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Book Review. The Magic Mirror: Law in American History by Kermit L. Hall

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Recommended Citation

Grossberg, Michael, "Book Review. The Magic Mirror: Law in American History by Kermit L. Hall" (1992).
Articles by Maurer Faculty. 2149.

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ment . . ."; second, by drawing on the common law heritage to enrich constitutional meaning and give it an American cast, and third, by creating a "mechanism to promote selective, collegial, and confidential decision making, so that the discretionary features of judging would not be exposed to public scrutiny" (9). In these ways the Marshall Court fashioned a unified jurisprudence that aimed to "maintain the force of eighteenth-century republican culture" in a new and hostile age (8-9). Here in a nutshell is a new and forceful interpretation of the Marshall Court—the first since William Crosskey's in the 1950s, or perhaps Charles Warren's in the 1920s. It deserves to be called seminal.

Kent Newmyer

University of Connecticut

Kermit L. Hall, *The Magic Mirror: Law in American History*, New York: Oxford University Press, 1989. Pp. ix, 404. \$16.95 (ISBN: 0-19-504460-6).

Once again Justice Oliver Wendell Holmes is our guide to the law's past. Holmes described the law as "a magic mirror, [wherein] we see reflected, not only our own lives, but the lives of all men that have been." Kermit Hall revives Holmes's metaphor as the defining image of his new synthesis of American legal history. Hall angles his legal mirror to reflect law in American history, not the history of American law: His subject is the interaction of law and society from the colonial era to the present.

Hall has succeeded in writing the most comprehensive synthesis we have of American legal history. He has done so in a crisp, readable style that makes the book accessible to a wide audience. In the process, *The Magic Mirror* effectively summarizes the findings of the "new" legal history that has emerged over the last twenty years. It also replays, though in a rather muted form, the interpretive conflicts that engulfed American legal historians in the 1970s and dominated debate in the 1980s. While Hall does not move the debate along much, *The Magic Mirror* does offer a revealing reflection of the substance and style of American legal history.

Taking Holmes's metaphor to mean that law is "a cultural artifact, a moral deposit of society" (4), Hall tries to blend the law's many elements into a single narrative. His aim, articulated most directly in a 1986 article, is "an integrated history of American legal culture" ("The Magic Mirror: American Constitutional and Legal History," *International Journal of Social Education* 1 [1986]: 23). To a greater degree than any other synthesizer, he widens the chronology and subject matter of American legal history. *The Magic Mirror* chronicles American law from the seventeenth century to the late twentieth. More significant, Hall reunited the numerous dualities that dominate the writing of legal history: legal and constitutional; public and private; criminal and civil; commercial and social; law and politics; and internal and external.

His synthesis instructs us on how to bridge these gaps without denying or obscuring the distinctiveness of each side of these matched sets.

Hall builds his survey on the "component elements" of the American legal order (4). These are its structure, substantive rules, and culture. By structure he means formal legal institutions including legislatures and administrative agencies as well as courts. He also notes the existence of informal institutions such as the family and the private association that impinge on the law, though he does not integrate them fully into his analysis. Hall's catholicism is also evident in his conception of substantive law, which he takes to include not merely caselaw and legislation but also administrative rulings and executive orders at each level of the American federal state. Legal culture is the most ambitious and ambiguous of his building blocks. He suggests that it has two components: ideology and interests. Hall examines these components by focusing on the "rule of Law," which he considers the most significant manifestation of American legal culture and the apt measure of its achievements and conflicts. Melding these elements together is a positivist definition of law as "a system of choice backed by the power of the state" (7). It allows him to center his synthesis on formal legal institutions and actors while acknowledging the presence of those outside the system.

The Magic Mirror surveys its three elements in a chronology divided temporally and topically. The emphasis is on adaptation. The division and emphasis reflect the literature of the field in concentration and periodization. But Hall combines topics with common themes that bridge previously separated domains.

Emblematic of Hall's successes are the integration of criminal law into his narrative and the melding of legal and constitutional history. In the colonial era he blends crime into a larger discussion of social and economic change that surveys dependency, deviance, gender, race, economic regulation, and substantive commercial rules. He ties these disparate topics together by introducing the themes of adaptation, social necessity, innovation, and struggles to realize the rule of law. In a similar fashion, he contextualizes later chapters on the development of criminal law by binding them to his larger story of adaptation. In the twentieth century, for example, he points out that the bureaucratization of criminal justice paralleled the application of administrative solutions to other social and economic problems.

Similarly, he weaves together developments in public and private law from the founding era to the years of legal liberalism. Merging legal and constitutional history is one of Hall's major historiographical causes. He provides a model of how to do so in paired chapters on the late nineteenth and early twentieth centuries that discuss a variety of public and private law issues: instead of separating public from private law, one chapter focuses on regulation and the other on adjudication. Hall's schema also has room for topics in the social history of American law such as race, domestic relations, and professionalization. Running through all of the chapters are succinct attempts to contextualize eras of the legal past with concepts that capture dominant as-

sumptions while acknowledging ambiguities and contradictions. Thus “legal liberalism” is used to label the dominate ethos of the mid-twentieth century and to set the cultural stage of descriptions of structural and substantive legal changes such as the creation of the Environmental Protection Agency and no-fault divorce.

No one comes to a text without assumptions, and the readers of this journal bring their own understanding of American legal history to *The Magic Mirror*. Part of the interest in reading it is discovering just how Hall tackles the problems of synthesis and interpretation we all confront while teaching and writing. A revealing example of his resolutions come in discussions of antebellum commercial law. Hall synthesizes the substantial body of work on the era’s private commercial law and addresses the Hurst-Horwitz split over its meaning.

Judicial instrumentalism is Hall’s focus. He describes the way judges took power from juries, created a facilitating body of corporation law, turned property into a dynamic commodity, adopted a will theory of contract, and devised a fault-based tort law. The implication is that needed legal adaptation occurred primarily as the result of powerful external forces, in this case a surging market economy. Disagreements, such as the Taney-Story split over vested rights in the 1837 Charles River Bridge Case, succumb to a general judicial determination to maintain a “middle ground” and mediate between the most obvious winners and losers (123).

Hall attempts the same. He notes that conflicts erupted over commercial law and that legal changes had uneven consequences. Downplaying their depth and minimizing their ideological sources and implications, he stresses what a Kentucky judge called in 1839 “the onward spirit of the age” (127). That spirit compels Hall to imply broad popular support for the emerging private law of commerce and to dismiss as overdrawn Horwitz’s contentions that it was the politicized tool of the judiciary wielded to benefit entrepreneurial elites at the expense of workers and consumers. Hall counters that judges generally acted in the public interest and, relying on John Reid’s work on the overland trail, that the rule of law thoroughly penetrated American culture garnering popular support for the legal changes. Trying to locate a middle interpretive ground, he does concur with Horwitz that judges assumed greater economic decision-making power and that they removed moral and equitable considerations from common law dispute resolution.

Judicious balancing, though, is not a substitute for a well-crafted argument. The absence of a clear interpretation is the book’s most conspicuous failing. Like a mirror, Hall makes his synthesis a rather passive reflection of legal historiography. Yet he introduces his study by suggesting that American legal history lacked a compelling explanatory framework. He argues that neither “critical legal studies” nor “pluralist consensus,” which he considers the field’s dominate paradigms, fully capture the legal past (7). He offers no explicit alternative, though his discussions of topics such as antebellum commercial law seem to reflect a pluralist view. Hall’s position is clearer in his 1986 article, but in the text he avoids a direct interpretive position.

Hall is orthodox in his compilation of seemingly objective information, balanced against the contentious declarations of others. He muffles his interpretive voice in favor of an authorial one that tries to narrate the story of American law instead of arguing for the validity of a story of American law. In choosing to do so, Hall loses the opportunity to use his synthesis to challenge, not merely to recapitulate, our understanding of American legal history. The lack of a clear interpretive structure is all the more unfortunate because Hall seems quite qualified for the task. As the author of our most comprehensive bibliography, a series of articles on the state of the field, and compilations such as the forthcoming *Oxford Companion to the Supreme Court*, Hall clearly has strong views on American legal history. Those views structure *The Magic Mirror* and surface occasionally, but are not articulated in a comprehensive manner.

The most obvious causalities of Hall's approach are the central propositions through which he periodically evaluates legal change and tries to give American legal history continuity. Besides the "magic mirror" metaphor itself, the most significant running themes are "distributive justice," "social control," and "the rule of law." None are fully defined analytically or contextually. Instead they stand as assertions offered either to suggest the character of legal change or posit causal forces. For instance, distributive justice is introduced as a standard by which to judge legislative and judicial allocation of economic costs, benefits, and risks (88). But the nature of that standard, the fact that its meaning might vary among legal actors at any particular time, and the implications of its changes over time are not explained in any detail. For example, in discussing eminent domain as an instance of antebellum distributive justice Hall asserts that corporations were better "suited to make efficient economic decisions about the course to be followed by a railroad or canal than was the legislature" (100). Yet he neither explains the implications of such an assertion for the meaning of the term nor why efficiency ought to be the primary basis for evaluation. Similarly, he suggests that in the Progressive era a traditional scheme of distributive justice rooted in politics gave way to regulation based on an a bureaucratized, apolitical model of public policy (190). But he offers little assessment of the implications of this change for the law and its varied actors. In similar fashion social control and the rule of law are repeatedly presented as seemingly unproblematic universals despite a dense historiographical literature that debates their utility in understanding the past. By developing these key concepts and integrating them into his narrative, Hall could have guided us through his story more securely. Equally important, he could have begun to articulate his own vision of the American legal history as an alternative to the paradigms he discounts.

Articulating a clear perspective on the American legal past could have been another way for Hall to achieve his primary goal of fitting legal history "into the mainlines of American historiography" (viii). Two points come to mind: First, synthesis itself is a major issue. Both the need for syntheses and the difficulties of synthesizing a fractured subject have been noted extensively.

Disputes have erupted over just what it means to synthesize a field and even whether synthesis ought to be attempted at all. Part of the problem, as is evident in the widespread discussion of Peter Novick's masterful history of the quest of objectivity, *That Noble Dream*, is the canon-bashing occurring in history as in all disciplines. Most relevant here are rising doubts about the value-free assumptions of many social-science methodologies and the increasingly influential lessons of literary analysis about the political character of all writing. Though Hall apparently concluded that directly presenting his perspective is not the proper style for a synthesizer, it is worth noting Allan Megill's recent assertion that "[t]he articulation of perspectives is a contribution to knowledge that historians too often overlook or view with discomfort" ("Recounting the Past: 'Description,' Explanation and Historiography," *American Historical Review*, 94 [1989]: 653). All the more so because *The Magic Mirror* reads rather like an effort in objective, social-scientific history. If so, Hall could have contributed to American historiography by explaining his position.

Second, Hall's disciplinary proclivities lead him to minimize the implications of social history for the history of American law. The massive outpouring of social history poses monumental challenges to all synthesizers. Like the others, Hall faced real difficulties in integrating social history into his narratives because of its range and fragmentation. Hall does draw on relevant work on slaves, women, workers, and criminals as data for empirical descriptions. But he does not come to grips with the causal arguments that structure the work he borrows.

It is in counterpoise to social history that the limits of Hall's conception of legal culture become evident. He identifies legal culture almost solely with the professionals and institutions of the legal system. He asserts that the "history of law in the United States, is the history of legal institutions broadly defined" (89); but the question then becomes: how broadly? Not enough in *The Magic Mirror* to include litigants, popular ideology, and institutions outside the formal order in any systematic manner. The exceptions are often troubling. For example, in describing eighteenth- and nineteenth-century law, Hall consistently depicts popular will as a repressive force trying to subvert a rather unambiguous rule of law. From the eighteenth-century South Carolina Regulators to the Reconstruction Klan, popular movements are justifiably tamed by professionals (35, 56-57, 187-88). Hall's approach tends to make the public the beneficiaries of lawyers' enlightened quest for justice and not an agent in the creation of the law.

Yet it is precisely the issue of individual and group agency that lies at the heart of the social histories that touch on the law. Social histories contain not only new information but also causal arguments that might expand the interpretive conceptions of legal historians like Hall who seek to discuss American legal culture and escape reigning paradigms. Three examples illustrate the point: First, Suzanne Lebsock chronicled the struggles by the white married women in Petersburg, Virginia, to use wills in a different way than their

husbands. She argued that gender distinctions emerged not merely in usage, as Hall noted (159), but also in legal ideology and values. Second, Hall noted the existence of rights consciousness only in conjunction with twentieth-century liberal constitutional jurisprudence (284). Hendrik Hartog argues that rights consciousness has been in force in law since the Revolution, and often at odds with formal public-law rules and institutions. Hartog contends that a popular constitutional history can be recovered by exploring lay constitutional aspirations in addition to the story of the national supreme court. Finally, Anthony Chase proposes that we take popular culture seriously as a part of the legal order. Though Hall ignores the topic almost entirely, Chase asserts that "Perry Mason" and "L. A. Law" are but the most recent expressions of a popular legal culture that has had its own role as a course of legal behavior and values. None of these arguments is grounded in the two paradigms that Hall says dominate legal history. They merely suggest that social history can be used to go beyond positivist definitions of law to include other voices and other sources of legal change in our stories of American law.

Integrating the causal arguments as well as the information of social history into American legal history would enlarge the boundaries of legal culture we see in *The Magic Mirror*. Legal culture would then include informal and formal institutions, lay and professional legal actors. Such an approach would bridge social and legal history in the way Hall rightly champions overcoming other dualities in the field. In short, by developing a more explicit interpretive structure, Hall could have used his text to suggest ways to recast as well as summarize American legal history.

The Magic Mirror succeeds in presenting us with the most integrated account we have of the history of the formal American legal order. It should serve us well as an introduction to many of the issues of American legal history and as a starting point for expanding the subject to capture the elusive yet powerful legal culture that has developed in this society over the last three hundred years. Kermit Hall deserves our thanks for both achievements. If in the end the reflection we see in the "Magic Mirror" is rather incomplete, Hall has told us the story of American law more fully than anyone else. As such, *The Magic Mirror* is an effective summation and a useful medium through which to contemplate new pursuits.

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Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy*, Chicago: University of Chicago Press, 1990. Pp. xiii, 343. \$29.95 (ISBN: 0-226-56970-5).

Professor Nedelsky argues that protection of private property rights was the core concern of the most prominent framers of the main body of the United