legal actors. This Article, the first to consider Spiritualism's implications for American law, examines the legal reaction to the anxieties Spiritualism generated for the Age of Contract. Principally, it looks at the judicial response to cases of Spiritualists' wills that were challenged on the grounds of insanity and undue influence. In these cases, concerns about the mind forced their way through the curtain of formalist objectivity at the heart of contractarian jurisprudence. In dealing with such concerns, I argue, American judges adopted a realist, pragmatic strategy of promoting polyphonic discussion, protecting individual belief, and preserving democratic decision-making. Approaching the subject from the perspective of cultural legal history, I suggest that popular culture, science, and the law were mutually constitutive discourses in which nineteenth-century Americans enacted their anxieties about the mind, the will, and the family. Finally, I propose that a contextualized understanding of these nineteenth-century debates can suggest much about current legal concerns regarding behavioral psychology and cognitive neuroscience.

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ABSTRACT

Spiritualism was one of the most salient cultural phenomena of late-nineteenth-century American life. The belief of considerable numbers of respectable citizens that they could communicate with the dead via an entranced medium called into question both popular and scientific conceptions of rationality, volition, and freedom. In turn, these changing ideas about the mind challenged American law's commitment to its belief in free and reasonable legal actors. This Article, the first to consider Spiritualism's implications for American law, examines the legal reaction to the anxieties Spiritualism generated for the age of contract. Principally, it looks at the judicial response to cases of Spiritualists' wills that were challenged on the grounds of insanity and undue influence. In these cases, concerns about the mind forced their way through the curtain of formalist objectivity at the heart of contractarian jurisprudence. In dealing with such concerns, I argue, American judges adopted a realist, pragmatic strategy of promoting polyphonic discussion, protecting individual belief, and preserving democratic decision-making. Approaching the subject from the perspective of cultural legal history, I suggest that popular culture, science, and the law were mutually constitutive discourses in which nineteenth-century Americans enacted their anxieties about the mind, the will, and the family. Finally, I propose that a contextualized understanding of these nineteenth-century debates can suggest much about current legal concerns regarding rationality, responsibility, and volition engendered by recent discoveries in behavioral economics, the psychology of emotions, and cognitive neuroscience.

INTRODUCTION

Rationality, responsibility, and volition—concepts fundamental to American law—are eroding in the face of modern science. Recent developments in the human sciences have called

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into question these and other core features of contemporary jurisprudence. Traditional accounts of legal actors as rational calculators capable of weighing costs and benefits and making efficient, wealth-maximizing choices have been undermined by research in behavioral psychology and economics.¹ Research on the psychology and physiology of emotions suggests that the ancient distinction between reason and emotion is no longer tenable and that affective responses play a considerable role in what were previously believed to be purely rational choices.² Perhaps most significantly, the twenty-first century has seen an explosion of research on cognitive neuroscience, a field that uses new brain imaging technologies to discover the “neural correlates” of various behaviors and predispositions.³ Many commentators are concerned that this work will undermine legal notions of responsibility and free will.⁴

¹ See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); CASS R. SUNSTEIN, *BEHAVIORAL LAW AND ECONOMICS* (2000); *HEURISTICS AND THE LAW* (Gerd Gigerenzer & Christoph Engel, eds. 2007). For an application of these insights to the realm of legal settlement see John Bronsteen, Christopher J. Buccafusco, & Jonathan Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits* (forthcoming COLUM. L. REV., 2008) (manuscript on file with author).

² As Joshua Greene and Jonathan Haidt write, “Moral psychology has long focused on reasoning, but recent evidence suggests that moral judgment is more a matter of emotion and intuition than deliberate reasoning.” Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS IN COGNITIVE SCI. 517, 517 (2002). See also ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF HUMAN CONSCIOUSNESS* (1999); JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* (1996). For the implications of this research for the law see Jody Lynce Madeira, *Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation*, 40 U.C. DAVIS L. REV. 137 (2006); *THE PASSIONS OF LAW* (Susan Bandes, ed. 1999); MARTHA NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001); Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN L. REV. 1 (1997).

³ See *LAW AND THE BRAIN* (Semir Zeki & Oliver Goodenough, eds. 2006); Jeffrey Rosen, *The Brain on the Stand*, N.Y. TIMES, March 11, 2007. Rosen quotes Joshua Greene as saying, “The official line in the law is that all that matters is if you’re rational, but you can have someone who is totally rational but whose strings are being pulled by something beyond his control.” *Id.*

⁴ See Stephen J. Morse, *New Neuroscience, Old Problems*, in *NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE* 157 (Brent Garland, ed. 2004).

Although the controlled experiments and dazzling brain images⁵ associated with modern science might be taken as signs that these challenges to law are new, in fact, most of them are not matters of first impression. Indeed, they parallel quite closely similar debates that took place in the second half of the nineteenth century. Then, as now, new research on the mind threatened to subvert legal notions about how and why people act as they do. Based in large part on their experiences with people who believed in Spiritualism, nineteenth-century scientists challenged widespread popular and legal ideas about rationality, freedom, and volition.⁶ The law's response to such challenges has more than historical relevance in light of the similar situation the law currently finds itself in. This Article, the first to fully address the subject,⁷ explores nineteenth-century American law's response to Spiritualism and the new mental science. Such an exercise promises to shed light on twenty-first century concerns.

When they weren't concerned with Reconstruction or "the woman question," and often even when they were, late-nineteenth-century Americans were concerned about the human mind. New scientific theories about insanity, hysteria, and volition filled the pages of newspapers, novels, and judicial opinions. As newly emergent psychological experts challenged traditional notions of rationality and novelists put forward theories about psychological realism, legal actors were wrestling with conflicting notions of

⁵ See Neal Feigenson, *Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI*, 2, INT. J. L. IN CONTEXT 233 (2006); JOSEPH DUMIT, PICTURING PERSONHOOD: BRAIN SCANS AND BIOMEDICAL IDENTITY (2003).

⁶ See *infra* notes 72-100 and accompanying text.

⁷ Susanna Blumenthal briefly discusses Spiritualism in her excellent work on insanity and the law of wills. See Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 960, 1025-29 (2006) (hereinafter Blumenthal, *DoW*). For her, the Spiritualism cases serve as an example for developments in the law of wills, whereas I am using the law of wills as an example of broader changes in nineteenth-century law, science, and culture. See also Susanna L. Blumenthal, *Law and the Modern Mind: The Problem of Consciousness in American Legal Culture, 1800-1930* (2001) (unpublished Ph.D. diss., Yale Univ.). Molly McGarry explores Spiritualism's influence on U.S. obscenity law in MOLLY MCGARRY, *GHOSTS OF FUTURES PAST: SPIRITUALISM AND THE CULTURAL POLITICS OF NINETEENTH-CENTURY AMERICA* (2008).

responsibility and mental disease.⁸ In each of these three fields – science, popular culture, and the law – debates about mind, interpersonal influence, and the will attracted extraordinary attention during the last quarter of the nineteenth-century.

Widespread interest in the mind during this period should not be surprising. This was, after all, the so-called “Age of Contract.”⁹ Emancipation had promised to remove the last vestiges of status-based society; from this point forward, social order would be based on exchanges between “free and independent men.”¹⁰ According to the received view of this era, American law became more objective and formalist, dealing with abstractions instead of actual legal actors.¹¹ Yet, the American obsession with freedom of contract necessarily raised fundamental questions about liberty, volition, and influence that forced their way through the curtain of formalist objectivity. Indeed, the age of contract placed the mind at center stage. Society’s success would depend on the uncoerced exertion of independent will, and Americans were understandably anxious about anything that threatened to constrain the will. Although historians and legal scholars have written voluminously on contractarian jurisprudence and its influence on legal doctrine, the economy, and society, they have largely ignored the era’s understanding of freedom and the will. Like objectivity, rationality, and credibility,¹² freedom has a history.¹³ Thus, to fully understand what Americans meant by “freedom of contract,” we must study what they thought about the mind.¹⁴

⁸ See generally JOEL PETER EIGEN, *WITNESSING INSANITY: MADNESS AND MAD-DOCTORS IN THE ENGLISH COURT* (1995).

⁹ See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); GILMORE, *supra* note 5; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985).

¹⁰ WILLIAM GRAHAM SUMNER, *WHAT SOCIAL CLASSES OWE TO EACH OTHER* (New York, Harper 1883).

¹¹ See generally HORWITZ, *supra* note 9.

¹² See LORRAINE DASTON & PETER GALISON, *OBJECTIVITY* (2007).

¹³ See Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 80 J. AM. HIST. 435, 436-437 (1994) (“...freedom has never been a fixed category or predetermined concept. Subject to multiple and conflicting interpretations, it has always been a terrain of struggle, its definition constantly created and re-created.”).

¹⁴ As Ariela Gross has shown in her study of race in nineteenth-century law, when popular and scientific conceptions conflicted, people often looked to trial

The phenomena associated with the rise of modern Spiritualism provided one of the most culturally salient opportunities for late-nineteenth-century Americans to discuss their anxieties about freedom, influence, and the will (and for twenty-first-century historians to study those anxieties).¹⁵ The popularity of Spiritualism – a heterogeneous system of beliefs and practices devoted to communication with souls of the deceased – forced Americans to confront serious challenges to the age of contract. Reports of respectable Americans seeking the personal and financial advice of dead relatives channeled through the bodies of entranced mediums raised troubling political, legal, and scientific issues about the mind.

Despite Spiritualism's prominence in nineteenth-century American culture, it has not yet received sustained attention from legal scholars. This Article examines legal, scientific, and literary responses to Spiritualism in an attempt to put nineteenth-century American law's obsession with freedom into broader cultural context.¹⁶ Part I describes the age of contract in American law and society, focusing on the legal ideas about the rational mind and the law's role in protecting freedom of contract. During the last quarter of the nineteenth century, however, widespread faith in human rationality and free will began to erode due in part to phenomena associated with Spiritualism and the various popular and scientific theories about Spiritualistic belief that are the subject of Part II. I explore how psychological theories that were developed in response to Spiritualism threatened foundational legal

courts for resolution. So too with the anxieties engendered by Spiritualism. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L. J. 109 (1998).

¹⁵ See ARTHUR CONAN DOYLE, *THE HISTORY OF SPIRITUALISM* (Arno 1975) (1926); ANN BRAUDE, *RADICAL SPIRITS: SPIRITUALISM AND WOMEN'S RIGHTS IN NINETEENTH-CENTURY AMERICA* (1989); ALEX OWEN, *THE DARKENED ROOM: WOMEN, POWER AND SPIRITUALISM IN LATE VICTORIAN ENGLAND* (1990); ALISON WINTER, *MESMERIZED: POWERS OF MIND IN VICTORIAN BRITAIN* (1998).

¹⁶ On cultural legal history see Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 649 (2001) (noting, "Analyzing the stories of trial participants, the stories' cultural provenance and their cultural resonance can provide a window into the complex relationship between legal institutions and processes on the one hand, and the wider culture on the other.").

notions of rationality, independence, and volition.¹⁷ Part III examines how American law reacted to these threats. Here I focus on attempts to invalidate Spiritualists' wills on the grounds of insane delusion and undue influence. These two doctrines, which necessitated individualized scrutiny of legal actors' minds, were transformed in this period, and they began the transformation of American law. Finally, in Part IV, I compare the law's treatment of Spiritualist testators with the treatment of Spiritualism in William Dean Howells's novel *The Undiscovered Country* (1880). I argue that, confronted with anxieties about rationality, freedom, and families, both the courts and Howells adopt realist, pragmatic strategies that promote individualized, democratic decision-making.

By reuniting three discursive spaces that contemporary academia treats in separate disciplines, I attempt to contextualize the mutually constitutive relationships between law, science, and popular culture in the age of contract. Doing so suggests new ways of interrogating late-nineteenth-century American culture's characteristically pragmatic response to the challenges of widespread religious unorthodoxy, increasingly unified and authoritative scientific opinion, and changing conceptions of gender roles and the family. Moreover, understanding the anxieties that nineteenth-century psychology raised for the age of contract will add perspective to current debates about the presumption of rationality in law and economics scholarship, the role of emotions in the law, and the impact of "neurolaw" on legal responsibility.

I. FREEDOM, REASON, AND THE WILL IN THE AGE OF CONTRACT

In his oft-quoted aphorism, the nineteenth-century legal historian Henry Maine declared "that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."¹⁸ According to legal and political theorists of the era, unlike status-based societies that apportioned rights and duties on the grounds of membership in distinctly identified and immobile

¹⁷ The threats to the age of contract associated with popular and scientific responses to Spiritualism emerged contemporaneously with other developments in Darwinian heredity, statistics, and sociology that were calling into question the myth of rational, independent agents. See *infra* note 100.

¹⁸ HENRY SUMNER MAINE, *ANCIENT LAW* 170 (10th printing 1901) (1861).

classes, societies based on contract allowed members to make their own place in the world through individual effort unencumbered by social categories. Belief in the success of a society founded on individual choice rested on widespread faith in human rationality and free will, and the laws that regulated it did not question that faith. This Part explores the promise contract in mid-nineteenth-century America, the psychological theories that supported it, and the laws and policies it generated.

According to the legal historian James Willard Hurst, “The years 1800-1875 were...above all else, the years of contract in our law.”¹⁹ In the United States, the movement from status to contract seemed to reach its apogee with emancipation, as the ratification of the 13th and 14th Amendments symbolized the victory of individual liberty and entitlement over the tyranny of coercion and dispossession.²⁰ The promise of contract, to borrow Brook Thomas’s phrase,²¹ meant that individuals would be granted the autonomy to run their own lives and make their own decisions free from the encumbrances of inherited social status. Society would be based on the autonomous choices of people acting in their own self interest.²² Yet as contractarian ideology increasingly became the organizing narrative for legal, economic, and social relations in postbellum America,²³ slavery retained its symbolic power. As Eric Foner notes, “In a world in which personal freedom increasingly meant the opportunity to compete in the marketplace in the pursuit of economic gain, slavery remained the master metaphor for describing impediments to individual advancement.”²⁴

¹⁹ HURST, *supra* note 9, at 18.

²⁰ See AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 172 (2002).

²¹ BROOK THOMAS, *AMERICAN LITERARY REALISM AND THE FAILED PROMISE OF CONTRACT* (1997).

²² P.S. Atiyah describes “a society rapidly becoming highly atomistic in its social organization. The individual stood or felt as the unit of organization. His relationships with his fellow man were increasingly of a bilateral rather than a multilateral nature, increasingly voluntarily chosen rather than imposed upon him.” P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 259 (1979).

²³ See STANLEY, *supra* note 20, at x (noting, “In the age of slave emancipation contract became a dominant metaphor for social relations and the very symbol of freedom.”).

²⁴ Foner, *supra* note 13, at 446.

Indeed, contract appealed to a nation grappling with the challenges of emancipation and Reconstruction, in part because the essence of nineteenth-century contract law, the concept of consent, was starkly differentiated from slavery's reliance on coercion. Although historians debate its origins,²⁵ the will or consent theory of contract law dominated the subject's jurisprudence throughout the nineteenth century. According to will theory, in order to be valid, a contract must be the product of consensus or, as it was often expressed, a "meeting of the minds."²⁶ The ability to consent requires both volition and freedom, distinguishing the contractual relationship from the status-based relationship.²⁷

²⁵ Compare ATIYAH, *supra* note 22 (attributing the rise of consent theory to the influence of laissez-faire economics and utilitarian moral philosophy) with Philip A. Hamburger, *The Development of the Nineteenth-Century Consensus Theory of Contract*, 7 L. & HIST. REV. 241 (1989); James Gordley, *Contract, Property, and the Will – The Civil Law and Common Law Tradition*, in THE STATE AND FREEDOM OF CONTRACT, 80-81 (Harry N. Scheiber, ed. 1998) ("Instead of identifying some distinctively modern idea of will in the work of the jurists, historians have simply concluded that because the jurists used the concept of will they must have been inspired by or in league with some other intellectual movement in the nineteenth century."); David Lieberman, *Contract Before "Freedom of Contract,"* in THE STATE AND FREEDOM OF CONTRACT, 96 (Harry N. Scheiber, ed. 1998) (noting, "Atiyah's emphasis on Smith and Bentham serves to obscure the range of cultural sources for nineteenth-century individualism and its accompanying critiques of paternalistic economic policy.").

²⁶ See GORDON, *supra* note 20, at 172. According to Gordon:

Consent, manifested in a series of contractual agreements (the 'social contract,' the marriage contract, the employment contract), was so closely identified with freedom and civic responsibility that lack of consent described lack of freedom. In the nineteenth century, theories of consent and contract traveled across venues and genres, coloring the analysis not only of polygamy and slavery but also of poverty, prostitution, and free labor. The 'will theory' of contract, for example, the notion that there must be some 'meeting of the minds' to form an enforceable agreement, was peculiarly a creature of the nineteenth century. The will theory implied that contracts were based on positive choice—that a contract was the child of consent.

Id.

²⁷ See LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* (1965) (hereinafter FRIEDMAN, CLIA). Friedman writes, "Older land law was characterized by rules leaving little room for voluntary arrangements. Thus, in the descent of lands, when a landowner died, his property descended according to a set statutory scheme. The classic common law recognized primogeniture: it gave the land to the decedent's oldest

The jurisprudential commitment to freedom of contract was characterized by the judicial prohibition from considering the details of particular transactions. As Lawrence Friedman puts it, “Contract law is abstraction—what is left in the law relating to agreements when all particularities of person and subject-matter are removed.”²⁸ Judges were not to inquire into the fairness of the deal, nor were they to consider the relative bargaining power of the parties.²⁹ Classical contract law treated individuals as autonomous units, and the law’s role was simply to ensure that agreements were indeed freely entered into and not the products of insanity, fraud, or duress.³⁰

The willingness to ground social progress on voluntary exchanges between contracting parties and the refusal to protect individuals from the consequences of unprofitable bargains rested on American law’s faith in man’s³¹ rational faculties. Early

son, who inherited by virtue of his status as oldest son. Volition, intention, had nothing to do with the matter.” *Id.* at 18.

²⁸ *Id.* at 20.

²⁹ See HORWITZ, *supra* note 9, at 180-183.

³⁰ According to the Lord Wynford’s much-cited statement:

The law will not assist a man, who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practiced, makes an imprudent bargain, no Court of justice can release him from it. ...

But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the law.”

Blackford v. Christian, 1 Knapp, R. 77, *quoted in* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 241 (Boston, Hilliard, Gray & Co 1836).

³¹ Here, the use of the masculine pronoun is appropriate. Although it promised to expand freedoms to larger classes of American society and although it placed great faith in the rational abilities of individuals, the promise of contract did not extend to all facets of nineteenth-century American law and society. As recent research by Amy Stanley and others has shown, when taken to its logical extremes, freedom of contract threatened to rend the country’s social fabric. See STANLEY, *supra* note 20, at 16. America had granted slaves their freedom and encouraged them to market their labor for paid wages, but granting the same rights to women would have “stripped a free man of the right to be master of a family.” *Id.* at 58-59. According to Stanley, nineteenth-century American treatise writers “sharply distinguished the wage contract and marriage contract from purely commercial transactions, defining both as *domestic relations* that presupposed not simply consent and exchange but unique rights of authority and obligations of obedience.”³¹ Thus, despite the era’s commitment to contractual freedom and individual rationality, significant

nineteenth-century American jurists placed great stock in Enlightenment and Scottish Common Sense philosophy's "optimistic vision of man's mental ability."³² According to Thomas Reid, the influential Scottish philosopher, men were universally endowed with rational faculties such as memory, emotions, and will that "Nature hath given to the human understanding."³³ For Reid, rational judgment was an exercise in "common sense"—"that degree of judgment which is common to men with whom we can converse and transact business."³⁴ Rationality and wise market behavior were identical, and they were sharply distinguished from irrationality and insanity. Combined with the utilitarian belief that man is a rational calculator of various hedonic outcomes, the confidence of Enlightenment philosophy encouraged the faith American law placed in the contracting individual.³⁵ Although differences in intellectual

spheres of social activity – particularly those related to the family – remained barred against the intrusion of contract. The promise of contract would, thus, be circumscribed by traditional expectations about family life. See THOMAS, *supra* note 21, at 37-38; GORDON, *supra* note 20, at 173-74.

³² Blumenthal, *DoW*, *supra* note 7, at 973. John Mikhail has challenged Blumenthal's focus on Scottish Common Sense philosophy, noting that:

...one could probably replace 'Scottish Common Sense philosophy' in Blumenthal's formulation with something as diffuse as 'The Enlightenment' or even 'Western jurisprudence' without significantly altering its import, because the assumption that rational and moral faculties are innate and universal is common to most writers in these traditions.

John Mikhail, *Scottish Common Sense and Nineteenth-Century Law: A Critical Appraisal*, 26 L. & HIST. REV. 167, 167-68 (2008). Obviously, the specific lineage or demarcation of individual philosophical schools is not necessary for this Article.

³³ Quoted in ROGER SMITH, THE NORTON HISTORY OF THE HUMAN SCIENCES 257 (1997).

³⁴ *Id.*

³⁵ The utilitarianism of Bentham and the Mills was part of a longer tradition of associationist psychology that extends back to John Locke and David Hartley. Roger Smith notes that nineteenth-century associationist psychology "was an attractive form of analysis because it represented change and progress in human life as the necessary outcome of past experience. Belief that ideas and feelings of pleasure and pain associate together and determine conduct provided authority for belief that human nature itself guarantees progress through experience – progress at the level of the individual, at the level of society and even at the level of nature as a whole." *Id.* at 251-252. On the influence of associationism on American legal thought, see Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L. J. 429, 472 (1998).

capacity could not be ignored,³⁶ contract theory assumed that parties could rationally measure the costs and benefits of proposed transactions and that they could freely choose whether to contract or not.³⁷ According to Susannah Blumenthal, this “default legal person” possessed the innate capacity to “master [his] passions and act in accordance with higher dictates of reason.”³⁸

Because American law took such an optimistic view of human rationality, inquiring into the specifics of contractual volition seemed unnecessary. Just as judges were to assume that transactions had been wisely and rationally entered into, they were also to assume that such acts were fully volitional. As Thomas Haskell notes, the period’s legal formalism presumed that “the self’s every act was deemed voluntary insofar as will was in it, and scarcely anything other than direct physical coercion was thought capable of displacing the will and emptying an act of its voluntary character.”³⁹ Accordingly, antebellum American law followed English common law in its shallow approach to questions of volition.⁴⁰ Although the doctrine of undue influence was emerging during this period, it was primarily concerned with protecting parties in certain fiduciary relationships (such as husband and wife, attorney and client, guardian and ward⁴¹) and with others thought to be particularly susceptible to imposition (such as seamen,⁴² the

³⁶ See HORWITZ, *supra* note 9, at 183.

³⁷ See ROY KREITNER, *CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE* (2007). He suggests that “part of the classical project was the advancement of an image of the economy in which participants made strictly rational choices based on bargained-for exchange.” *Id.* at 91.

³⁸ Susanna L. Blumenthal, *The Default Legal Person*, 54 *UCLA L. REV.* 1135, 1157 (2007). Kreitner refers to a similarly defined legal actor as the “autonomous calculating subject.” KREITNER, *supra* note 37, at 3-4.

³⁹ THOMAS L. HASKELL, *A Brief Excursus on Formalism*, in *OBJECTIVITY IS NOT NEUTRALITY: EXPLANATORY SCHEMES IN HISTORY*, 310 (1998).

⁴⁰ The treatment of volition in English law is itself an interesting, and as yet unexplored, subject for historical inquiry. It developed, in large part, out of the Ecclesiastical Law’s approach to marriage, coverture, and wills of personal property. See R. H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* (1986). Interestingly, the canon law applied an objective standard to claims of duress. The threat of force must have been “such as would have moved a constant man.” *Id.* at 91.

⁴¹ See 1 STORY, *supra* note 30, at 239-40; LEONARD SHELFORD, *A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND* (Philadelphia, J.S. Littell 1833).

⁴² John Fonblanque writes that “seamen dealing for their prize-money or wages, are considered entitled to as much favour and protection in equity as young

very old, and “imbeciles” whose disability does not amount to complete incapacity).⁴³ Moreover, the law relating to volition between presumably capable parties was limited for the most part to issues of fraud and coercion.⁴⁴ In the latter case, mid-nineteenth-century jurists focused on physical coercion and on psychological coercion that paralleled physical force, *i.e.*, compulsion resulting from fear.⁴⁵ Thus, throughout much of the nineteenth-century, little judicial attention was paid to matters of individual cognition.

The age of contract held out the hope of a dynamic and progressive society based on the free and rational exchange of goods and services. Contractarian jurisprudence was grounded on the notion of mutual consent and supported by widespread optimism in the abilities of the human mind. Yet just as the age of contract began to flower in American law, this sanguine view of mental function would be challenged by a diverse group of popular phenomena that threatened traditional ideas about rationality, freedom, and volition. Spiritualism – as well as associated phenomena such as mesmerism, hypnotism, and electro-biologism – attracted significant attention as scientists, journalists, politicians, jurists, and the public disputed subjects such as the line between eccentricity and insanity, the extent of interpersonal influence, and

heirs, they being, as Sir Thomas Clarke observes, a ‘race of men loose and unthinking, who will almost for nothing part with what they have acquired perhaps with their blood.’” 1 JOHN FONBLANQUE, A TREATISE OF EQUITY 135, n. k (3d ed., Philadelphia, R. Byrne 1805).

⁴³ See HENRY HOME KAMES, PRINCIPLES OF EQUITY 81 (2d ed. Edinburgh, A. Millar 1767) (“The weakness and imbecility of some men make them a fit prey for the crafty and designing.”); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 431 (Am. ed., Josiah Randall ed., Philadelphia, P. Byrne 1812) (noting, “Persons, indeed, of but little better understanding [than ‘perfect idiots’], may be, and often are, imposed on, or intimidated by those around them; but such cases may more properly be considered as falling under the head of *undue influence* or *coercion* than under that of incapacity in the testator.”).

⁴⁴ See 2 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 411-24 (Winchester, VA 1831); 1 EDWARD VAUGHAN WILLIAMS, THE LAW OF EXECUTORS AND ADMINISTRATORS 36-39 (2d Am. Ed., Francis J. Troubat ed., Philadelphia, R.H. Small 1841).

⁴⁵ See *id.* Williams writes, “If it can be demonstrated that actual force was used to compel the testator to make the Will, there can be no doubt, that although all formalities have been complied with, and the party perfectly in his senses, yet such a Will can never stand. So, if there were at the time of bequeathing, a fear upon the testator, it could not be, as it ought, *libera voluntas.*” *Id.*

the limits of volitional capacity.⁴⁶ And as it did, it called into question the common law's reserved approach to the peculiarities of individual psychology.

II. SPIRITUALISM AND THE SCIENCES OF THE MIND

The origin of modern Spiritualism can be conveniently dated. In March 1848 in Hydesville, New York, near Rochester, Kate and Margaret Fox, sisters aged twelve and fourteen, convinced their neighbors that they could communicate with spirits of the deceased by raps made by the spirits in response to the girls' questions.⁴⁷ News of the phenomena spread rapidly, and within a year the Fox sisters were touring the country competing for attention with other newly discovered "mediums."⁴⁸ Following only "the race question" and "the woman question," Spiritualism was perhaps the most salient feature of the second half of the nineteenth century.⁴⁹

A. *Spiritualism in American Culture*

Spiritualism's most prominent feature was the séance. In a movement so heterogeneous, it is perhaps impossible to describe a typical Spiritualist meeting, but the numerous contemporary accounts of séances give us a good sense of what attendees, or as they were known in Spiritualist parlance, "investigators," were likely to experience.⁵⁰ A group composed of both men and women would meet in a private residence and take seats around a table, alternating genders and holding hands, in a darkened room. The medium, usually a young woman in her teens or twenties, would

⁴⁶ On the role mesmerism played in the science and society of Victorian Britain *see generally* WINTER, *supra* note 15.

⁴⁷ A number of histories of Spiritualism are available. More or less contemporaneous treatments include DOYLE, *supra* note 15; FRANK PODMORE, MODERN SPIRITUALISM (1902). The subject has recently attracted the attention of social historians in both America and Britain. *See* JANET OPPENHEIM, THE OTHER WORLD: SPIRITUALISM AND PSYCHICAL RESEARCH IN ENGLAND, 1850-1914 (1988); BRAUDE, *supra* note 15; OWEN, *supra* note 15.

⁴⁸ 1 DOYLE, *supra* note 15, at 62.

⁴⁹ *See* BRAUDE, *supra* note 15, at 27.

⁵⁰ For accounts of séances, *see* BRAUDE, *supra* note 15, at 19-25; WILLIAM DEAN HOWELLS, THE UNDISCOVERED COUNTRY 19-33 (Boston, Houghton, Mifflin & Co. 1880).

then enter a trance state either on her own or with the assistance of a mesmerizer. In this unconscious state, it was widely believed, she became a passive conduit for the forces that enabled communication between the earthly and spiritual worlds.⁵¹ Once the medium was fully entranced, the investigators would wait patiently, often for hours, for evidence of the spirits' arrival, usually heralded by knocks or raps that seemed to come from the walls, floor, ceiling, or table. The spirits were asked to identify themselves, either by rapping at appropriate points as the alphabet was scanned or by writing on slates held by the medium. Often the spirits would be the investigators' deceased relatives, but just as often they might be famous personages from the past (Benjamin Franklin was a favorite guest⁵²). Investigators could then interrogate the spirits about aspects of the afterlife or seek advice regarding more earthly matters. If they were lucky and had gotten the attention of a game spirit, the investigators might then be treated to a materialization of the spirit who exited a closet that the medium had entered moments before.⁵³

More than other new religions of the period,⁵⁴ Spiritualism⁵⁵ attracted the extended notice of people throughout American society. As one historian notes, "Every notable progressive family of the nineteenth century had its advocate of Spiritualism, some of them more than one."⁵⁶ Perhaps the most perplexing aspect of Spiritualism for its skeptical contemporaries as well as its skeptical historians was the belief of "intelligent and truthful persons such as would be regarded as trustworthy on all

⁵¹ See BRAUDE, *supra* note 15, at 85.

⁵² See *id.* at 5.

⁵³ See *id.*

⁵⁴ See generally LAWRENCE FOSTER, RELIGION AND SEXUALITY: THE SHAKERS, THE MORMONS, AND THE ONEIDA COMMUNITY (1984).

⁵⁵ It is perhaps not correct to refer to Spiritualism as a religion. While many avowed Spiritualists did adopt specific cosmological beliefs, including those propounded by Andrew Jackson Davis's Harmonial Philosophy, other investigators thought of Spiritualism as simply an extension of their Christian beliefs or as a scientific attempt to prove the existence of life after death. See BRAUDE, *supra* note 15, at 32-55. Braude lists three factors that provoked popular interest in Spiritualism: "the desire for empirical evidence of the immortality of the soul; the rejection of Calvinism or evangelicalism in favor of a more liberal theology; and the desire to overcome bereavement through communication with departed loved ones." *Id.* at 33-34.

⁵⁶ *Id.* at 27.

other subjects,”⁵⁷ including the physicist William Crookes, the naturalist Alfred Russell Wallace, and New York State Supreme Court Judge John Edmonds, whose treatise on the subject was immensely popular.⁵⁸ According to Arthur Conan Doyle, himself a Spiritualist as well as one of the movement’s first historians, the “conversion...of such well-known men” as Judge Edmonds, Wisconsin Senator Nathaniel Tallmadge, and University of Pennsylvania professor of chemistry Robert Hare “gave enormous publicity to the subject, while at the same time it increased the virulence of the opposition, which now perceived it had to deal with more than a handful of silly, deluded people.”⁵⁹ Public exhibitions were staged, both skeptics and believers offered rewards for unimpeachable proof, and commissions composed of respected clergy, scientists, and other public figures were organized to investigate the phenomena.⁶⁰ Although its status occasionally waned with the exposure of fraudulent mediums, Spiritualism remained culturally salient throughout the second half of the nineteenth century and into the twentieth.

Spiritualism was threatening to many nineteenth-century Americans regardless of whether it would ultimately prove true or false, and it was particularly threatening to essential aspects of the age of contract. Of course, if all of the manifestations were concocted by charlatan mediums to dupe the excessively credulous, it would have raised difficult questions about the public’s susceptibility to fraud, one of the mortal sins against freedom of contract. But if, as even skeptics often believed, “there was something in it,” more than fraud was at stake. In order for mediums to contact the spirits, they often assumed trance-like or mesmeric states, shutting down their own wills to allow the spirits a channel for communication. Describing his powers, the famous medium Daniel Dunglas Home claimed, “I have no control over [the spirits]. They use me, but I do not use them. ... I am a passive

⁵⁷ WILLIAM B. CARPENTER, *PRINCIPLES OF MENTAL PHYSIOLOGY* 611 (New York, D. Appleton & Co. 1882) (hereinafter MP).

⁵⁸ JOHN W. EDMONDS & GEORGE T. DEXTER, *SPIRITUALISM*, 2 vols. (New York, Partridge & Brittan, 1853-1855).

⁵⁹ 1 DOYLE, *supra* note 15, at 123.

⁶⁰ One of the most famous, if ultimately inconsequential, commissions was the Seybert Commission organized by the University of Pennsylvania in the 1880s. See UNIVERSITY OF PENNSYLVANIA SEYBERT COMMISSION FOR INVESTIGATING MODERN SPIRITUALISM, *PRELIMINARY REPORT* (Philadelphia J.B. Lippincott Company, 1887).

instrument—no more.”⁶¹ The passivity of a medium’s trance generated anxiety about morality and responsibility both for skeptics as well as for believers concerned about the medium’s susceptibility to the devious plots of spirits from lower realms.⁶² Similarly, “investigators” were encouraged to suspend their own wills and judgments to create an inviting atmosphere for the spirits. In such a state, investigators seemed to be perfect subjects for mind control.⁶³ In a society committed to freedom of contract, the submission of the will to external influences was dangerous,⁶⁴ but for Spiritualists, submission of the will was a necessary and desired act for communication with the spirits.

Like Mormonism, Shakerism, and the varieties of utopian religions that emerged in the middle of nineteenth century, Spiritualism provoked concerns about gender and family life.⁶⁵ Spiritualism came to national attention at a time when Americans were beginning to rethink the proper role for women in social, economic, and political life. Rightly or wrongly, in the minds of many Americans it was linked with radical challenges to traditional family life, such as those proposed by the celibate Shakers, the communal Oneida Perfectionists, and the advocates of “Free Love.”⁶⁶ Certainly many Spiritualists traveled in the same

⁶¹ Quoted in 1 DOYLE, *supra* note 15, at 190.

⁶² See BRAUDE, *supra* note 15, at 87-88. Braude quotes a Spiritualist editorial that looked forward to the day when a medium could achieve communication with the spirits “in a more advanced and spiritualized condition...fully awake and conscious.” *Id.* at 88. William Howitt warned that God “has servants of all grades and tastes ready to do all kinds of work, and He has here sent what you call low and harlequin spirits to a low and very sensual age.” Quoted in 1 DOYLE, *supra* note 15, at 226.

⁶³ The eminent legal treatise writer Francis Wharton published an article on Spiritualism’s implications for criminal jurisprudence where he discussed the possibility of using a mesmerized subject to commit crimes. See *Spiritualism and Jurisprudence*, 12 ALB. L. J. 216 (1875). The subject became intensely popular during the late 1880s and 1890s, especially in France.

⁶⁴ See CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* 188 (1980).

⁶⁵ For excellent legal histories of these groups, see *id.*; GORDON, *supra* note 20. Weisbrod notes, “Underlying the attacks on Oneida was the idea that the practices of the community were not only immoral but also unnatural, and violative of the rules of familial relationships.” WEISBROD, *supra* note 64, at 37.

⁶⁶ According to Braude, “Most Spiritualists did not support free love, but most free love advocates were Spiritualists, so the movements were widely linked in the popular mind.” BRAUDE, *supra* note 15, at 129.

circles as these reformers,⁶⁷ and the Spiritualist periodicals often carried essays criticizing the unequal burdens that the law placed on wives in conventional marriages.⁶⁸ Less visibly than Spiritualist doctrine, but perhaps more importantly, Spiritualist practice also threatened accepted gender norms.⁶⁹ The séance room placed members of opposite sexes in intimate and clandestine physical contact with one another, and, contrary to orthodox religious practice, Spiritualist meetings were led by women. Even the committed Spiritualist Arthur Conan Doyle was concerned with such “promiscuous sittings.”⁷⁰ As the historian Alex Owen puts it, “What the séance promised was the ritualized violation of cultural norms.”⁷¹ Accordingly, Spiritualism posed an attractive target for social conservatives and defenders of the status quo.

B. The Psychology of Spiritualistic Belief

Men of science from every specialty found in Spiritualism an alluring research subject. Some, like Crookes and Wallace, and eventually William James and the Society for Psychical Research, were intrigued by the promise of empirical proof of the existence of an afterlife.⁷² By far the larger class of scientists, however, saw in Spiritualism the opportunity to gain credibility for themselves and their research by discrediting such phenomena and their practitioners.⁷³ While much of their effort was aimed at exposing fraudulent mediums by revealing the sleight-of-hand techniques used to create various spiritual manifestations, skeptics were

⁶⁷ For example, the well-known feminist reformer Victoria Woodhull also served as president of one of the Spiritualist associations.

⁶⁸ See OWEN, *supra* note 15, at 33. According to the Spiritualist James Burns, “Spiritualism does not annul the marriage relation, but puts it on a firm and natural basis, declaring it to be a crime to form a union on external or conventional grounds, but only on that spiritual affinity, which makes the very *beings* of the beloved dear to each other.” *Quoted in id.*

⁶⁹ Owen notes, “the Victorian séance room became a battle ground across which the tensions implicit in the acquisition of gendered subjectivity and the assumption of female spiritual power were played out.” *Id.* at 11.

⁷⁰ 1 DOYLE, *supra* note 15, at 297.

⁷¹ *Id.* at 203.

⁷² See ALAN GAULD, *THE FOUNDERS OF PSYCHICAL RESEARCH* (1968).

⁷³ See WINTER, *supra* note 15.

especially fascinated by the “thoroughly honest and competent”⁷⁴ believers who attended séances hoping to commune with the departed. What was it about such people that allowed them to hold beliefs that were “completely in opposition to the universal experience of Mankind?”⁷⁵ Phenomena such as mesmerism and Spiritualism were instrumental in motivating scientists to develop psychological explanations of seemingly unaccountable belief.⁷⁶

Among the first to suggest an explanation for Spiritualist belief were the physicians who worked with the insane. With the growth of publicly-supported insane asylums, the psychiatrists who specialized in “mental alienation” were emerging as increasingly authoritative experts on pathological mental states.⁷⁷ These “alienists” classed Spiritualist mediums and believers among the growing categories of maniacs. Most believers were respected members of their communities, yet Spiritualists seemed to suffer from hallucinations and delusions regarding a single subject, a condition alienists referred to as monomania.⁷⁸ The various nosologies of Spiritualist monomania ascribed the delusions to “disordinate, abnormal, or, . . .unnatural function” of the mind or

⁷⁴ WILLIAM B. CARPENTER, *MESMERISM, SPIRITUALISM, &C. HISTORICALLY & SCIENTIFICALLY CONSIDERED* 56 (New York, D. Appleton & Co. 1877).

⁷⁵ *Id.* at 57.

⁷⁶ See WINTER, *supra* note 15, at 99. She writes:

Some historians have faulted the observers for not considering the possibility of ‘suggestion,’ in the modern sense of a physical response caused by anticipation. But such causal explanations did not exist at the time. In fact, they came into being in consequence of experiments like this one [on a mesmeric subject].

Id.

⁷⁷ JAMES C. MOHR, *DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA* 140-41 (1993).

⁷⁸ According to Alfred Taylor’s treatise on medical jurisprudence, monomania is “that form of insanity in which the mental alienation is partial. The delusion is said to be confined either to one subject or to one class of subjects. . . . [M]onomania varies much in degree; for many persons affected with it are able to direct their minds with reason and propriety to the performance of their social duties, so long as these do not involve any of the subjects of their delusions.” But, he continues, “it is not to be supposed that a man is insane upon *one* point only, and sane upon all other matters. . . . In monomania, the mind is unsound; not unsound in one point only, and sound in all other respects, but this unsoundness manifests itself principally with reference to some particular object or person.” ALFRED SWAINE TAYLOR, *MEDICAL JURISPRUDENCE* 632 (5th Am. ed., Philadelphia, Blanchard & Lea 1861).

body.⁷⁹ According to the American professor of medical jurisprudence Frederic Marvin, who coined the term “mediomania” as a specific class of Spiritualist monomania that affected hysterical women, the disease “is usually preceded by a genito or venerio-pathological history.”⁸⁰ Emphasizing the threat such delusional women posed to society, Marvin claimed that a small change in the angle of a believer’s womb could cause her to become so possessed by her delusion that she “forsakes her home, her children, and her duty, to mount the rostrum and proclaim the peculiar virtues of free-love, elective affinity, or the reincarnation of souls.”⁸¹ It was thus not unusual during this period for female mediums and believers to be committed to asylums on the grounds of religious monomania.⁸² Nonetheless, Spiritualism’s immense popularity across American society suggested that the line between insanity and mental health was less distinct than had previously been thought.

While alienists like Marvin emphasized various aspects of Spiritualist psychopathology, many other writers on the human mind focused on the role of volition in Spiritualist belief. The will was a central point of scientific debate in the late nineteenth century, and every major treatise writer had to put forth a theory about it. Yet during this period, the role given to volition in human cognition shrunk considerably, due in part to the desire for a continuous theory of causation in the natural and human sciences.⁸³ To the most extreme writers on the subject, men like Henry Maudsley and Thomas Huxley, such a theory required the complete dismissal of belief in a metaphysical will free from the influence of antecedent natural forces.⁸⁴ According to them,

⁷⁹ OWEN, *supra* note 15, at 145, (quoting Henry Maudsley).

⁸⁰ FREDERIC R. MARVIN, *THE PHILOSOPHY OF SPIRITUALISM AND THE PATHOLOGY AND TREATMENT OF MEDIOMANIA*, 38 (New York, Asa K. Butts & Co. 1874).

⁸¹ *Id.* at 47.

⁸² The anti-Spiritualist psychiatrist L. Forbes Winslow claimed that there were 40,000 Spiritualists confined in American asylums. See Roy Porter, *Introduction – Georgina Weldon and the Mad Doctors*, in *WOMEN, MADNESS AND SPIRITUALISM*, 6 (Roy Porter, et al., eds. 2003). Owen describes the successful suit of the Spiritualist medium Louisa Nottidge to get herself released from a British insane asylum. OWEN, *supra* note 15, at 152-153.

⁸³ See Lorraine J. Daston, *British Responses to Psycho-Physiology, 1860-1900*, 69 *ISIS* 192, 193-94 (1978).

⁸⁴ T. H. Huxley, *On the Hypothesis that Animals are Automata, and its History*, 16 (n.s.) *FORTNIGHTLY REV.* 555 (Nov. 1874).

human behavior was no different from the behavior of animals or planets; given sufficient information about a person's previous states, "it would be possible not only to predict his line of action on every occasion, but even to work him, free will notwithstanding, like an automaton."⁸⁵

Although Maudsley's thesis found support among many intellectuals, it is not surprising that most British and American scientists refused to go so far down the road to determinism.⁸⁶ The emphasis Maudsley and Huxley placed on unconscious and involuntary mental activity, however, resonated deeply with other contemporary psychologists. Indeed, as the role of free will was diminishing, that of the unconscious was rapidly expanding. Interest in Spiritualism, mesmerism, and the like spurred research on "unconscious cerebration,"⁸⁷ and many theories of Spiritualist belief focused on automatic and unknown mental processes.

⁸⁵ HENRY MAUDSLEY, *THE PHYSIOLOGY AND PATHOLOGY OF THE MIND* 160 (London: Macmillan & Co 1867). Even the libertarian political thinker (and eventual psychical researcher) Henry Sidgwick had to admit the influence of recent psychological research on the scope of volitional conduct. He writes:

The belief that events are determinately related to the state of things immediately preceding them is now held by all competent thinkers in respect of all kinds of occurrences except human volitions. It has steadily grown both intensively and extensively, both in clearness and certainty of conviction and in universality of application, as the human mind has developed and human experience has been systematized and enlarged. Step by step in successive departments of fact conflicting modes of thought have receded and faded, until at length they have vanished everywhere, except from this mysterious citadel of the Will.

HENRY SIDGWICK, *THE METHODS OF ETHICS* 62-63 (6th ed., 1901) (18--).

⁸⁶ Among those prominent American scientists who maintained a belief in free will while acknowledging the considerable role of unconscious and involuntary action was the physician Oliver Wendell Holmes, father of Supreme Court Justice. See OLIVER WENDELL HOLMES, *MECHANISM IN THOUGHT AND MORALS* (2d. ed., London, Sampson Low, Son & Martin 1871). Holmes writes, "Like the general-in-chief, [the will's] place is anywhere in the field of action. It is the least like an instrument of any of our faculties; the farthest removed from our conceptions of mechanism and matter, as we commonly define them." *Id.* at 27. See also MARTIN J. WIENER, *RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830-1914* (1990). Wiener notes, "Victorian physiologists developed models of human functioning and particularly of mental process that, although increasingly materialist and determinist, left an important, even decisive, role for self-mastery and self-creation." *Id.* at 42.

⁸⁷ The term is Carpenter's, but it was much publicized by Frances Power Cobbe. See FRANCES POWER COBBE, *Unconscious Cerebration – A Psychological*

The most widely read scientific author on Spiritualism, the British mental physiologist William Benjamin Carpenter, rejected the idea that Spiritualist belief was a matter of displaced wombs or lesions of the will.⁸⁸ Like the more radical theories put forward by Maudsley and Huxley, Carpenter's "mental physiology" was influenced by functional accounts of the nervous system that gave little scope to conscious, volitional action. The role of unconscious cognition was not limited simply to various supportive functions such as digestion and respiration; instead even "intellectual operations of a high order may go on *automatically*—one state of consciousness calling forth another in strict accordance with the 'laws of thought.'"⁸⁹

According to Carpenter, the will had only a restricted role to play in the selective mustering of attention toward particular mental representations automatically offered to it.⁹⁰ In certain circumstances, however, the will can be directed at a particular idea for so long that the idea becomes "dominant," usurping the attention and holding the selective power of the will in abeyance. When this happens, the automatic processes of cognition continue without interruption. The power of dominant ideas, Carpenter suggests, explains the testimony regarding mesmeric and Spiritualist phenomena. Either willingly or at the suggestion of a medium, believers focus their attention on a particular idea, for example, that they will hear a certain noise. In time, the idea of the noise becomes dominant, and unconscious processes overwhelm the will and judgment, now held in abeyance by the idea, until the believers actually think they hear it.⁹¹

Study, in DARWINISM IN MORALS, AND OTHER ESSAYS (Boston, George H. Ellis 1883). On Carpenter and Cobbe, see Jenny Bourne Taylor, *Forms and fallacies of memory in 19th-century psychology: Henry Holland, William Carpenter and Frances Power Cobbe*, 23 *ENDEAVOR* 60 (1999).

⁸⁸ According to Carpenter, the opinion of medical men that believers are "all hysterical" "has now been fully proven to be incorrect by the fact, that steady, sensible, middle-aged men, having all their wits about them, are sometimes found to be as good subjects of certain of these operations, as the susceptible young females who are deservedly regarded with so much suspicion." CARPENTER, MP, *supra* note 57, at 612.

⁸⁹ *Id.* at 377.

⁹⁰ *Id.* at 420. He writes, "[The will] can *select*, among the motives which present themselves, those which the Moral Sense approves as the most worthy, and can *intensify the force* of these by *fixing the attention* upon them..." *Id.*

⁹¹ In his words:

The influential American psychiatrist George M. Beard put forward a similar theory of hypnotic and Spiritualist trance in a paper presented to the New York Medico-Legal Society in 1876.⁹² Influenced by recent theories about the conservation of energy, Beard believed that individuals were endowed with a finite amount of nervous force, and if that force was overtaxed by one area of the mind, other areas would suffer.⁹³ Spiritualistic trance would occur, Beard thought, the nervous force normally directed at the will was dissipated by some exciting idea. He claimed that trance “is a functional disease of the nervous system, in which the cerebral activity is concentrated in some limited region of the brain with suspension of the activity of the rest of the brain, and consequent loss of volition.”⁹⁴ When the attention is directed by some exciting cause—“fear, or wonder, or expectation”—toward a particular object or idea, it drains the nervous force from the rest of the mind and especially the will causing the subject to act automatically in response to suggestions by the medium: “he sees and hears whatever he is told to see and hear.”⁹⁵ Accordingly, “The fully entranced person has no will; what he wishes to do he cannot; what he wishes not to do he does; he is at the mercy of an external or internal suggestion.”⁹⁶

The social and ethical implications of these psychological explanations of Spiritualist belief were considerable. Unlike the alienists’ accounts of Spiritualist delusions, the psychological

...the characteristic which is common to all of these states being the more or less complete surrender of the guiding and controlling action of the Will, while there is a greater or less degree of receptivity for external impressions. The current of mental activity thus comes to be essentially *automatic*; and the corrective action of Common Sense—which is the *general resultant* of antecedent experience—being thus suspended (as in dreaming), the Ego comes to believe implicitly the ideas which may possess him at the time, whether these have been directly suggested to him by external prompting, or have been evolved by the operations of his own mind.

Id. at 627-628.

⁹² George M. Beard, *A New Theory of Trance and Its Bearings on Human Testimony* (1876), in PAPERS READ BEFORE THE MEDICO-LEGAL SOCIETY OF NEW YORK, 3D SER. 319 (1886).

⁹³ On Beard see CHARLES E. ROSENBERG, *NO OTHER GODS: ON SCIENCE AND AMERICAN SOCIAL THOUGHT* (1997).

⁹⁴ Beard, *supra* note 92, at 319.

⁹⁵ *Id.* at 323.

⁹⁶ *Id.* at 326.

theories offered by Carpenter and Beard did not only apply to those who, through environmental or hereditary factors, were predisposed towards insanity. As Beard argued, “Trance is not, ...as many suppose, the peculiar gift of certain temperaments. It is the property of the human race. All persons are liable to become entranced, just as they are liable to become paralyzed or epileptic.”⁹⁷ While the development of certain habits of mental action could, Carpenter suggested, protect people from the nefarious influence of dominant ideas, the essential lesson of his research was that even seemingly trustworthy people could be made to believe they saw tables levitate. Moreover, everyone recognized that if people could be influenced to see and hear things without conscious awareness that they were acting according to external suggestions, they might also be influenced to *do* things unconsciously, thus calling into question individual responsibility.⁹⁸ Although Beard doubted that people could be unwittingly forced to commit crimes through the influence of hypnotic suggestion, he did believe that less morally critical actions, such as signing a contract or will, could be compelled.⁹⁹ Given the apparent feasibility of such conduct, it should not be surprising that Spiritualism provoked so much anxiety in the age of contract.¹⁰⁰

⁹⁷ *Id.* at 333.

⁹⁸ The French psychiatrists were particularly intrigued by the question of whether a person could be made to commit a crime under the influence of hypnotic suggestion. See RUTH HARRIS, *MURDERS AND MADNESS: MEDICINE, LAW AND SOCIETY IN THE FIN DE SIÈCLE* (1989). Common law writers were also concerned about the possibilities of unconscious or hypnotic crime. See JOEL PETER EIGEN, *UNCONSCIOUS CRIME: MENTAL ABSENCE AND CRIMINAL RESPONSIBILITY IN VICTORIAN LONDON* 156 (2003) (noting “...the world of mesmerism, of hypnotism ‘beheading’ the will, of the possibility that someone else had committed the crime, offered the defendant a way to comprehend what had happened in the period that was ‘simply a blank to me.’”).

⁹⁹ Beard writes, “It is conceivable that so simple a movement as the signing of one’s name to a false document of terrible import, might be automatically made by a mesmerized subject, at the suggestion of the person whom she supposed put her into the trance.” Beard, *supra* note 92, at 352.

¹⁰⁰ Spiritualism was, of course, not alone in challenging the mythical rational, independent agent at the center of the age of contract. Contemporaneous developments in Darwinian heredity, statistics, and sociology were also developing a picture of the world as highly interconnected and determined. Crime, insanity, and drunkenness no longer appeared to be consequences of individual choice but rather the regular (and measurable) effects of hereditary and/or social influences. See DANIEL J. KEVLES, *IN THE NAME OF EUGENICS*:

IV. SPIRITUALISM AND THE LAW

Spiritualism quickly gave rise to popular concerns about its moral and legal implications, and it was not long before it made its way into American courts.¹⁰¹ Many of the initial cases were criminal prosecutions of fraudulent mediums¹⁰² that some commentators hoped would settle the truth of the matter once and for all.¹⁰³ The bulk of litigation surrounding Spiritualism, however, involved challenges to the wills of Spiritualist testators.¹⁰⁴ In these cases, disappointed heirs sought to overturn

GENETICS AND THE USES OF HUMAN HEREDITY (1995). The British polymath Francis Galton was at the center of this trend. His work on heredity and statistics was foundational for both fields. It was, in fact, entirely interconnected. He was also, however, the founder of the eugenics movement. *See id.* *See also*, THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY (1977); STEPHEN M. STIGLER, THE HISTORY OF STATISTICS: THE MEASUREMENT OF UNCERTAINTY BEFORE 1900 (1986); IAN HACKING, THE TAMING OF CHANCE (1990). Haskell writes, “To insist on the interconnectedness of social phenomena in time and in social space is to insist on the improbability of autonomous action. This presumption against autonomy applied to all social phenomena, including especially the irreducible constituent atoms of the social universe, individual human beings.” HASKELL, *supra* note 100, at 13.

¹⁰¹ The most curious case is, without doubt, a copyright dispute about a play composed by the aid of automatic writing. Although the plaintiff claimed that the true author of the play was in fact a spirit, the judge felt compelled to assign her rightful ownership of the composition. *See* Blewett Lee, *Copyright of Automatic Writings*, 13 VA. L. REV. 22 (1926).

¹⁰² *See* *Spiritualism Jugglery*, N.Y. TIMES, Aug. 27, 1865, at 2; *Spiritualism in Court – Exposure of an Imposter*, N.Y. TIMES, Jul. 1, 1866, at 5; *Trial of a Trickster*, N.Y. TIMES, Oct. 15, 1876, at 5. On the trial of William Mumler, the “spirit photographer,” *see* Jennifer Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J. L. & HUMAN. 17 (1998).

¹⁰³ *See* *Some Legal Points in the Buffalo Spiritualist Trial*, N.Y. TIMES, Aug. 28, 1865, at 4 (hoping, “It is not impossible, therefore, but that this trial may have a perceptible effect in diminishing the number of those who attend these mystic sessions. It will not lessen the number of fools.”); *Judge Hall on Spiritual Mediums*, N.Y. TIMES, Sep. 30, 1865, at 4 (“Truth would not fear a cross-examination. Let us see whether spiritualism fears it.”).

¹⁰⁴ A number of cases have been reported in appellate opinions, and I have found newspaper accounts of many more. *See* *Denson v. Beazley*, 34 Tex. 191 (1870); *Chafin Will Case*, 32 Wis. 557 (1873); *Leighton v. Orr*, 44 Iowa 679 (1876); *Greenwood v. Cline*, 7 Or. 1 (1879); *In re Smith’s will*, 52 Wis. 543 (1881); *Thompson v. Hawks*, 14 F. 902 (Cir. Ct. D. Ind. 1883); *Otto v. Doty*, 61 Iowa 23

wills written by believers on the grounds of insane delusion and undue influence. The trials of Spiritualists' wills, and wills cases more generally, thus provided an ideal forum for nineteenth-century Americans to debate questions of sanity, influence, and familial duty.

A. *Delusion and Undue Influence*

Although it may seem odd for an article on the age of contract to turn to testamentary law, there are, in fact, good reasons to do so. As a matter of substantive and procedural law, contracts and wills cases are fairly similar.¹⁰⁵ Although both fields have their unique doctrinal issues,¹⁰⁶ both also revolve around the intentional disposition of real or personal property. Accordingly, the law's inherent psychological presumptions about capacity and willfulness, the focus of this Article, have been sufficiently analogous that American jurists addressing either subject matter often refer to case law in both fields. Furthermore, questions of capacity and influence were much less likely to be raised in contracts cases than in wills cases.¹⁰⁷ Moreover, most of the

(1883); *Baylies v. Spaulding*, 6 N.E. 62 (Mass. 1886); *In re Storey's will*, 20 Ill. App. 183 (1886); *Middleditch v. Williams*, 45 N.J. Eq. 726, 17 A. 826 (1889); *In re Keeler's will*, 3 N.Y.S. 629 (1889); *In re Trich's will*, 165 Pa. 586 (1895); *Whipple v. Eddy*, 161 Ill. 114 (1896); *Steinkuehler v. Wempner*, 169 Ind. 154 (1907); *O'Dell v. Goff*, 149 Mich. 152 (1907). The most widely reported Spiritualist will contest concerned the testament of the shipping baron Eber B. Ward in 1875. See *Important Will Contest*, N.Y. TIMES, Sep. 25, 1875, at 1; *Ward's Will: How the Spirits Struggled for the Mastery of Dividing up the Property*, CHI. DAILY TRIB., Oct. 2, 1875, at 6; *The Ward Will Case*, N.Y. TIMES, Oct. 5, 1875, at 1.

¹⁰⁵ See Blumenthal, *DLP*, *supra* note 38, at 1233-1234. Blumenthal writes, "To a significant degree, capacity challenges brought with respect to contracts and deeds mirrored those involving wills, both at the level of procedure and substance. This was due, at least in part, to the fact that a good number of the disputed conveyances and agreements were likely intended to operate as gifts or will substitutes. Further inclining the courts in this direction was the identity of the disputants; as in will contests, they tended to be relatives of the grantor, whose death was often the occasion for the suit." *Id.*

¹⁰⁶ See *id.* at 1149. Blumenthal suggests that "judges tended to apply a more demanding standard of capacity to marketplace transactions than those that took place within the family circle, generally holding that more 'mind' was needed to make a valid contract than a will." *Id.*

¹⁰⁷ See Hamburger, *supra* note 25, at 285-286. He notes, "In cases of duress and mental incapacity, litigants and judges availed themselves of consensus theory

contracts cases in which incapacity or undue influence were alleged were actually brought by the heirs of the contracting party as a part of broader disputes about the estate.¹⁰⁸ Finally, because cases of disputed wills inevitably impact testators' families, they offer a valuable portrait of legal interactions with domestic life in the age of contract.

The substantive and procedural law relating to wills was in flux during this period.¹⁰⁹ Because contractarian jurisprudence discouraged courts from examining the specific provisions of a contract or will, the judge's role was limited to ensuring that testaments were freely made and not the products of insanity or undue influence. Blumenthal has shown how American courts responded to developments in psychiatry in their treatment of insanity. Courts began to recognize concepts such as "partial" and "moral" insanity, and so-called "unnatural" wills became increasingly vulnerable.¹¹⁰ In addition, following English practice, American law adopted "delusion" as the appropriate standard for gauging insanity.¹¹¹ To a considerable extent, these changes are the result of the increasing number of people who met Reid's test of common sense rationality – they were able to carry out business relations – but who, nonetheless, believed in Spiritualism.

The rules relating to undue influence were also changing during the second half of the nineteenth century. The phrase "undue influence" was originally appended to the broader defense of "fraud, imposition, and undue influence," although during the early nineteenth century, most juristic writing on the subject was devoted to fraud or fear-inducing coercion.¹¹² Also, as noted above, the defense was primarily applied to certain fiduciary relationships that generated power imbalances such as husband and wife or ward and guardian.¹¹³ Courts "jealously" guarded

relatively infrequently, because existing precedent and doctrine greatly reduced the advantages of such analysis." *Id.* at 285.

¹⁰⁸ Blumenthal, *DLP*, *supra* note 38, at 1219.

¹⁰⁹ See Blumenthal, *DOW*, *supra* note 7, at 1004-05.

¹¹⁰ *Id.*

¹¹¹ According to Isaac Redfield, the leading American wills treatise writer, "The belief in the existence of mere illusions, or hallucinations, creatures purely of the imagination, such as no sane man could believe in, are unequivocal evidences of insanity." 1 ISAAC F. REDFIELD, *THE LAW OF WILLS* 59 (3d. ed., Boston, Little, Brown & Co. 1869) (hereinafter REDFIELD, *LOW*).

¹¹² See *supra* notes 39-44.

¹¹³ *Id.*

contracts and wills that granted benefits from the weaker to the stronger member of such relationships, because they were anxious about the use of “surprise, trick, cunning”¹¹⁴ or psychological imposition “tantamount to force and fear.”¹¹⁵ By the second half of the century, however, undue influence itself became a primary subject for discussion in treatise literature, with fraud falling to the wayside.¹¹⁶

Although a complete proof would stretch this Article beyond its intended scope, there is good reason to believe that the growth of undue influence coincided with and drew heavily upon contemporary concerns about the very same psychical phenomena that have been discussed above. Undue influence included both broader and less direct influence than was required to prove fraud or duress. Judges and treatise writers were reluctant to specify the precise nature of the influence, and, unlike with fraud and duress, they did not explain how the influence had to operate psychologically. It became clear, however, that, just as Beard had suggested,¹¹⁷ undue influence did not require fear; any “feeling that [the testator] is unable to resist” would suffice.¹¹⁸ Yet, in their descriptions of its action, jurists drew, occasionally explicitly, on language used by scientific and popular writers on mesmerism, hypnotism, and Spiritualism, defining undue influence as “moral coercion”¹¹⁹ and looking for evidence “that the testament speaks

¹¹⁴ 2 TUCKER, *supra* note 44, at 411.

¹¹⁵ SHELFORD, *supra* note 41, at 209. Shelford writes:

The influence, to vitiate a testamentary act, must amount to *force and coercion destroying free agency*, it must not be the influence of affection and attachment, nor the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a will; further, there must be proof that the act was obtained by that coercion, by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear.

Id. (emphasis in original).

¹¹⁶ See REDFIELD, LOW, *supra* note 111, at 474. Redfield states, “Fraud, and undue influence, are so nearly synonymous, that it will not be important to enter into the definition of possible distinctions between them, since the result of either must be the same upon the testamentary act.” *Id.* The remainder of Redfield’s discussion is devoted to undue influence.

¹¹⁷ See Beard, *supra* note 92, at 323.

¹¹⁸ JAMES SCHOULER, A TREATISE ON THE LAW OF WILLS 237 (2d ed., Boston, Boston Book Co. 1892).

¹¹⁹ Potts v. House, 6 Ga 324 (1849).

the mind of another”¹²⁰ or that “the mind and the will of the testator have been overpowered and subjected to the will of another.”¹²¹

John Ordronaux, a professor of medical jurisprudence at Columbia Law School, was particularly explicit in his reliance on psychology in his description of undue influence:

It is a well-known principle of mental philosophy, that a strong mind always overpowers a weaker mind with which it is brought into contact by a process akin to benumbing, so that the closer the relationship the sooner the subjugation. And this may all happen without, as well as by, intentional effort. We all surrender to our mental masters as soon as we meet them face to face. ... The law practically recognizes this canon of our mental constitution by attaching to undue influence a meaning synonymous with *constraint*. It recognizes it as the exercise of such a power over another’s mind as serves practically to dethrone his will and to substitute ours in its place. In other words, it is a real transfusion of mind.¹²²

Similarly, James Schouler notes in his *Treatise on the Law of Wills*, “influences of one kind or another surround every rational being, and operate necessarily in determining his course of conduct under every relation of life.”¹²³

Perhaps in recognition of the pervasive influences that affect everyone, the bounds of the defense were expanded from the specific relationships previously enumerated to cover all cases of contractual or testamentary disposition.¹²⁴ Moreover, courts and commentators consistently invoked the notion that enumerating precise rules for undue influence would be impossible. Instead, judges were persuaded to undertake detailed and specific examinations of the underlying facts.¹²⁵ The intricacies of

¹²⁰ 1 H.C. UNDERHILL, *A TREATISE ON THE LAW OF WILLS* 180 (Chicago: T.H. Flood & Co. 1900).

¹²¹ SCHOULER, *supra* note 118, at 239.

¹²² JOHN ORDRONAUX, *COMMENTARIES ON THE LUNACY LAW OF NEW YORK* 371 (Albany, John D. Parsons 1878).

¹²³ SCHOULER, *supra* note 118, at 237.

¹²⁴ See REDFIELD, *LOW*, *supra* note 111, at 142.

¹²⁵ See *e.g.* *Greenwood v. Cline*, 7 Or. 17 (1879) (noting, “It becomes necessary to look into the documents, the relations of the parties to each other, and the circumstances surrounding the whole transaction, in order to ascertain whether there exists any grounds for imputing fraud and undue influence in the execution

interpersonal influence could not be masked by a wall of abstraction. According to Allan McLane Hamilton and Lawrence Godkin:

Just how much pressure may be considered undue is of course a matter for judges and juries to decide; yet it is a grave question whether any one is capable, without a deep insight into the character and mode of life of a particular individual, to estimate his susceptibility or powers of resistance, and to say how much he has been made to do anything against his will and at the dictation of others.¹²⁶

Thus, cases where the court must decide which influences are in fact undue, and specifically those directly dealing with Spiritualists, enable us to see late-nineteenth-century American jurists struggling with questions of volition, suggestion, and interpersonal influence. Although it would be too much to suggest that undue influence doctrine evolved in direct response to popular and scientific notions of interpersonal influence, it seems likely that the law assimilated these ideas into its existing legal framework.¹²⁷

B. Spiritualism on Trial

The first and leading case concerning a disputed Spiritualist's will is *Robinson v. Adams*.¹²⁸ Under dispute was the will of Mary Green, which partially disinherited her only daughter and her grandchildren. The testatrix believed this action was necessary in order to protect her money from her son-in-law, whom she believed was possessed by an evil spirit that he used to

of the will.”). See also UNDERHILL, *supra* note 151, at 179 (“No precise principle can be enunciated, no distinct rule can be laid down, which will be applicable to all cases. Every case depends wholly upon its own particular facts and attendant circumstances.”); REDFIELD, LOW, *supra* note 111, at 478 (“In regard to undue influence...the cases are almost infinite, in number and variety.”).

¹²⁶ 2 ALLAN MCLANE HAMILTON & LAWRENCE GODKIN, A SYSTEM OF LEGAL MEDICINE 125 (New York, E.B. Treat 1894).

¹²⁷ For another example of the refraction of psychological ideas in legal doctrine see EIGEN, *supra* note 98, at 13. Eigen writes, “Over time, however, one can glimpse the absorption of clinical terms and innovative meanings given to familiar forms of behavior, as they become the focus of courtroom deliberation.” *Id.* See also Blumenthal, *DoW*, *supra* note 7.

¹²⁸ 62 Me. 369 (1870).

control her daughter's mind and alienate her affections.¹²⁹ Before her death, Mrs. Green admitted that she had consulted the spirit of her deceased husband about the will and that he had directed her regarding its provisions. According to the contestants, Mrs. Green's belief that she could communicate with spirits who told her how to draft her will should amount to insane delusions and undue influence as a matter of law.¹³⁰ The contestants requested that the judge refuse to "give this system of spiritualism a standing in court" and instead follow the lead of a recent English decision in judicially declaring Spiritualism "mischievous nonsense, well calculated...to delude the vain, the weak, the foolish, and the superstitious."¹³¹ "No mind," the contestants asserted, "can be sound and free from undue influence which is moved, constrained or restrained, in business transactions by this diabolical system."¹³²

The trial judge, however, was unwilling to take the case from the jury. Had he ruled against the will as a matter of law, he noted, "undoubtedly there would be a very large number of people in the country incapable of makes wills."¹³³ Instead, he instructed the jury on the law relating to insane delusion: "insanity is where a person believes something to exist, which not only does not exist, but of which he has no evidence sufficient to satisfy any healthy mind, and he acts upon it, reasons upon it, and holds it as a

¹²⁹ *Id.* at 374.

¹³⁰ *Id.* at 382. The appellant's lawyer asserted:

About the essential facts, there is no dispute. It is not every thing which is to be left to a jury in such a trial as this; nor in any trial. The court will not ask the jury whether there are such facts in nature as life and death; nor whether a dead man can speak, or can make a contract, or a will; nor whether he can dictate or advise a living person how to do either.

Id. He continued, "This is not only good logic and sound sense, but good orthodox christianity [sic] also; and we therefore respectfully submit, that it ought to be declared by this court to be good law." *Id.* at 383.

¹³¹ *Id.* The English case was *Lyon v. Home*, 6 Eq. Cs. 655 (1868). It involved a conveyance from an elderly woman to the famous Spiritualist medium Daniel Dunglas Home. She argued and the court held that the conveyance was the result of undue influence and fraud. Although he described the case as "remarkable," the great British jurist Frederick Pollock found the case "more curious than instructive." FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY* 516, n. a (London, Stevens & Sons 1876).

¹³² 62 Me., at 383.

¹³³ *Id.* at 391.

reality.”¹³⁴ It was thus up to the jury to decide if the testatrix believed what could not possibly be true. On the matter of undue influence, the trial judge instructed the jury as he would have with a purely earthly influence: “if she did have what she deemed directed communications on the subject of this will, and implicitly followed them, yielding her own will and judgment and exercising no free agency then it would not be her will, but another’s, in the same manner as if actually dictated by a living person.”¹³⁵ Following these charges, the jury found in favor of the will.

On appeal, the Supreme Court of Maine affirmed the trial court’s refusal to take the questions from the jury. According to the Court, “the very purpose of [the jury] is to have [it] inform the court as to the truth of certain allegations.”¹³⁶ Such questions as these were simply not for the Court to decide. Justice Kent noted:

we were called to deal with this matter not theologically – or in one sense, morally or scientifically – but legally, as bearing on the single point of insanity, or insane delusion. What our individual or collective opinion as to the facts, truth, possibilities, or evidence, or claims, of this so-called spiritualism, may be, has nothing to do with the questions before us. It is only as to the proved effect of this belief on another person’s mind, that is before us.¹³⁷

Accordingly, the Court supported the trial judge’s decision to allow “great liberality” in the evidence admitted to determine the state of Mrs. Green’s mind.¹³⁸ Justice Kent explained, “To enable the jury to determine the real state of mind, the action of that mind, as shown best by conversations, declarations, claims and acts, is the most satisfactory evidence.”¹³⁹ When dealing with assertions of insanity or undue influence, courts should be allowed to make particularized inquiries into the testator’s mental function by

¹³⁴ *Id.* at 402. The judge added a further instruction given the impossibility of proving that spiritual communication does not exist: “That may be an insane delusion; that is to say, where it is so palpable that he believes it without reason; any reason sufficient to satisfy a healthy mind; and he acts upon it, when it cannot possibly be true; that is an insane delusion.” *Id.* at 402.

¹³⁵ *Id.* at 407.

¹³⁶ *Id.* at 403.

¹³⁷ *Id.* at 404.

¹³⁸ *Id.* at 413. The Court declared, “Much is necessarily left to the discretion of the presiding judge, and it is impossible to lay down any general rules which would cover all cases.” *Id.*

¹³⁹ *Id.*

admitting diverse and often conflicting evidence from her life. From the “great mass of evidence” before it,¹⁴⁰ the Court had little trouble upholding the jury’s findings regarding insanity and undue influence. Although Mrs. Green believed that she was receiving advice from her deceased husband, “she did not yield implicitly and blindly to these suggestions, but regarded them—as she would have regarded such letters if they had been written during life—as friendly suggestions, which had some effect on her mind, but not to the point of destroying her own free will and deliberate judgment.”¹⁴¹ Her will would stand.¹⁴²

Isaac Redfield, the leading American treatise writer on the law of wills, was appalled by the decision in *Robinson*. He was clearly familiar with the work of mental physiologists on Spiritualism, and he would have liked to bar the courthouse doors against a belief “which is extending, every day almost, to greater numbers and more highly cultured portions of the native as well as foreign population of the country.”¹⁴³ Its popularity, however, belied the fact that such phenomena violated the “daily and ordinary experience of ordinary persons.”¹⁴⁴ Wills drafted by Spiritualists should be immediately suspect, according to Redfield, because “[believers] feel themselves entirely incapable of going counter to [the medium’s] dictation. ... They become, either willingly or unwillingly, commonly the former, the complete slaves of such influence.”¹⁴⁵ In any event, juries could not be trusted with such decisions, and courts should rule on them as a matter of law with the aid of “experts conversant in such topics.”¹⁴⁶

In cases concerning Spiritualists’ wills, however, courts were more likely to follow *Robinson* than Redfield. For the most

¹⁴⁰ *Id.* at 412.

¹⁴¹ *Id.* at 408-09.

¹⁴² Interestingly, a note at the end of the case indicates that the proponents eventually withdrew prosecution of the will and agreed to let Mrs. Robinson have the property if she paid them \$3000. The estate was valued at \$27,000. *Id.* at 414.

ISAAC F. REDFIELD, LEADING AMERICAN CASES AND NOTES UPON THE LAW OF WILLS 365 (Boston, Little Brown, & Co. 1874).

¹⁴⁴ *Id.* at 367.

¹⁴⁵ *Id.* at 387.

¹⁴⁶ *Id.* at 387. Other commentary on the Spiritualist wills cases includes Ardemus Stewart, *Belief in the Preternatural, and Its Effect Upon Dispositions of Property*, 40 AM. L. REG. & REV. 505 (1892); Blewett Lee, *Psychic Phenomena and the Law*, 34 HARV. L. REV. 625 (1920); Charles Gordon, *Wills as Affected by Belief in Spiritualism*, 4 N.Y.U. L. REV. 58 (1927).

part, courts tended to uphold Spiritualists' wills when there was evidence that the testator had freely chosen his beliefs however unusual they may seem,¹⁴⁷ but they were also willing to invalidate wills when they believed that testators were wholly in the power of another party.¹⁴⁸ For example, in the case of *In re Smith's will*, the Supreme Court of Wisconsin reinstated a Spiritualist's will that disinherited his children. Although the Court found him to be a man of "some peculiarities and eccentricities," it relied on the fact that "[h]e brought [the spiritual communications] to the test of his judgment, and acted accordingly."¹⁴⁹ In *Thompson v. Hawks*, however, the testator's will, disinheriting his children in favor of his spiritual medium, was invalidated on the grounds of incapacity and undue influence.¹⁵⁰ Unlike the testator in *Smith*, here the testator "embraced spiritualism as practiced by the spirit medium, and instead of merely believing in it as an abstract proposition, he became possessed by it and suffered it to dominate his life and override every other consideration."¹⁵¹

¹⁴⁷ See, e.g., *Denson v. Beazley*, 34 Tex. 191 (1870); *In re Smith's will*, 52 Wis. 543 (1881); *Middleditch v. Williams*, 45 N.J. Eq. 726, 17 A. 826 (1889);

¹⁴⁸ See, e.g., *Thompson v. Hawks*, 14 F. 902 (Cir. Ct, D. Ind. 1883); *Leighton v. Orr*, 44 Iowa 679 (1876). Blumenthal's findings are in substantial agreement. See Blumenthal, *DoW*, *supra* note 7, at 1027. Regarding the *Chafin's Will Case* (38 Wis. 557 (1873)), she writes:

The judges seemed to construe narrowly the legal definition of insane delusion so as to exclude most forms of human perversity. ... In other words, the judges enforced a rule of reasonableness even as they claimed only to be effectuating Chafin's will. They thus gave broad scope to the principle of testamentary freedom, while still preserving courts' power to define and police the borderline cases and thereby protect vulnerable individuals from the worst impositions.

Id.

¹⁴⁹ *In re Smith's Will*, 52 Wis. 543 (1881). The Court continued, "It is difficult to find evidence of insane delusion, or of any peculiar exposure of liability to undue influences in a faith thus absolutely subordinated to the judgment." *Id.*

¹⁵⁰ 14 F. 902.

¹⁵¹ *Id.*, at 905. This case was published with a note on the presumption of undue influence. Wayland E. Benjamin, *The Presumption of Undue Influence*, 14 F. 905 (1883). The author concluded:

Where, as in the principal case, the spirit medium is a beneficiary under a will made in accordance with such communications, the burden is upon those seeking its probate to show that it was the voluntary and well-understood act of the testator's mind. From such a relation, the exercise of dominion and influence by the medium over the mind of the testator is implied.

Id. at 907.

In these cases, and in the law more broadly, we see legal actors grappling with a number of troubling issues related to the mind. How should it handle unconscious and perhaps immoral influence exerted on people's decisions? What should it do with seemingly rational market actors who disinherit their children and give their money to charlatans? What respect must be paid to people's religious beliefs, and who should decide which beliefs are valid and which lunacy? Because American jurists were not answering these questions in a vacuum, it will be valuable to situate them in broader cultural context. To that end, this Article now turns to the treatment of Spiritualists in late-nineteenth-century fiction.

IV. SPIRITUALISM, FICTION, AND THE PROMISE OF CONTRACT

As it had for American psychologists, Spiritualism also proved irresistible to nineteenth-century American novelists. The leading lights of American literature – Hawthorne,¹⁵² Melville,¹⁵³ James,¹⁵⁴ Twain,¹⁵⁵ Howells¹⁵⁶ – as well as those that shone less brightly, were captivated by the behavior they witnessed around them.¹⁵⁷ Given the variety of literary talents the subject attracted, it is no wonder that the fictional treatments of Spiritualism varied greatly.¹⁵⁸ In this Article, I will examine the treatment of Spiritualism in American realist literature to more fully situate the movement's place in American culture and to suggest comparisons with the legal response to Spiritualist belief. Although my argument would hold for other realist treatments,¹⁵⁹ I will focus on one of the novels that dealt with Spiritualism most centrally, William Dean Howells's *The Undiscovered Country* (1880).¹⁶⁰

¹⁵² THE BLITHEDALE ROMANCE (1852).

¹⁵³ *The Apple-Tree Table; or, Original Spiritual Manifestations* (1856) in THE COMPLETE SHORTER FICTION (1997).

¹⁵⁴ THE BOSTONIANS (1886).

¹⁵⁵ LIFE ON THE MISSISSIPPI (1883); THE AMERICAN CLAIMANT (1892).

¹⁵⁶ THE UNDISCOVERED COUNTRY (1880).

¹⁵⁷ See HOWARD KERR, MEDIUMS AND SPIRIT-RAPPERS AND ROARING RADICALS: SPIRITUALISM IN AMERICAN LITERATURE, 1850-1900 (1972).

¹⁵⁸ See *id.*

¹⁵⁹ Henry James's *The Bostonians* (1886) would also be particularly fitting, although it is more concerned with trance-speaking than Spiritualism, per se.

¹⁶⁰ HOWELLS, *supra* note 50.

A. The Undiscovered Country

Howells's novel, set "at a time when the rapid growth of the city was changing the character of many localities," opens on a séance in Boston on a street "inhabited by fortune-tellers and charlatans of a low degree."¹⁶¹ The skeptical amateur scientist Ford and his friend Phillips have been invited to witness the spiritual manifestations associated with the mediumship of the beautiful Egeria Boynton. Upon arriving, the visitors are greeted by her father, Dr. Boynton, who describes their spiritual "investigations" and his use of mesmerism – "the application of exterior will" – to sustain his daughter during the spirit communications.¹⁶² With the assistance of a professional medium, Mrs. Le Roy, the séance proceeds with the expected raps and materializations. During the final display, Ford, intent on exposing the fraud, tricks the Spiritualists and injures Egeria while trying to catch the charlatan in the act. A dispute ensues, Ford threatens to inform the authorities about the charade, and Boynton challenges Ford to a scientific test, which the latter declines.

Disappointed by his failure in Boston, Boynton decides to quit the company of "professional mediums" to continue his investigations in a more conducive setting. He and Egeria eventually settle in with a Shake community, the only people, according to Boynton, who "have conceived of spiritism as a science and practiced it as a religion."¹⁶³ Boynton insists on demonstrating his daughter's powers to the Shakers, but she is reluctant and, when he questions her faith, she admits her own doubt: "How can I tell father? It is you who do it. I see, or seem to see, whatever you tell me. I have always done that. It began so long ago, when I was so little, that I can't remember anything different. I *want* to please you; I *want* to help you; but I don't know if I can, father."¹⁶⁴ Boynton eventually convinces Egeria to "yield [herself] passively to [his] influence," but their trial before the Shakers is a failure. The following day Boynton learns that Ford had been in the camp the previous night, and he concludes that the skeptic's negative influence had caused their failure. He attacks Ford but injures himself instead. Ford's sense of duty

¹⁶¹ *Id.* at 1, 7.

¹⁶² *Id.* at 15-16.

¹⁶³ *Id.* at 181.

¹⁶⁴ *Id.* at 68.

commits him to staying with Boynton in the Shaker camp during the latter's convalescence. In time, Boynton turns away from Spiritualism, and Ford learns to accept him as a "singularly upright and truthful man" who had "the hope that the world has had for eighteen hundred years."¹⁶⁵ Simultaneously, Ford courts Egeria, and she too disowns her Spiritualist past, stating, "I think the great thing is to be free ... It was slavery even if it was true."¹⁶⁶ Flushed with her newfound freedom from her father's influence, Egeria is reluctant to accept the possibility of Ford's.¹⁶⁷ After her father's death, Egeria overcomes her misgivings about Ford's influence over her and agrees to marry him.

Howells's treatment of Spiritualism in *The Undiscovered Country* fits nicely into Brook Thomas's analysis of American literary realism. For Thomas, realist fiction represents both the promise of living in the age of contract and the limits of that promise. It does this, he asserts, without the help of a transcendent moral order; the challenges of the age of contract are confronted immanently and democratically.¹⁶⁸ In *The Undiscovered Country*, the anxieties associated with modern life are everywhere on display. "The changing character of many localities" has separated families and splintered communities. Boynton and Egeria, we learn, were forced to leave their family home in Maine in the face of Egeria's maternal grandfather's disapproval of their "researches." In a society based on impersonal contractual relationships, questions of trust, consent, and influence loom large. Spiritualism becomes Howells's vehicle for addressing these questions.

Although believers treated the phenomena as matters of religion, for Howells, Spiritualism presented a "psychological rather than a supernatural problem."¹⁶⁹ Both Egeria's and Boynton's beliefs are manifestations of their psychologies. Egeria desires to please her father and has never known anything but his influence, and Boynton longs for contact with his deceased wife and empirical verification of the afterlife. Howells represents social and familial ties – the bonds between friends, families, and lovers – as forces, influences, and exertions of will. In doing so,

¹⁶⁵ *Id.* at 394, 364.

¹⁶⁶ *Id.* at 302-303.

¹⁶⁷ *See id.* at 323.

¹⁶⁸ THOMAS, *supra* note 21.

¹⁶⁹ KERR, *supra* note 157, at 21.

however, Howells refrains from adopting the scientific, materialist position initially advocated by the character Ford.¹⁷⁰ The multitude of opinions – by Ford, Boynton, Egeria, the Shakers – creates a polyphonic discursive space that serves to individualize particular cases of Spiritualistic belief.¹⁷¹ On one hand, Boynton’s lifelong manipulation of Egeria’s innocent sense of familial duty is, to Howells, “play[ing] the vampire.”¹⁷² His coercive control is not based on fear but rather on Egeria’s emotional commitment to him and on the length and nature of their relationship. As Egeria’s statement makes plain, Spiritualist belief could become a form of intolerable slavery,¹⁷³ still an emotionally salient social concern.¹⁷⁴ Yet, in Ford’s ultimate recognition of the value of Boynton’s character, Howells charts a path of criticism of Spiritualism’s frauds but respect for its honest and reasonable believers.¹⁷⁵ Howells depicts Boynton as a man of character who, despite his eccentric beliefs, exercises his judgment and his will. In so doing, the author withholds any transcendent moral order and encourages an individualized, democratic approach to Spiritualists and their place in modern society.

B. Law, Literature, and Freedom

¹⁷⁰ As Tom Quirk notes:

[T]he scientific mindset was equally eager for abstract generalizations, the enunciation of natural laws that hovered above and apart from lives as they are lived but somehow explained those lives nonetheless. The universe, it was supposed, was composed of Energy and Matter, and the relation between them could be understood in exclusively mechanistic terms. Science and technology, however, often proved desiccating and diminishing to actual experience and to familiar acquaintance. Though generally empirical in their attitude, realists, unlike naturalists, were not willing to allow scientists the final word on matters of value and human freedom.

Tom Quirk, *Introduction – The Historical Context*, in *THE PORTABLE AMERICAN REALISM READER* (James Nagel & Tom Quirk eds. 1997).

¹⁷¹ On polyphony, see MIKHAIL BAKHTIN, *PROBLEMS OF DOSTOYEVSKY’S POETICS* (Carlyn Emerson, ed. & trans. 1984). For a discussion of polyphony and the law, see e.g. MILNER S. BALL, *THE WORD AND THE LAW* 144 (1993).

¹⁷² HOWELLS, *supra* note 50, at 318-319. Boynton admits, “I seized upon a simple, loving nature, good and sweet in its earthliness, and sacred in it, and alienated it from all possible human happiness to the uses of my ambition. I have played the vampire!” *Id.*

¹⁷³ See *supra* note 166.

¹⁷⁴ See Foner *supra* note 13, at 446.

¹⁷⁵ KERR, *supra* note 157, at 138-139.

American courts enacted many of the same strategies for dealing with the anxieties associated with Spiritualism in the age of contract that Howells had in *The Undiscovered Country*. Concerns about volition, influence, and family and social structure were aired polyphonically through the voices of contestants, proponents, witnesses, and judges. And like Howells, the *Robinson* court converted matters of belief into matters of psychology. Specifically, the Court was not concerned with the truth or falsehood of Spiritualism, only with its effects on the minds of believers. To a considerable extent, the courtroom was a site for psychological evaluation of legal actors. Even so, like Howells, the *Robinson* court resisted the temptation to reduce Spiritualist belief to a matter of scientific theory. Although late-nineteenth-century American law was irresistibly drawn to the language associated with psychological accounts of mesmeric and Spiritualist phenomena, it remained reluctant to adopt those accounts as a matter of law. These were, after all, still matters of religious faith, and the courts were not the place for scientists to decide which beliefs were correct and which delusions. Instead, the Court turned the case over the jury, the legal system's most democratic institution. People would be judged not by abstract legal principles nor by fashionable scientific theories but rather by their fellow citizens who faced the same opportunities and anxieties.

By the late nineteenth century, American courts were liberalizing the rules of testamentary capacity and allowing more wills to stand. They turned away from scientific explanations of insanity and adopted a more pragmatic and specifically legal approach to capacity.¹⁷⁶ By paying attention to contemporaneous developments in popular culture we can put such changes in a broader historical context. The age of contract valued freedom and rationality above all else, yet the phenomena associated with Spiritualism proved a threat to both. Unseen forces seemed able to make people do things unconsciously, and scientific theories about Spiritualistic belief suggested that people were not as rational as had been previously believed. Mental health and mental disease looked more like differences in degree than differences in kind,

¹⁷⁶ Blumenthal, *DoW*, *supra* note 7, at 1034.

and people no longer seemed as independent as they once had.¹⁷⁷ As the age of contract's psychological foundations began to crack, the jurisprudential doctrines that rested upon them gave way. In particular, the abstraction of mid-century law no longer seemed as tenable.

American law's response to Spiritualism, its believers, and its critics offers a fascinating portrait of the interaction between law, science, and popular culture. Changing ideas about rationality and volition encouraged judges to liberalize the law relating to capacity and undue influence even if they did not fully incorporate the implications of novel scientific research. In fact, the courts became one of the principal battlegrounds for debates between popular and scientific belief. In such cases, judges preferred to withhold moral judgment in favor of democratic, jury-based decision making.

V. CONCLUSION: CULTURAL LEGAL HISTORY AND SECOND DEATH OF CONTRACT

The pages of novels, scientific treatises, and judicial opinions became the stages on which nineteenth-century Americans enacted their anxieties about the human mind. By reuniting these sources we can tell a more contextualized story about the history of nineteenth-century law, science, and popular culture.¹⁷⁸ In the decades following emancipation, America held out the promise of a contract-based society grounded in an optimistic vision of human rationality and free exchange among equals. The rise of modern Spiritualism threatened the core tenets of the age of contract, both in the anxieties about influence and control that it raised and in the challenge that psychological explanations of Spiritualistic belief posed to human rationality and

¹⁷⁷ For other challenges to the age of contract's belief in free and independent legal actors, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); GILMORE, *supra* note 5; BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920* (2001); BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

¹⁷⁸ For examples of similar work see THOMAS, *supra* note 21; GORDON, *supra* note 20; LAURA HANFT KOROBKIN, *CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY* (1998).

volition. In the treatment of Spiritualism by both realistic fiction and the American courts, we see similar strategies for coping with these anxieties. Concerns about freedom, influence, and the family were articulated polyphonically and the tension between individual freedom and familial duty is highlighted.¹⁷⁹ Questions of religious belief were converted into ones of psychological influence, but both Howells and the *Robinson* court were reluctant to embrace purely scientific explanations of Spiritualism. Finally, ultimate resolution of the conflict would rest in the democratic readership and jury without the guidance of transcendent moral principles. These strategies indicate one of the important ways that Americans dealt with apprehension about freedom, the will, and interpersonal influence in the age of contract. They also suggest new ways of interrogating important aspects of late-nineteenth-century American legal culture, including its characteristically pragmatic responses to widespread religious unorthodoxy, increasingly unified and authoritative scientific opinion, and changing conceptions of gender roles and the family.

Finally, it is worth reflecting on this study's implications for current debates about rationality and freedom. As noted above, recent research on the human mind has again challenged fundamental principles of American jurisprudence.¹⁸⁰ Following new work in behavioral psychology and the psychology of emotion, people no longer appear as rational as legal theory, with its emphasis on cost-benefit analysis, suggests. Moreover, cognitive neuroscience, by demonstrating the essentially material basis of human behavior in given brain states, is contesting the very notion of freedom and responsibility. American law seems to be experiencing the Second Death of Contract.

Although much has changed in the relationships between law, science, and popular culture since the nineteenth century (perhaps most importantly the vastly increased orthodoxy and authority of modern science), it seems likely that American law will and should respond to these challenges in much the same way that it did to those associated with Spiritualist phenomena. That is to say, once again, popular perceptions matter greatly, and they

¹⁷⁹ Thomas notes, "The only action that the [realist] aesthetic point of view prescribes is the act of presenting to readers differing points of view and the web of interconnected actions that make it impossible to achieve sovereign control over our actions." THOMAS, *supra* note 21, at 278.

¹⁸⁰ See *supra* notes 1-5.

will likely make themselves felt in the jury room. No matter how unified scientific opinion may become on subjects like free will, determinism, and responsibility, science must be filtered through layers of the “moral intuition”¹⁸¹ of popular belief and the “artificial reason”¹⁸² of legal process to have practical effect. Developments in the human sciences and the traditions of the law seem continually in conflict in large part because they are deeply interrelated. As in the nineteenth century, contemporary scientists feel compelled to address the social and legal implications of their research, and, because this research receives popular dissemination, the law must respond to it. The mutually constitutive nature of these three domains is valuable to American society, and it should be encouraged rather than feared.

¹⁸¹ See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

¹⁸² See Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD UNIV. COMMONWEALTH L. J. 1 (2003).