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Reflections on the Magic Mirror

Kermit Hall's history of the development of American law and legal culture borrows its title and central literary conceit from Justice Oliver Wendell Holmes, Jr., that inexhaustible source of pithy quotations. "This abstraction called the Law," Holmes wrote, is "a magic mirror, (wherein) we see reflected, not only our own lives, but the lives of all men that have been!" Hall invites us to look into the "magic mirror" of legal history to better understand the larger history of American society and to answer "questions about how previous generations went about using the law to affect values and moral principles they deemed important."[1]

To fulfill his ambitions, Hall sets out a broad agenda. He describes the *Magic Mirror* as a "book about law in American history rather than strictly a history of American law," for it offers a "synthesis of American legal culture" fitted "closely to the main lines of the historiography of American history," one that situates legal developments within the history of American society, politics, economics, culture, and intellectual life.[2] Hall's determination to write about law *in* American history governs the organization of the book. Chapters do not treat substantive areas of law or types of legal institutions, but rather address broad historiographical themes or problem areas, with the whole work following a rough chronological arrangement. After a quick look at the colonial period, Hall explores the American Revolution's effect on the law; the construction of the federal and state constitutions and the new nation's legal system; governmental efforts to promote and regulate the economy; the law of personal status; domestic relations; the criminal justice system; the professionalization of the bench and bar; and the twentieth-century formation of modern legal culture.

The *Magic Mirror* cites several primary sources and some of Hall's own research, but relies mainly on published secondary works. It tells a story familiar to students of American legal history: The first settlers carried to the New World a body of English legal ideas that they selectively applied and reshaped in their difficult new environment. Emer-

[1] KERMIT L. HALL, *The Magic Mirror: Law in American History*. New York, Oxford: University Press 1989. pp. IX, 404; here: p. 3.

[2] Ibid., p. VIII.

ging capitalism and tighter imperial control undermined the relatively simple and consensual seventeenth century legal system. The eighteenth century saw the rise of more formal, complex, hierarchical and differentiated legal institutions manned by an increasingly professional bench and bar.

The American Revolution, conservative and legalistic in character, left private law more or less alone, but worked enormous change in public law, as the writing of the federal and state constitutions and the growth of a deep "constitutional consciousness" attest. This creativity and agitation in public law continued into the early republic, where Federalists, moderate Republicans, and radical Republicans argued about the proper relationship between law and politics and the role of government in a capitalist economy.[3] The moderate Republicans prevailed; they undertook limited judicial reforms, but insisted that courts had to check the popular will.

The triumph of the moderate Republicans insured that conflicts over public policy and disputes about the allocation of economic resources would be "settled through legal *as well as* political processes".[4] Under the sway of a utilitarian and instrumental vision of law, courts helped shape the antebellum marketplace. Like the equally active legislatures, they promoted economic expansion and distributed the costs and benefits of growth. Antebellum judges "Americanized" the common law, crafting pro-development doctrines and eliminating traditional moral precepts in the name of certainty, stability, and uniformity.

The Civil War did not, as has been often supposed, enthrone the doctrine of laissez-faire. Under the pressure of postwar industrialization and urbanization, governmental practice diverged from laissez-faire theory. Indeed, legislative regulation of the economy and society increased after the war. Armed with the power of judicial review and doctrines of substantive due process and freedom of contract, courts cast a suspicious eye on reform legislation, but allowed most of it to survive. As the First World War approached, government legislation and the new administrative agencies heralded the onset of a "regulatory state" guided by the Progressive ideal of scientific, rational, and nonpartisan regulation.

[3] Ibid., p. 67.
[4] Ibid., p. 86.

World War I marked the beginning of "modern legal culture", a cluster of values and attitudes that emerged in response to growing ethnic and cultural pluralism, to the civil liberties violations of the war and the post-war years, and to the calamity of the Great Depression. In the wake of the New Deal, American legal culture developed a more frankly instrumental view of law. Americans wanted government, especially the ever more active and powerful federal government, to safeguard civil rights and civil liberties and to pursue "broad-scale social justice by relying on the adminstrative-legal process and judicial power to resolve conflict among contending social interests".[5] This ideology of "liberal legalism" provided the foundation for the revolution in public law engineered by the Supreme Court after World War II and the concomitant growth of "rights consciousness".[6]

Lucid and accurate, the *Magic Mirror* should prove useful to undergraduates, law students, and general readers interested in gaining an overview of American legal history in a reasonable number of pages. The *Magic Mirror*'s breadth of interests is perhaps its most appealing feature. Hall confines himself neither to public law nor private law, neither to the law's "external" history (its relationship to the society that surrounds and shapes it) nor its "internal" history (its rules and institutions). He tries to integrate them all. And he tries to establish a perspective that sees marginal groups (such as blacks, Chinese immigrants, and Native-Americans) alongside the majority and that discusses the injustices and prejudices of the legal system as well as its progressive achievements.

Hall emphasizes the breadth of his synthesis and his integration of legal history into the main lines of American historiography in order to distinguish the *Magic Mirror* from Lawrence M. Friedman's *A History of American Law* (1973; revised edition, 1985), the first serious effort to survey American legal history. In fact, the *Magic Mirror* owes much to Friedman's *History*.[7] Both Hall and Friedman have written "sociolegal" studies that highlight the adaptation of law to social and economic change. Both also view the interplay of personal and group interests as decisive in shaping the course of development in a legal system characterized by pragmatic decision-making and frank instrumentalism.[8] But

[5] Ibid., p. 285.
[6] Ibid., p. 308.
[7] Hall readily acknowledges his debt to Friedman's "pioneering efforts". Ibid., p. VIII.
[8] Ibid., p. 335.

the differences are telling: Friedman concentrates on private law and downplays constitutional law, while Hall tries to cover both private and public law; Friedman speeds through the twentieth century in only 40 pages, while Hall provides four full chapters; and Friedman offers a "history of American law" organized, by and large, according to legal categories such as torts, procedure, and corporations, while Hall writes about "law in American history". Hall also devotes more attention to minorities and women, and stresses the effects of racial, ethnic, religious and cultural diversity, reflecting the influence of recent social history written "from the bottom up". Although well aware of the importance of non-elites and of cultural diversity, Friedman prefers to dwell on the doings of the "middle class mass" that played the leading role in his story of legal change.

The influence of Critical Legal Studies historiography also sets the *Magic Mirror* apart from Friedman's *History*, a work greatly indebted to James Willard Hurst's "Wisconsin school" of American legal history. Although Hall does not endorse the Critical Legal Studies movement's dark view of the American legal past, he often takes up themes and questions central to their scholarship, themes and questions that Friedman and the Hurstian tradition ignore or downplay. He insists, for instance, on endowing the law with at least a partial autonomy; he notes the role of ideologies in shaping legal expectations and perceptions; and he stresses the importance of the law as a tool of legitimation and of social control in the interest of the powerful.[9]

Hall seems most comfortable when he can draw upon both the Hurstians and the Critical Legal Studies movement while claiming to transcend the limitations of each. Consider his discussion of the rule of law in American legal history. After contrasting the Critical Legal Studies position (the rule of law is humbug that allows the powerful to mask their hegemonic control) with the Hurstian one (the rule of law has nurtured economic growth and free expression and limited government authority), Hall concludes: "This book suggests that neither interpretation quite captures the supple nature of the American historical experience nor the powerful contradictions that have beset it."[10]

And what of Hall's interpretation? It does not overcome the shortcomings of the Critical Legal Scholars and the Hurstians. Instead, it

[9] Of course, historians associated with the Critical Legal Studies movement have not been the only ones to emphasize these themes.

[10] Ibid., p. 7.

evades them. Hall defines the rule of law in his introduction and stresses its importance, yet he refers to the concept only sporadically in the book, usually in short passages. The rule of law serves as a shibboleth, as a desideratum of uncertain meaning, rather than as an analytic tool that could help anchor the narrative.[11]

Hall's handling of the rule of law is not simply an isolated blemish, and it reveals a central problem with the *Magic Mirror*: For all of the book's virtues, the author's ambitions run ahead of his execution. In his determination to integrate such a wide variety of topics and historiographical traditions in under 350 pages, Hall achieves breadth, but often at the price of cursory generalization and ambiguity.

Indeed, the *Magic Mirror* fails to achieve what Hall defines as its central goal – a "synthesis of American legal culture."[12] The murkiness of legal culture as an analytic concept causes much of the problem. Legal culture, Hall suggests, is "the matrix of values, attitudes, and assumptions that have shaped both the operation and the perception of the law."[13] Evolving in response to Americans' ideological commitments and their individual and group interests, it stands as one of the three "component elements" of the legal system, along with structure (institutions and their processes) and substance (rules).[14]

Unfortunately, the *Magic Mirror* does not make clear the boundaries of legal culture and the relationship between the legal and general cultures. Hall asserts that the "legal culture has historically been the product of changes in the general culture", and the book provides examples of how the former "mirrored" or "resonated to changes" in the latter.[15] But although certain that legal culture somehow reflects the wider cultural context, the *Magic Mirror* does not explain the interrelation-

[11] Sometimes Hall implicitly opposes the rule of law to the rule of arbitrary will or force, and identifies the former with legitimate, constitutional government. See, e. g., ibid., pp. 61, 67. At other times, Hall invests the rule of law with some notion of minimal due process or substantive fairness. See, e. g., ibid., p. 265. The definition of the rule of law that Hall provides in his introduction can accommodate both usages. But the two have different meanings and implications. The reader is never sure why Hall emphasizes one aspect of the rule of law rather than another at different points in the book, or whether such an indistinct and variable concept can do the analytic work that Hall expects it to do.

[12] Ibid., p. VIII.

[13] Ibid., p. 6

[14] Ibid., p. 4. Hall's tripartite division of the legal system into structure, substance, and legal culture reveals another debt to the work of Lawrence Friedman. See LAWRENCE M. FRIEDMAN, Legal Culture and Social Development, in: Law and Society Review 4 (1969) pp. 29–44; LAWRENCE M. FRIEDMAN, The Legal System: A Social Science Perspective, New York 1975.

[15] Ibid., pp. 333, 266, 308.

ship between the two. We do not know whether legal culture easily and routinely adjusts to developments in the general culture, or whether it enjoys a partial autonomy that can resist certain developments and embrace others. Do impulses in the general culture become transformed, become translated into a different cultural language, by being incorporated into the legal culture? Does the legal culture in turn affect the general culture? In the *Magic Mirror* we get little sense of the mechanisms, the *process*, by which the legal and general cultures reciprocally influence each other. Still less do we understand their interconnection if we assume a plurality of general and legal cultures of differing stability and influence.

Even to think about the relationship of legal and general culture may be difficult in the terms established by the *Magic Mirror*, as Hall's legal culture is a vague and protean concept. If law and legal institutions and ideas can plausibly intrude into nearly every corner of life (structuring one's workplace, family, religion, and even sense of self), and if all "values, attitudes, and assumptions that have shaped both the operation and the perception of the law" comprise legal culture, then the concept of legal culture could take in a person's entire mental universe. Where, then, are the boundaries between the legal culture and the general culture? Hall, of course, does not want to conflate the two. But we are unsure after reading the *Magic Mirror* where he would draw the line and what legal culture is and is not.

Hall's definition of legal culture stakes out more ground than his book – or any book – could cover. The *Magic Mirror* does not survey the whole of American legal culture; it highlights selected elements and leaves the rest unexplored. There is a gap between Hall's theoretical commitments, including his definition of legal culture, and the more modest practical achievement of his book. Consider an example – the rise of modern legal culture in the twentieth century. Hall focuses on the effects of racial and cultural diversity; the increasing professionalization of the bar and criminal justice system; the growth of federal power and involvement in society and the economy; the persistence of a belief in equality before the law; the creation of private advocacy organizations promoting civil rights and civil liberties; the forging of an ideology of "liberal legalism"; the strengthening of a relativistic and instrumentalist view of law; and the rise of "rights consciousness", an "expectation of justice", and a "general expectation

of recompense" for wrongs.[16] These aspects of modern legal culture are revealing and important, but they scarcely constitute the full "matrix of values, attitudes, and assumptions that have shaped both the operation and the perception of the law". Of course, to explore *every* relevant value, attitude, and assumption underlying modern legal culture would require hundreds of pages, assuming it could be done at all. And there's the problem: Hall's expansive definition of legal culture, if taken literally, would render impossible a synthetic history of American legal culture, especially if the historian used race, class, gender, ethnicity, religion, occupation, and geography to create dozens or hundreds of sub-legal cultures, all of them interrelated and changing over time.

As a practical matter, Hall had to make choices, both in his coverage of legal culture and in his overall account of legal history. Yet his choices – his emphases and selection of themes, his omissions – do not cohere over the course of the book. The *Magic Mirror* is less an integrated book than a collection of related chapters.

Hall's method of synthesis produces narrative and analytic coherence within chapters rather than within the book as a whole. Almost every chapter relies heavily on the work of a talented historian or group of historians working in a particular field.[17] These historians' concerns and their approaches to doing history indelibly shape that chapter. As a result, individual chapters (and sometimes groups of chapters) adhere together, even boast an integrated outlook or style. But the book as a whole does not; the work of no historian or group of historians extends throughout the *Magic Mirror*, lending it an inner structure and unity. On balance, Hall's selection of themes and emphases appears captive to the uneven outlines of the historiography, reflecting its idiosyncracies and blind-spots as well as its strengths. Striking themes and ideas introduced in one chapter reappear without explanation several chapters

[16] Ibid., pp. 247–48, 265–68, 284–85, 308, 324, 334. This list gives a sense of Hall's approach; it does not capture every nuance of his argument.

[17] Here are a few examples: Hall's chapter on "The Law in Revolution and Revolution in the Law" relies on the work of Bernard Bailyn and Gordon Wood; "Law, Politics, and the Rise of the American Legal System" draws on RICHARD E. ELLIS, The Jeffersonian Crisis: Courts and Politics in the Young Republic, 1971; "Common Law, the Economy, and the Onward Spirit of the Age: 1789–1861" leans on MORTON J. HORWITZ, The Transformation of American Law, 1780–1860, 1977; and "The Nineteenth-Century Law of Domestic Relations" depends on MICHAEL GROSSBERG, Governing the Hearth: Law and the Family in Nineteenth-Century America, 1985. Although the endnotes often do not reveal the extent of the debt, the dominant concerns and overall approach of these chapters emerge out of the underlying historiography.

later, or disappear despite their continuing relevance. Why, for example, does the *Magic Mirror* pay so much more attention to the inequitable distributive consequences of legal doctrine in the antebellum period rather than, say, in the seventeenth or twentieth centuries? Is it because, by some considered standard of judgment, that issue mattered more in the early nineteenth century than at other times? Or is it because the most important and best-known work on how legal doctrine produced economic winners and losers, Morton Horwitz's *The Transformation of American Law, 1780–1860* (1977), covers the antebellum years? And why does the tension between law and politics count for so much at the turn of the nineteenth century and in the 1930s, but otherwise fade into the background? Is it because the issue appears most prominently in the literature on judicial resistance to the New Deal and in Richard Ellis's *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (1971)?[18]

To be sure, the *Magic Mirror* does not simply string together paraphrases of theses and ideas drawn from the legal historiography. Hall establishes a set of priorities, and criticizes some of the major works in the field.[19] And several themes run throughout the *Magic Mirror* or throughout large sections of it – for instance, the transformative effects of market capitalism and the impact of cultural diversity on legal culture.[20] Yet these themes do not serve as the skeleton of the book; however important in one chapter or another, they do not pull together the disparate elements of American legal history and unify the narrative. What makes a synthesis more than a series of ordered synopses of the historiography is what the *Magic Mirror* lacks – a unifying vision, a plot that relates the parts to the whole.[21] For all of Hall's skill in crafting

[18] For a discussion of how "republicanism" appears and disappears throughout the *Magic Mirror*, see BERNARD J. HIBBITTS, Book Review, in: University of Pittsburgh Law Review 51 (1989), pp. 167–177.

[19] Hall's appraisal of MORTON J. HORWITZ's The Transformation of American Law, 1780–1860, 1977 provides a notable example. See, Hall, Magic Mirror, pp. 127–28.

[20] These themes are broad enough to take in and organize large chunks of material, yet specific enough to do useful analytical work. When the *Magic Mirror* abandons mid-level themes for all-embracing generalizations, the results disappoint. In the "Epilogue," we find: "Unity within diversity, constancy within change: those have been dominant themes in American legal history" and "The institutions of the legal system have changed yet remained the same." Ibid., pp. 333–334.

[21] See THOMAS BENDER, Wholes and Parts: The Need for Synthesis in American History, Journal of American History 73 (1986), pp. 120–136, esp. 121–22, 131.

particular chapters or sections of the book, the whole remains disjointed.[22]

Of course, if Hall had used a strong, overarching thesis to impose order on the book, a reviewer might have criticized him for shoehorning the great diversity of American legal history into a rigid schema. And that reviewer would have been on to something. A unifying vision that brought greater coherence might have imposed a narrower focus, enthroned an *idee fixe*, and excluded valuable information and differing perspectives. The academic mind likes to believe that a historian could have eliminated a book's vices, leaving its virtues untouched, indeed enhanced. But it is more realistic, and fairer, to suggest that vice sometimes provides the foundation for virtue. In that spirit, we might conclude with a speculation that reflects well on the *Magic Mirror*: perhaps the absence of a unifying vision and the theoretically unsophisticated treatment of legal culture support the book's important and undoubted virtues – breadth, catholicity of interest, and an ability to convey a wealth of information in an accessible format.

[22] LAWRENCE FRIEDMAN's History provides an illuminating contrast. What holds Friedman's book together is less an encompassing theme or set of themes than a chatty and witty writing style and a commitment to a functionalist account of how law adapts to economic and social change.