

William & Mary Law Review

Volume 32 (1990-1991)
Issue 2 *Free Speech and Religious, Racial, and
Sexual Harassment*

Article 6

February 1991

A Mirror Crack'd? The Rule of Law in American History

Christopher L. Tomlins

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Legal History Commons](#)

Repository Citation

Christopher L. Tomlins, *A Mirror Crack'd? The Rule of Law in American History*, 32 Wm. & Mary L. Rev. 353 (1991), <https://scholarship.law.wm.edu/wmlr/vol32/iss2/6>

Copyright c 1991 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

BOOK REVIEW

A MIRROR CRACK'D? THE RULE OF LAW IN AMERICAN HISTORY

THE MAGIC MIRROR: LAW IN AMERICAN HISTORY, By Kermit L. Hall. New York: Oxford University Press 1989. Pp. 404. \$32.50

CHRISTOPHER L. TOMLINS*

She left the web, she left the loom,
She made three paces thro' the room,
She saw the water-lily bloom,
She saw the helmet and the plume,
She look'd down to Camelot.
Out flew the web and floated wide;
The mirror crack'd from side to side;
"The curse is come upon me," cried
The Lady of Shalott.¹

I. INTRODUCTION

Mirrors, whether as metaphors of reflection and refraction or of emulation, have long proven irresistible to scholars struggling for convenient ways of representing social and institutional relationships in society. Students of law, dating from the anonymous medieval author of *The Mirrour of Justices*,² are no more immune

* 1989-90 Senior Fellow of the Commonwealth Center for the Study of American Culture and Visiting Professor of Law, Marshall-Wythe School of Law, College of William and Mary. Reader in Legal Studies, La Trobe University, Melbourne, Australia. B.A., Oxford University, 1973; M.A., University of Sussex, 1973, Oxford University, 1977, and The Johns Hopkins University, 1977; Ph.D., The Johns Hopkins University, 1981. I am grateful to Michael Grossberg, Daniel Ernst, and David Rabban for their comments on an earlier draft of this Article.

1. A. TENNYSON, *The Lady Of Shalott*, in POEMS OF TENNYSON 25-29 (J. Buckley ed. 1958). I am indebted to John Horacek of the Borchardt Library for his assistance in pinpointing this reference.

2. ANONYMOUS, THE MIRROUR OF JUSTICES (circa 1300). Relied upon unquestioningly by Sir Edward Coke, *The Mirrour of Justices* was later described by Pollock and Maitland as "so full of fables and falsehoods that as an authority it is worthless." 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 478 n.1 (2d ed. 1968).

than any other. "What a subject is this in which we are united," Oliver Wendell Holmes told an 1885 Suffolk Bar Association Dinner in the speech in which Kermit Hall has found the title of this book, "this abstraction called the Law, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been!"³ More recently than Holmes, but drawing upon the vein of legal studies inspired, at least in part, by the quasi-sociological observations that introduced *The Common Law*,⁴ Lawrence Friedman has resorted to the same device. "This book," Friedman wrote in the preface to the first edition of *A History of American Law*, "treats American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society."⁵

Professor Hall writes in the broad tradition of Holmes and Friedman, so perhaps it is not surprising that again the metaphor of first choice should be that of law the mirror. There are other similarities, not least that his, like theirs, is an ambitious attempt at an authoritative overview. Hall's goal is to restate the "best current understanding" about the evolution of American legal culture in order to provide, consciously, a scholarly milestone.⁶

In pursuit of this goal, Hall draws widely on the scholarship—notably that of Willard Hurst, Lawrence Friedman, Harry Scheiber, Morton Horwitz, and their contemporaries, as well as a number of younger scholars—that since 1960 has remade the history of law in America as the history principally of social and economic processes. The result is a book that surveys four centuries of American legal development in fewer than 350 detail-packed pages.⁷ Hall weaves skillfully into one narrative themes

3. THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 21-23 (M. Howe ed. 1962) [hereinafter OCCASIONAL SPEECHES]. As I shall explain in my concluding remarks, Holmes borrowed this image from Alfred Lord Tennyson's superb Arthurian romance, *The Lady of Shalott*, A. TENNYSON, *supra* note 1. Hence my intermittent references to that work.

4. O.W. HOLMES, *THE COMMON LAW* (1881). I refer here, of course, to Holmes' eminently quotable and oft-quoted introductory remark:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Id. at 1.

5. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 10 (1973).

6. K. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* vii (1989).

7. *Id.* Aesthetically, the book suffers somewhat from its publisher's choice of a small typeface and cramped margins, presumably to keep the page count as low as possible.

of evolution in the structure of legal institutions at the local, state, and national level; the changing substance of public and private law; and the administration of criminal justice. He illustrates comprehensively the impact of law on social, economic, racial, and domestic relationships. He shows how one may write effectively about law in the context of American political history, and he shows how the historically segregated agendas of legal and constitutional historians may be united sensitively in one synthesis.⁸ Written in part to furnish a manageable text for survey courses, *The Magic Mirror* will be found intelligible and informative by diverse audiences of historians and legal academics, whether students or scholars. This is no mean achievement, and in this respect the book is an undoubted success. Yet curi-

This format gives the text the appearance of having been crammed onto the page and does not make for particularly easy reading. The book's footnotes are also not at all comprehensive, a real problem in a project so dependent on the work of other scholars. Hall partially redeems this failing in a useful bibliographic essay in which he draws attention to those works upon which he has relied most.

8. The organization of such a project is a major element in its success or failure. Although the book generally is clear, I found its organization not without some problems. Hall's approach is both chronological and topical, and sometimes these characteristics get in each other's way. The first four chapters, *id.* at 9-86, take us chronologically through the colonial and Revolutionary eras, with clearly written and easy to follow chapters divided into topical categories. Five topical survey chapters follow, *id.* at 87-188, which deal successively with law and economy in the antebellum period (two chapters), race and slavery, domestic relations, and the criminal justice system. The last three topics are taken to the close of the nineteenth century. Hall then returns to the Civil War as the point of departure for two chapters on law and industrialization, 1860-1920, *id.* at 189-210, 226-46, which are, however, separated by an intervening chapter on the legal profession, *id.* at 211-25. Then comes a chapter on the formation of modern legal culture through 1945, *id.* at 247-66, a chapter on the Depression, *id.* at 267-85, and chapters on contemporary (postwar) law and society and on the imperial judiciary. The twentieth-century chapters follow through on the topics discussed in the nineteenth-century chapters—race, gender, criminal justice—but in a more abbreviated fashion.

Because Hall tends to keep his topics fairly distinct, this organization is problematic in that it inhibits comparative generalization across topics. In addition, it inhibits the emergence of a clear sense of periodization and causation. The Civil War, for example, features repeatedly as a significant chronological divider, but its causative significance, if any, is never clear. The relationship between the legal culture chapters and the industrialization and Depression chapters, *id.* at 211-85, suggests that the author sees the former as playing a determining role, but this is nothing more than a hint and the concluding observations of the book contradict it. Finally, the double chapters on law and the economy before and after the Civil War tend to be very repetitive, as Hall organizes them with one focussed primarily on legislative activity ("the state") and the other on judicial activity ("the judiciary"), surveying the same policy agenda twice. The separation inhibits close analysis of the dynamics of legislative-judicial competition for initiative in policy formation. For recent examples of such analysis concentrating on the post-Civil War period, see Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1126-48 (1989); Hattam, *Economic Visions and Political Strategies: American Labor and the State*, 1865-1896, 4 STUD. AM. POL. DEV. 82, 106-16 (1990).

ously—for there is much here that speaks of a desire to innovate—the book is excessively cautious and also somewhat dated. Although Hall uses the work of many recent scholars, he reproduces little of the interpretive excitement that has characterized legal history over the last ten or fifteen years. Hall leaves much of his own interpretation implicit, so the reader has to work hard to figure out his line of argument. At the end of it all, however, *The Magic Mirror* leaves one with the distinct impression that ultimately Hall chose to restate an orthodoxy in the face of intellectual phenomena that have shaken its foundations.⁹

Professor Hall writes:

If we are to make progress, we must have works that attempt to sum up our legal past. We must pause occasionally to try to synthesize and integrate into a larger body of knowledge that which we do know, and, in so doing, press future scholars to cast a revisionist eye on its assumptions.¹⁰

This Review aims to assess Hall's synthesis precisely in the manner he recommends here. Part II casts a revisionist eye over the methodology and assumptions that guide his text. Part III summarizes analytically the substance of the book. Finally, Part IV returns to the matter of assumptions and specifically to what I see as, in this case, their blinkering effect.

II. WARP AND WEFT

There she weaves by night and day
A magic web with colors gay.

9. The orthodoxy I refer to here is that of the so-called "Wisconsin School," which championed the application of behavioral social science methods to legal history. Pioneered by Willard Hurst, this approach has been taken furthest in development and refinement (and sheer authorial panache) by Lawrence Friedman. On the Wisconsin School, see Grossberg, *Legal History and Social Science: Friedman's History of American Law, the Second Time Around*, 13 LAW & SOC. INQUIRY 359 (1988). As both Grossberg and other commentators—notably Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9 (1975-76)—have underlined, this orthodoxy, like most, was at its inception not an orthodoxy at all, but revolutionary and subversive. *Id.*; Grossberg, *supra*.

Hall confirms my judgment of his sympathies in his article, *American Legal History as Science and Applied Politics*, 4 BENCHMARK 229 (1990). I am very much indebted to Professor Hall for his courtesy in making a copy of this piece available to me in advance of publication.

10. K. HALL, *supra* note 6, at viii. Lawrence Friedman was the last scholar to hang out a target in this fashion when he offered *A History of American Law* as "a whipping boy, a primer, something to react to; a shape for the field, even if others find it misshapen." L. FRIEDMAN, *supra* note 5, at 10.

She has heard a whisper say,
 A curse is on her if she stay
 To look down to Camelot.
 She knows not what the curse may be,
 And so she weaveth steadily,
 And little other care hath she,
 The Lady of Shalott.¹¹

The similarities in metaphor, scholarly orientation, and avowed authorial intent to which I have adverted invite explicit comparison between *The Magic Mirror* and Lawrence Friedman's *A History of American Law*. Hall follows Friedman's tracks quite closely in a number of respects,¹² but one important difference in perspective is apparent early on. In 1972, Friedman declared that he had set out to write a history of American law that took "nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society," one grounded on "[t]he basic premise . . . that, despite a strong dash of history and idiosyncrasy, the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups."¹³ Although admiring of Friedman's achievement, Hall doubts the sufficiency of so determinedly instrumentalist an approach.¹⁴ Critical of what he sees as the strong tendency among post-Friedman historians to write of law solely as a creature of its social context, he argues for a legal history sensitive to the content as well as the consequences of the law, to its form as well as its function, to the legacy of the past as well as the demands of the present.¹⁵ Law is a human institution, its history "a tale of human choices . . . of individuals caught up in the efforts of the state to allocate blame, to deter criminal behavior, to punish wrongdoing, and to encourage socially valuable activity."¹⁶ But law is also "a cultural artifact,"¹⁷ persisting over centuries and transcending individual lives.¹⁸ Hence, "we cannot know the law only through the indi-

11. A. TENNYSON, *supra* note 1.

12. Hall discusses the similarities and differences in content and perspective between his work and Friedman's. K. HALL, *supra* note 6, at viii.

13. L. FRIEDMAN, *supra* note 5, at 14-15. Friedman reconfirmed this approach in the second edition. See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 15-16 (2d ed. 1985).

14. K. HALL, *supra* note 6, at 4.

15. *Id.* at 3-4.

16. *Id.* at 4.

17. *Id.*

18. *Id.*

viduals who have administered and lived under it. We trivialize the rule of law, and we miss the opportunity to sort out the clashing views about it, when we disregard its inner logic and rules, its institutions, and its processes."¹⁹ True to this form, *The Magic Mirror* is to be "about law, constitutions, legal institutions, and the idea of the rule of law as separate subjects," as well as part and parcel of "our social history."²⁰ Resorting to a second common metaphor, law the black box, Hall wants us to be sensitive to "both the internal and external history of American law."²¹

Hall pursues this revised agenda through an exploration of the "connective tissue" of the legal system—its structure, substance, and culture.²² By "structure," Hall means the formal (courts, legislatures, administrative agencies, executives) and informal (the family, private associations, trade groups, unions) institutions that produce and administer law, and the procedures that these institutions have developed to sustain that function.²³ Here, as elsewhere in the book, Hall reveals a positivist bent:

The purpose of legal history is not to explain all social choices and all aspects of social control. The distinctiveness of the American legal system has been its reliance on a formal structure, and it is with the understanding of the place of that formal structure in society that American legal history is concerned.²⁴

Hall does not, therefore, give his attention to informal institutions as arenas of power and the production of law in themselves, but only insofar as they are impacted by, or perform as transmission belts for, the law of the formal system.²⁵

19. *Id.*

20. *Id.* at 3.

21. *Id.* Hall credits the black box metaphor to L. FRIEDMAN, *AMERICAN LAW* 138-53 (1984). Cf. Gordon, *supra* note 9, at 10-11 (describing the "internal legal historian" as staying within the legal box and the "external legal historian" as writing "about the interaction between the boxful of legal things and the wider society of which they are a part").

22. K. HALL, *supra* note 6, at 4.

23. *Id.* at 5.

24. *Id.* Thus, "[a]ll law is a system of social choice backed by the power of the state." *Id.* at 7.

25. This perspective leads Hall to leave some rather important gaps in his history. For example, he does not consider the household in his colonial chapters, notwithstanding its key status as an arena of primary jurisdiction both in early modern Anglo-American law and in cultural practice. For work suggestive of the potential of a household focus in the recovery of colonial legal cultures, see Isaac, *Communication and Control: Authority*

Hall's approach to structure determines the nature of substance, the second of Hall's three elements. By "substance," Hall means the outputs—the "primary rules"—of the formal system: its judicial pronouncements, statutes, executive orders, and administrative regulations. Law, then, is the discourse of officials. This characteristic does not necessarily lend it uniformity. Indeed, presaging one of the most important themes of his book, Hall argues that one should see American law as historically multiform both in structure and substance: "There has never been only one American legal system, but permutations and deviations."²⁶ Multiformity, however, is the product of jurisdictional plurality rather than the product of ideological diversity or ideational incoherence. The multiplicity of regional sovereignties both before and after the creation of the federal state resulted in plural power centers and thus a plurality of official discourses.

The last of the legal system's three elements, culture, is also the most important. Describing the concept of "legal culture" as "genuinely elusive," Hall sees it first as "a manifestation" of ideology, defined as "strong ideas about how the world should and does operate," and second as having "evolved in response to" individual and group interests.²⁷ Hall defines individual and group interests in terms of material interests and personal attributes: "[p]roperty holding, social class position, wealth, and race."²⁸ Gender is a notable absentee from this list, although Hall does resort to gender as a descriptive category in the body of the book.²⁹ Together, ideas and interests interact to create "the matrix of values, attitudes, and assumptions that have shaped both the operation and the perception of the law."³⁰

Hall's formulation of the culture concept is problematic on several counts. First, it differentiates between ideology and interests in such a way as to present the latter, race for example,

Metaphors and Power Contests on Colonel Landon Carter's Virginia Plantation, 1752-1778, in *rites of Power: Symbolism, Ritual, and Politics Since the Middle Ages* (S. Wilentz ed. 1985). See also R. STEINFELD, *THE INVENTION OF FREE LABOR IN THE UNITED STATES* (rev. ed. June 1989) (forthcoming 1991).

Giving such consideration to the colonial household would have required Hall to devote greater time in his discussion of the "emergence" of a new law of domestic relations in the nineteenth century to showing how this emergence was in part at least a process of rearrangement of other "orders of things"—a process of disassembly and reassembly of other legal logics—involving, for example, the hiving off of master and servant law from the law of the household.

26. K. HALL, *supra* note 6, at 5.

27. *Id.* at 6.

28. *Id.*

29. See *id.* at 328-30.

30. *Id.* at 6.

as objective characteristics, not as in themselves ideological or cultural constructs.³¹ Second, Hall discusses neither component nor, indeed, the culture concept itself theoretically; that is, in a manner that would enable one to understand with some precision what Hall means when he says that *together they constitute* American legal culture.³² On its face, Hall's formulation actually does not do much more than recycle the old "ideas and interests" formulation to which numerous American historians have resorted over the years in discussing policy formation.

The way Hall applies the concept, however, suggests the most important weakness of Hall's formulation of legal culture. Legal culture has enormous potential as a concept of general analytic use. For example, one can quite easily conceive of conducting research into "the legal culture of American workers." This research could explore phenomena such as rule-oriented behavior, modes of legitimating the exercise of power in interpersonal relations, concepts of justice, legality, authority, rights, right action, and so forth in specific settings and over time. It could attempt to compare the results to similar research on other specific populations and to assumed social norms and values. The research could assess the extent of each population's contribution to the maintenance of those norms, examine specific instances of interaction, and tease out divergences. We already have some samples of what such research, both historical and anthropological, might look like.³³ Hall, however, gives legal culture a much

31. *Id.*

32. Given the intensity with which social and intellectual historians (and law and society scholars) have debated the potential of cultural anthropology and ethnography as sources of methodological and empirical insight in recent years, Hall's failure to attempt to situate this attempt at writing a history of legal culture in that historiographical context is both regrettable and puzzling. See, e.g., Appleby, *Value and Society*, in *COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA* 290-316 (1984); W. REDDY, *MONEY AND LIBERTY IN MODERN EUROPE: A CRITIQUE OF HISTORICAL UNDERSTANDING* (1987); Henretta, *Social History as Lived and Written*, 84 *AM. HIST. REV.* 1293 (1979); Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 *AM. HIST. REV.* 567 (1985); Walters, *Signs of the Times: Clifford Geertz and Historians*, 47 *SOC. RES.* 537 (1980); see also *infra* note 34.

33. See, e.g., Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 *WIS. L. REV.* 767; Hartog, *Pigs and Positivism*, 1985 *WIS. L. REV.* 899; see also M. BURAWAY, *MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM* (1979); P. FRIEDLANDER, *THE EMERGENCE OF A UAW LOCAL, 1936-1939: A STUDY IN CLASS AND CULTURE* (1975); J. GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980); Merry, *Everyday Understandings of the Law in Working-Class America*, 13 *AM. ETHNOLOGIST* 253 (1986); Merry, *Concepts of Law and Justice Among Working-Class Americans: Ideology as Culture*, 9 *LEGAL STUD. F.*

more restricted meaning: almost without exception, legal culture here means the operational assumptions and values associated with the formal legal system and the legal profession.³⁴ To be sure, these assumptions and values "evolve[] in response to" the interests of other social actors,³⁵ which Hall tends to lump together as "the general culture." Nevertheless, the realm of the legal in society is defined by the institutional and ideological frontiers of the law box.³⁶ This is not all that surprising, given Hall's positivist definition of what constitutes legal history. It is, however, highly limiting, not least on Hall himself. The reader may notice, for example, that notwithstanding its status as one of the three organizing concepts for the entire book, legal culture does not begin to feature in any analytically significant or systematic way until two-thirds of the way through the book, when it becomes Hall's point of entry into a description of the world of bench and bar in the later nineteenth century.³⁷

Despite its absence from the first two-thirds of the book, the culture concept gets primacy in Hall's description of how the

59 (1985).

For examples of work with similar implications for historical exploration of the legal culture of slaves and slavery, see Grossberg, *supra* note 9, at 375-79. For examples of work exploring the legal culture of women, see S. LEBSOCK, *THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860* (1984); Minow, "Forming Underneath Everything That Grows," *Toward a History of Family Law*, 1985 WIS. L. REV. 819.

Finally, for examples of work suggestive of the discrete legal cultures associated with different forms of social and political movements, see N. POLLACK, *THE JUST POLITY: POPULISM, LAW, AND HUMAN WELFARE* (1987); N. SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* (1982). The issue of sharply contrasting conceptions of legality is posed in M. FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977*, at 1-37 (1980), and in a somewhat different fashion by Forbath, Hartog, & Minow, *Introduction: Legal Histories from Below*, 1985 WIS. L. REV. 759. On the relationship between societal ideologies and the values of individuals and groups, see J. THOMPSON, *STUDIES IN THE THEORY OF IDEOLOGY* (1985); Lears, *supra* note 32; Mann, *The Social Cohesion of Liberal Democracy*, 35 AM. SOC. REV. 423 (1970).

34. K. HALL, *supra* note 6, at 6-7. In discussing legal culture as a manifestation of ideology, for example, Hall singles out the ideas of "prominent figures in the legal system." *Id.* at 6.

35. *Id.*

36. Even within the law box, Hall defines the realm of the cultural very narrowly. For example, *The Magic Mirror* does not contain one word on literature. On the crucial cultural configuration of law and letters in America, see R. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984); Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988). See also P. MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* (1965).

37. K. HALL, *supra* note 6, at 211. As far as I can establish, the words "legal culture" appear only twice, both times incidentally, in the first ten chapters of *The Magic Mirror*. *Id.* at 27, 127.

three component elements of the legal system interact.³⁸ As he puts it, "Legal culture through ideology and interest provides the mainsprings of the legal system in the United States. Structure and substance provide the institutional manifestations of the system; legal culture embodies the motivating forces in response to which the other two develop."³⁹ When we get right down to it, however, the single mainspring of interest far outweighs all other considerations. "Our legal history reflects back to us generations of pragmatic decision making rather than a quest for ideological purity and consistency. Personal and group interests have always ordered the course of legal development; instrumentalism has been the way of the law."⁴⁰

This Friedmanesque conclusion contradicts Hall's introductory call for greater analytic appreciation of the law's autonomy. Hall attempts to avoid the contradiction, however, by the invocation of a fourth component of the legal system, namely "the rule of law" itself.⁴¹ In effect, this is the magic in the mirror. Hall sees the rule of law represented in American culture as a principle set apart, autonomous of specifiable legal events, and "one of the great forces in the history of western civilization" that proposes to make "all persons equal before a neutral and impartial authority."⁴² The rule of law derives its legitimacy from "the possibility of applying it on a reasoned basis free from the whim and caprice of both individuals and government," independent of considerations of "[s]ocial position, governmental office, family of birth, wealth, and race."⁴³ In the American context, as Hall describes it, the rule of law ideal is the keystone of cultural consensus in a society otherwise dominated by centrifugal interests.⁴⁴ Far more than a tool in the hands of the most powerful—Hall is critical of those who take such an approach⁴⁵—the rule of

38. *Id.* at 4-7. Indeed, Hall characterizes the book as "a synthesis of American legal culture." *Id.* at viii.

39. *Id.* at 6.

40. *Id.* at 335.

41. *Id.* at 6.

42. *Id.*

43. *Id.*

44. *Id.* at 7.

45. *Id.* at 6-7. Here, he names "scholars identified with the critical legal studies movement" who "complain that the law merely provided a formal device by which the most powerful elements of a capitalist society—the ruling class—perpetuated their control." *Id.* at 7. As Robert Gordon, among others, has pointed out, such a characterization misunderstands Critical Legal Studies (CLS) scholarship. See Gordon & Nelson, *An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 139, 144-54 (1988) [hereinafter Gordon & Nelson, *Exchange*]. I return to this point below. See *infra* notes 61-62, 257-60.

law's enduring symbolic effectiveness is consequential upon the legal system's responsiveness to all interests. That response has often fallen short, Hall acknowledges,⁴⁶ but never so far or so fundamentally as to call the ideal into question. Hence, the rule of law remains a determinate normative standard, a frontier of right action. When people behave in ways of which we disapprove, we say they have stepped outside of it.⁴⁷

This account of Hall's conceptualization of his task suggests that there is more to *The Magic Mirror's* theorization of legal historical writing than immediately meets the eye. In seeking to elucidate "the main lines of development in American legal culture,"⁴⁸ Hall cleaves strongly to a traditional liberal position, embracing on the one hand a jurisprudentially positivist conception of "law" as an official discourse emanating from governing institutions,⁴⁹ and on the other a conception of the rule of law as an autonomous and transhistorical ideal that safeguards us from oppression, not least the oppression of those same institutions.⁵⁰ Governing institutions' responsiveness over the long term to the basic needs of all citizens entrenches the rule of law in American culture and ensures the continuing loyalty of the citizenry to those institutions.⁵¹

My own opinion is that this theoretical stance, largely implicit though it is, is not helpful to the task of furthering either the general project of legal history or Hall's own exciting project of writing a history of American legal culture. What it has led to here, for example, is better described as a history of the American legal system.⁵² Legal culture does not coincide in extent and

46. See, e.g., K. HALL, *supra* note 6, at 188, 265.

47. *Id.* at 56, 335.

48. *Id.* at vii.

49. Thus, law in America is "a system of social choice . . . in which government provides for the allocation of resources, the legitimate use of violence, and the structuring of social relationships," and to write the history of that law is to write "the history of legal institutions broadly conceived." *Id.* at vii, 89.

50. *Id.* at 6-7.

51. *Id.* Thus, "[t]he rule of law in American history has made possible widespread economic and political power, and the long-term trend has been toward the greater dissemination of both, as the evolving legal history of blacks and women suggests." *Id.* at 335.

52. Hall's conclusions in fact treat "legal system" and "legal culture" as virtual synonyms. *Id.* at 334-36. Elsewhere, Hall's writings confirm that he sees the culture concept primarily as providing a foundation upon which to write a history integrating facets of the legal system—notably public law and private law—that official legal discourse ordinarily treats as distinct. See Hall, *The Magic Mirror: American Constitutional and Legal History*, 1 INT'L J. SOC. EDUC. 22, 39-40 (1986) [hereinafter Hall, *American Constitutional*

limits with official institutions and ideologies any more than the party system defines the realm of politics. Contemporary scholarship already realizes this,⁵³ and it will become clearer as more historians turn to search out the diversity of legal cultures that exist at any one time, and at different times, in a society.⁵⁴ The more this process continues, the more the identification of law as a discursive monopoly of official institutions—that is, of the state—will be recognized as a historical problem that scholars should explain, rather than a common point of departure that scholars can assume.⁵⁵

The multiplicity of legal ideas and settings that the uncovering of multiple legal cultures implies also controverts rule-of-law ideology's imputation of an objectively determinate content to law and hence the representation of the rule of law as a per se normative standard of behavior. Robert Gordon has argued, "[L]aw is indeterminate at its core, in its inception, not just in its applications. This indeterminacy exists because legal rules derive from structures of thought, the collective constructs of many minds, that are fundamentally contradictory."⁵⁶ Having recognized the infinite range of contributing consciousnesses, however, we must go on to explain how some legal discourses at some points in time become privileged whereas others are rendered oppositional or ignored altogether.⁵⁷ Such a project ought to be

and Legal History]. Difficulties in obtaining a copy of this piece through conventional channels leave me very much indebted to Professor Hall for his courtesy in making a copy available to me himself.

53. See *supra* note 33.

54. I do not wish to be understood as saying here that Hall fails to recognize plurality in legal culture as a significant phenomenon in American history. He does recognize this. But he confines that insight by defining it almost entirely in jurisdictional and regional terms. See, e.g., K. HALL, *supra* note 6, at vii-viii. For a rare hint of recognition of plural legal cultures as social phenomena, see his comments on ethnicity, crime, and the criminal justice system. *Id.* at 255. Even here, however, the talk is of plural moralities rather than plural legalities. *Id.* For additional hints, see Hall, *The "Magic Mirror" and the Promise of Western Legal History at the Bicentennial of the Constitution*, 18 W. HIST. Q. 429 (1987).

55. Ideally, this process will bring to fruition in American history a theorization of law that, 15 years ago, was described as "only just beginning," namely what the Italian historiographer Arnaldo Momigliano described in 1963 as conceiving "history of law" as "a formulation of human relations rooted in manifold human activities." Gordon, *supra* note 9, at 9 (quoting A. MOMIGLIANO, *The Consequences of New Trends in the History of Ancient Law*, in STUDIES IN HISTORIOGRAPHY 239, 240-41 (1966)). Momigliano continued: "And if, in some civilizations, there is a class of juriconsults with special rules of conduct and of reasoning, this too is a social phenomenon to be interpreted." *Id.*

56. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 114 (1984).

57. See *id.* at 120-24; *supra* note 32. Gordon notes the importance of the task without, however, doing much here to address it.

part of Hall's goal of delineating the main lines of development in American legal culture. But Hall's focus on the formal system, his evolutionary perspective, and his conception of the rule of law all discount any perspective that treats law as a stew of multiple and contradictory discourses, some sanctioned, some not.⁵⁸ To explore law in these terms requires that we expand the objects of legal history well beyond the delineation of conditions sustaining or infringing upon the rule of law and establish instead the characteristics of the law that becomes the modality of rule.⁵⁹

Unwillingness to entertain such an expansion hinders Hall in his quest to give real meaning to that "genuinely elusive"⁶⁰ concept of legal culture with which he desires to concern himself. I do not attribute this unwillingness to any innate scholarly blindness on Hall's part. Rather, I believe the problem is more concern lest, as a result of such expansion, the curse of critical scholarship undermine the liberal legal rule of law he avows.⁶¹ In this he is by no means alone.⁶² Unfortunately, to crack this mirror's code requires that one take risks. One must, so to speak, dare to look down to Camelot.⁶³

58. Gordon has commented that legal writers sometimes restrict their view of what law is to a bunch of discrete events that occur within certain specialized state agencies . . . and therefore assume that the only question for a social history of law is the relation between the output of these agencies and social change. But if that output is all there is to law, how on earth are we going to characterize all the innumerable rights, duties, privileges, and immunities that people commonly recognize and enforce without officials anywhere nearby?

Gordon, *supra* note 56, at 107.

59. I have made one such attempt. See Tomlins, *Law, Police and the Pursuit of Happiness in the New American Republic*, 4 *STUD. AM. POL. DEV.* 3 (1990). For perspectives on this theoretical turn, see Diamond, *Not-So-Critical Legal Studies*, 6 *CARDOZO L. REV.* 693 (1985); Hunt, *The Critique of Law: What is 'Critical' about Critical Legal Theory?*, 14 *J. L. & Soc'y* 5 (1987); Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 *L. & Soc'y REV.* 11 (1985); Trubek & Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program or Pandora's Box?*, 14 *LAW & SOC. INQUIRY* 3 (1989).

60. K. HALL, *supra* note 6, at 6.

61. Hall's distaste for the "critical legal" historians who have made liberal legalism an object of criticism is displayed mutedly in K. HALL, *supra* note 6, at 6-7, and more openly in Hall, *American Constitutional and Legal History*, *supra* note 52, at 37-39. See also *infra* notes 258-61 and accompanying text.

62. See, e.g., Gordon & Nelson, *Exchange*, *supra* note 45, at 165-68, 184-85 (Nelson). This exchange arose as a consequence of Nelson's earlier assessment of CLS in *THE LITERATURE OF AMERICAN LEGAL HISTORY* (W. Nelson & J. Reid eds. 1985). It is fair to say, I think, that Hall agrees with Nelson's assessment in all essentials. See K. HALL, *supra* note 6, at 6-7.

63. See A. TENNYSON, *supra* note 1.

III. LINES OF SIGHT

And moving thro' a mirror clear
That hangs before her all the year,
Shadows of the world appear.
There she sees the highway near
 Winding down to Camelot:
There the river eddy whirls,
And there the surly village-churls,
And the red cloaks of market girls,
 Pass onward from Shalott.⁶⁴

What follows in this Section is, in essence, a synopsis of Hall's account of law in American history, together with some comments specific to elements of that account. Notwithstanding the shortcomings that I have argued exist in Hall's conceptualization, I want to underline that I regard his account as an important contribution. Not only does it comprise the only thorough survey of four centuries of legal development currently available, but it also seeks always to contextualize those dynamics by setting them in wider historical currents. Hall's text, one might say, sits on the drawbridge between legal and general historiography and offers pointers to scholars passing in each direction. This is a strategic position to aspire to, and the book's comprehensiveness will no doubt ensure that it remains a useful source of traffic advisories for quite some time.

A. The Colonial and Revolutionary Periods

Hall rather slights the colonial period. We move from the earliest days of the seventeenth century to the Revolution in a brisk forty pages,⁶⁵ after which the pace slows considerably as Hall traces the developments of the nineteenth and twentieth centuries in meticulous detail. Nonetheless, the early chapters usefully establish major, albeit familiar, themes, notably those of pragmatism, adaptation, and diversity. Far from "receiving" the common law *en bloc*, early migrants carried with them a body of legal ideas which they applied pragmatically across a range of settings varying widely in climate, geography, and settlement pattern.⁶⁶ This diversity of setting and application reinforced the

64. *Id.*

65. K. HALL, *supra* note 6, at 9-48.

66. *Id.* at 12-14.

the legitimation of market activity and of market measures of efficient resource allocation.⁸⁴

Importantly, Hall does not regard this new market system as a legally constituted phenomenon.⁸⁵ Rather, he represents markets as the institutional expression of the cumulated autonomous decisions that private economic actors have taken in their own interests.⁸⁶ From this perspective, the primary social significance of market legitimation lay in its transfer of a substantial element of control over the distribution of economic rights *away* from legal institutions, relocating it in the agreements reached among private individuals.⁸⁷ Hall recognizes that lawmakers do in fact act in ways that influence market outcomes, but he sees this as a process of imposition on markets in order to modify their otherwise autonomous operation.⁸⁸ Hall formulates the process as one of "intervention" in the private marketplace through legislative and judicial action distributing costs, benefits, and risks of economic growth to serve the public interest in economic development and otherwise to protect the "rights of the public."⁸⁹

84. *Id.* at 88.

85. *Id.*

86. *Id.*

87. *Id.* at 88, 95-96.

88. *Id.* at 88-89.

89. *Id.* at 89. An alternative, and in my opinion more satisfactory, approach is to think of markets, just like all other social institutions, as legally constituted phenomena. As Robert Steinfeld stated, to think of the historical process of free market formation as one of "liberation of self interested individuals from traditional legal and communal constraints"—that is, as a process of legal/governmental withdrawal—is to ignore how the process of free market formation "inevitably made necessary collective [which is to say legal/governmental] choices about whose and what kinds of freedom would be legally privileged and whose and what kinds of freedom would be legally restricted." Steinfeld, *The Struggle Over Alternative Legal Constructions of a Free Market in Labor: the Philadelphia Cordwainers' Case of 1806*, in *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS* 1, 1, 3 (C. Tomlins & A. King eds.) (rev. ed. Nov. 15, 1990) (forthcoming). There is nothing necessitarian or essentialist about this alternative way of conceiving markets; the rules creating the "coercive power which pervades 'free' markets . . . give different shapes to that power depending upon which particular ones are chosen." *Id.* at 4. It merely involves recognition that the institution of the market is constituted by the legal choices made and is not a naturally occurring phenomenon. "The deliberate collective choices involved are unavoidable—the 'free' market is simply not self-defining." *Id.* at 5. Hence, it is inaccurate to conceptualize the interaction of law and economy along a spectrum of nonintervention/intervention or distribution/redistribution; all possible economies represent institutions constituted by the choice of combinations of different kinds of legal rules.

Peter Oxenbridge Thacher provided a fine example of judicial conceptualization of markets in precisely these terms in the course of a charge to the Suffolk County grand jury at the opening of the December 1832 session of the Boston Municipal Court:

All who are engaged in trade, commerce, manufactures, the mechanic arts,

As we already know, courts were deeply involved in the creative explosion, and their "americanization" of the common law⁹⁰ brought major changes in any number of doctrinal areas: corporations, property, contract, tort, labor.⁹¹ Here also, "privatization" is Hall's principal theme.⁹² These activities underline the extent to which, as Morton Horwitz argued, courts took on a self-conscious role as economic policymaking institutions.⁹³ Hall acknowledges Horwitz's contribution, but criticizes his contention that the transformation of American law that took place during these years served the wealthy at others' expense.⁹⁴ The judiciary may have "facilitated economic development through legal instrumentalism, but it clung to the idea that the public enjoyed certain rights that it was required to protect. . . . Even in cases involving labor, the judiciary accepted that unionization was not a criminal activity."⁹⁵ Hall also criticizes Horwitz for discounting

agriculture, and the learned professions, all, in every varied pursuit of industry and talent, may freely contend together for profit in pursuit of their respective good. But the operations of society cannot proceed, unless the law, which, like the air, is over every thing, and pervades every thing, and is the life of every thing, protect, in full extent, the principle of equal and fair competition.

Tomlins, *Criminal Conspiracy and Early Labor Combinations: Massachusetts, 1824-1840*, 28 LAB. HIST. 370, 384 (1987).

90. K. HALL, *supra* note 6, at 109.

91. *Id.* at 106-26.

92. *Id.* In corporations law, for example, courts repudiated the claim that all corporations were inherently public because the state chartered them to fulfill social responsibilities. *Id.* at 111. In the area of property, courts promoted private economic activity by liberating actors from the restraints of antidevelopmental doctrines, stressing instead "the efficient use of resources based on competition," *id.* at 114, while in contract, "will theory" made perhaps the most potent of common law contributions to the privatization of economic decisionmaking by turning the law from a mechanism for court-supervised transfers of title into a means for enforcing private agreements in a market of fungible goods. *Id.* at 120. Tort law saw the erosion of strict liability standards, the development of the fault principle, and, in industrial accidents, the fellow-servant rule that made the extent of an employer's liability a creature purely of private agreement between employee and employer. *Id.* at 123-26. Finally, in the area of labor, courts modified the use of criminal conspiracy doctrine against unions, believing that benefits "might accrue from the contest between unions and employers." *Id.* at 113-14.

93. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

94. K. HALL, *supra* note 6, at 127-28.

95. *Id.* at 127. Public rights is a broad and important concept that certainly offers scope for judicial action countervailing the contest of private interests and the ascendancy of the powerful over the weak. Usually, however, courts looked at "public rights" in terms of a more particular reading—the public right to an efficient use of resources through the facilitation of a competitive market economy—that mobilized public rights as a countervailing doctrine only to a limited extent. No doubt such a definition was a legitimate reading of "public right," but one can also imagine other equally legitimate readings. For some sense of the variety of available definitions of "public rights" and of

jurisdictional discontinuities created by migration into widely separated colonies and resulted in the creation not of a unified system, but of a series of legal systems.⁶⁷

Diversity was not unalloyed, and Hall also stresses sources of uniformity in the colonial legal tradition: a migrant population relatively homogenous in socioeconomic origins, common acceptance of notions of a higher law, and an early turn toward codification which gave law a "consensual, rational" appearance.⁶⁸ The development in all colonies of active legislative bodies based on an extensive franchise further reinforced respect for law, culminating in "the eventual acceptance of a popular will theory of law. That is, legitimate law had to be derived from the people."⁶⁹

The themes of jurisdictional diversity, legitimacy through adaptation, and consensual lawmaking establish an interpretive foundation for the rest of the book. *The Magic Mirror* does not ignore social conflict, but it does not highlight it as a dynamic developmental influence. A case in point is the Revolution, "an ambiguous affair as revolutions go."⁷⁰ Egalitarian rhetoric notwithstanding, antagonism to a hierarchical social order did not drive the Revolution's development. Rather, it was a war for jurisdictional independence, stimulated by "[t]he forces of acquisitive capitalism and the Enlightenment's emphasis on individual reason and human worth," animated by the idea of the rule of law, and important historically in that it cleared the stage for America's nineteenth-century surge of legal experimentation while simultaneously establishing the foundations for a modern "constitutional consciousness" that emphasized the limitations of governmental power.⁷¹

B. Law in the New Republic

Left unclear at the end of the Revolutionary decade were the precise relationships that would pertain between the key constituent elements of the new order: the rule of law and popular will, judiciaries and legislatures, and the federal government and the states. Hall sees this set of relationships as defined during

67. *Id.* at 13-14.

68. *Id.* at 15.

69. *Id.* at 17.

70. *Id.* at 49.

71. *Id.* at 49-50, 57-58.

the period of 1787-1815.⁷² Hall focusses in particular on Federalist ambitions to resort to central institutions to impose their vision of the public good, using the federal courts along the way to "coerce political stability"⁷³ and Jeffersonian fears of a federal judiciary out to destroy both popular politics and, through judicial review and a federal common law, state sovereignty.⁷⁴ While "radicals" inveighed against lawyers and the common law in general, "moderate" Jeffersonians sought reform that would curb Federalist excesses while preserving the courts' capacity to check popular will.⁷⁵ The moderates' triumph after 1801 settled the new Republic's first major political crisis and created the conditions for establishing the "truly hybrid legal system" from which the subsequent revolution in substantive law emerged.⁷⁶ Federal judicial power was not inhibited and "substantial discretion" was also retained at the local level championed by the radicals.⁷⁷ Moderate Jeffersonians, however, gave the legal system "a decidedly state-centered cast."⁷⁸ State appellate courts enjoyed great authority to interpret the substantive common law and complemented state legislatures that retained a full quota of police powers through which to realize the rights of the community at large.⁷⁹ This division of legal labor "fixed the most critical decisions about the allocation of economic resources and social policy before the Civil War in the states."⁸⁰

In the explosion of decisionmaking that followed, Hall argues, state legislatures and courts turned away from "the ethical yardstick" that their colonial predecessors employed.⁸¹ Without altogether abandoning earlier commitments to the policing of economic behavior, legislatures came to concentrate much more fully on the *promotion* of economic activity.⁸² Similarly, judges began concentrating on "how legal rules encouraged economic growth, individual risk taking, and the accumulation of capital."⁸³ The result was the *privatization* of economic decisionmaking through

72. *Id.* at 67-68.

73. *Id.* at 77.

74. *Id.* at 76-77.

75. *Id.* at 78-79. Hall does not define the terms "radical" and "moderate."

76. *Id.* at 86.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 109.

82. *Id.* at 95-96.

83. *Id.* at 109.

the centrality of the rule of law in American culture and cites John Phillip Reid's study of migrants on the overland trail.⁹⁶ The migrants were well beyond the reach of legal authority, yet they behaved "in ways that underscored their law-abiding nature."⁹⁷

the contest among them at this time, see L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948).

The particular example cited, Lemuel Shaw's "decriminalization" of unions in *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842), bears out this comment, for Shaw grounded the decision on the competitive marketplace principle that the maximization of opportunities to pursue self-interest maximized the good of all. *Id.* at 127-34. Maximization of opportunity implying no inherent limitations on the form in which opportunity might be pursued, when interests were held sufficiently in common to warrant collective rather than individual pursuit of them, associations might be created for their pursuit through the same contractual devices that constituted all forms of social relation. *Id.* Thus, in the instant case "we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests." *Id.* at 130.

The measure of acceptability of any species of human behavior having become its tendency to contribute to the reproduction of a competitive marketplace society, pursuit of self-interest, either singly or—through a self-constituted association—collectively, was legitimate even if it proved to be injurious to another, as long as, *but only as long as*, it was perceived to be congruent with the principle of competition and its contractual incidents. Because injurious outcomes might result from socially beneficial actions, the mere fact of an injurious outcome was not sufficient to justify condemnation of the behavior that led to it. At the same time, given that society had no existence apart from the myriad of individual transactions, any injury was potentially socially deleterious. Hence, the legality of an injurious outcome would be judged by the end sought or, in cases in which the end was judged laudable or meritorious or public spirited, by the means used. *Id.* at 128-31.

To some extent the decision in *Hunt* is congruent with both of Hall's themes. It was a privatization of the issue of combination, turning it from what had been primarily a confrontation between working people and the courts over the legitimacy of labor organizations in the postrevolutionary polity into a matter of industrial relations—a conflict between working people and their employers over the degree of control each would exercise at the point of production that the courts would arbitrate. In addition, it invoked the public interest in justification. But *Hunt* decriminalized unions only within the narrow realm of a "competitive market" reading of public rights and did nothing to erode the courts' continued command over the determination of the degree of criminality to be read in the intentions or actions of associated workmen. In the industrial struggles that became endemic during the second half of the nineteenth century, the courts' use of criminal conspiracy proved devastating. See, e.g., Hattam, *supra* note 8.

For a more developed discussion of these points, see C. TOMLINS, *THE PURSUIT OF HAPPINESS: LAW, LABOR AND IDEOLOGY IN THE EARLY REPUBLIC* ch. 5 (rev. ed. Nov. 15, 1990) (unpublished manuscript).

96. J. REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1980).

97. K. HALL, *supra* note 6, at 128. Hall does not make the point of his criticism completely clear, but it appears to be that migrant displays of respect for property rights and equanimity in settling disputes under extreme conditions demonstrate consensual adherence to a rule-of-law mentality in American culture, and that the apparent absence of popular alienation from the law gives the lie to Horwitz's contention of bias. In fact, however, Reid's account is not necessarily incompatible with Horwitz's at all. Horwitz's

C. Slavery, Domestic Relations, and Criminal Justice

Yet in some cases, it seems, legal ideology could indeed mask unconscionable outcomes. For example, southern appellate judges confronting slavery used the common law tradition as "a mask that concealed their humanity and that of the slaves."⁹⁸ Northern judges too "pulled on the masks of the law and resorted to a highly formal approach to issues of personal status, morality, and race" when confronting slavery.⁹⁹ Nor did this dissembling cease

subject was the judiciary's role during the first half of the nineteenth century in creating dynamic and developmentally facilitative doctrinal rules in areas of law—contract, property, and tort—in which prevailing doctrine had not been facilitative. His normative gloss on this process was that it was a project that undermined preindustrial communal customs and ties, one undertaken more in the interests of the wealthy and powerful seeking opportunities for capital accumulation and profit than in the interests of the citizenry at large. Reid's description of the concept of property operative among migrants on the overland trail—essentially one of absolute right—shows that it bore little resemblance to contemporary property *doctrine*, which both Hall and Horwitz would agree had by the 1840's become dynamic, flexible, and, in matters of owners' rights, contingent upon fulfilling the developmental imperative. *See, e.g., id.* at 114-19; M. HORWITZ, *supra* note 93, at 31-62. Further, Reid stresses the rootedness of the migrants' concept of property in the custom and experience of the eastern, predominantly New England communities from which they came, describing these areas as "an agrestic, community-centered world we have lost." J. REID, *supra* note 96, at 362. In these respects, Reid's story is good evidence for the existence of a gulf between the concept of property current on the trail and (apparently) in eastern agrarian communities, and the legal-doctrinal concept of property current in the decisions and opinions of the mid-nineteenth-century bench and bar. The existence of such a gulf supports Horwitz's account rather than detracts from it.

Reid's account actually has more critical implications for Hall than for Horwitz. One of the main points of Reid's book is that the culture of property on the overland trail was a legal culture:

A pattern of behavior based on mutual expectations concerning duties and rights may as accurately be labeled "legal" behavior as may behavior dictated by fear of police enforcement. What [the migrants'] words and conduct tell us is that for nineteenth-century Americans the definition of binding "law," vesting rights and imposing obligations, was not limited to a command or set of commands from the "sovereign" backed by threats or by force. Nor was "law" some abstraction discovered or justified by appealing to "natural" or universal rules of ideal deportment. Law was the taught, learned, accepted customs of a people.

Id. at 361-62. As we have seen, Hall's own definitions of "law" and "legal culture" are narrower, much more positivist, and more limiting. *See supra* notes 31-37 and accompanying text.

(Reid, of course, gives his account a gloss of its own, one essentially based on the claim that because the culture of property can be rendered in legal terminology by an observer, there is in fact no difference between an implicitly holistic "law" and the legal culture of the trail. Because the latter can be characterized in the terminology of the former, the former must be the source of the latter. This is precisely where his book is weakest. But this is not a review of *Law For the Elephant*.)

98. K. HALL, *supra* note 6, at 134.

99. *Id.* at 141.

until Chief Justice Taney's brutally explicit appraisal of the constitutional status of slavery and the slave in *Dred Scott v. Sandford*¹⁰⁰ simply left no more room for maneuver.

What Taney did in *Dred Scott*, of course, was hold that the Constitution was constitutive of the racial and physical subordination of African-Americans.¹⁰¹ The postwar corollary was constitutional amendments and legislative enactments that altered the legal conditions of that subordination. Hall argues that in this process racism acted as a brake on the otherwise "unparalleled opportunity" for legal reform.¹⁰² It is not clear to me whether this means that the legal culture was endemically racist or was inhibited by the racism endemic in American culture at large.

Similar questions emerge from Hall's analysis of nineteenth-century domestic relations law.¹⁰³ Here, Hall ascribes a transformation in the traditional American family underway during the nineteenth century to the "ideological and economic forces that flowed from the American Revolution,"¹⁰⁴ a transformation moderated by an emergent family law grounded in the "persistent belief that the private family was the foundation of national morality" and assuring "continuity within change."¹⁰⁵ But are the values to which the law lends continuity ascribable to the general culture, which is apparently changing in directions eroding patriarchy, or to the legal culture, which apparently acts to maintain patriarchy? Hall describes the Constitution as gender-neutral¹⁰⁶ and appears to imply that legal values are not gendered—that gender discrimination, like racism, is a societal phenomenon which imposes itself on the legal culture.¹⁰⁷ Others have disagreed, however,¹⁰⁸ and Hall's closing statement—that "[t]he end of traditional patriarchy only meant that a new judicial patriarchy grew to replace it"¹⁰⁹—is equivocal in that it is susceptible to either interpretation.

100. 60 U.S. (19 How.) 393 (1857).

101. *Id.* at 399-454.

102. K. HALL, *supra* note 6, at 143; *see also id.* at 145 (Hall argues that "[t]he embedded racism of the Reconstruction era limited the scope of social change through the law").

103. *Id.* at 150-67.

104. *Id.* at 150.

105. *Id.*

106. *Id.* at 327.

107. *See id.* at 327-29.

108. *See, e.g.,* S. LEBSOCK, *supra* note 33; Minow, *supra* note 33; *see also* Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

109. K. HALL, *supra* note 6, at 152.

Apart from these asides, Hall's narrative of nineteenth-century domestic relations law is in fact a chronicle less of continuity amid change than of an ascending curve of state activity transforming the family and the relationships among its members. According to Hall, "the traditional private contractual basis of marriage" became subject to licensing to regulate the fitness of prospective marriage partners.¹¹⁰ Legislators also took steps to reform married women's property rights, restrict the dissemination of birth control information, outlaw abortion, and regulate the adoption of children.¹¹¹ Such developments accelerated dramatically in intensity after the Civil War. It is not immediately clear why, for Hall's basic explanation for legal activity in this area—concern with the impact of market capitalism on the family¹¹²—is not temporally refined enough to explain the clear rhythms in state activity that his narrative uncovers.

Hall's exposition of developments in criminal law follows, in broad outline, his narrative of domestic relations law.¹¹³ Again, the "powerful forces of market capitalism and individualism" unleashed by the Revolution provide the dynamic.¹¹⁴ And again, what emerges most clearly from the chronicle is a rising curve of state activity in the second half of the nineteenth century, as criminal regulation of moral behavior (such as abortion and gambling) and public order offenses (notably vagrancy¹¹⁵) rejoined the early nineteenth century's emphasis on economic crime¹¹⁶ in mutual dedication to the achievement of social order and control.¹¹⁷ By 1900, innovations in penal policy and policing during the second half of the century had created the broad outlines of the modern criminal justice system.¹¹⁸ Hall finds, however, that the persistence of traditions of popular control and local decision-

110. *Id.* at 155.

111. *Id.* at 158-64.

112. *Id.* at 150-51.

113. *Id.* at 168-88.

114. *Id.* at 169.

115. *Id.* at 185. Hall does not make the connection, but fascinating parallels exist between the development of a race-based statutory law of involuntary labor in the post-Civil War South and a non-race-based statutory law of involuntary labor aimed at vagrants in the North. See Stanley, *The Underside of Contract Freedom: Obliging the Beggar to Labor*, in *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS* (C. Tomlins & A. King eds.) (rev. ed. Nov. 15, 1990) (forthcoming).

116. This emphasis was attributable to "the economic forces of the Revolution" that "placed great value on holding and using private property for individual gain." K. HALL, *supra* note 6, at 169.

117. *Id.* at 185.

118. *Id.* at 187.

making inhibited the development of the order, routine, and efficiency that the description "criminal justice *system*" implies.¹¹⁹ Although Hall stresses elsewhere the importance of jurisdictional diversity and popular will to consensual, and therefore legitimate, governing authority, when it comes to criminal justice he implies that popular and decentralized control pose a continuing problem for public order and "the rule of law."¹²⁰

D. *The New Regulatory State*

The substantive thrust of criminal law in the direction of explicit social regulation¹²¹ was congruent with larger trends in the relationship between law and American society and economy.¹²² As Hall presents it, the legal history of the late nineteenth and early twentieth centuries is principally the familiar story of a transition from a distributive to a regulatory state.¹²³ Drawing on recent work in political history,¹²⁴ Hall relates distributive outcomes during the nineteenth century to a distinctive institutional structure that placed political parties at the center of local and national lawmaking.¹²⁵ Rapid urbanization and industrialization, however, generated demands from new social groups on a scale that the established party system could not accommodate.¹²⁶ The result was a proliferation of third parties and social reform movements urging new views of law and legal institutions "designed to serve disaffected social constituencies."¹²⁷

The most prominent of these movements were the predominantly agrarian populists, who were strongest in the South and

119. *Id.*

120. *Id.* at 176-85, 187-88, *passim*.

121. Hall writes that over the course of the nineteenth century, "the purposes of criminal law shifted from punishment to regulation of antisocial behavior." *Id.* at 187. Insofar as to be an African-American or a woman outside one's appropriate sociocultural location was to engage in antisocial behavior, one might suggest that the law both of domestic and of race relations in the second half of the nineteenth century had attained a similar purpose. *See id.*

122. *See id.* at 189-210.

123. *Id.* at 190.

124. *See, e.g.,* R. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* (1986).

125. K. HALL, *supra* note 6, at 195. "The parties aggregated the electorate and organized governmental functions, most notably the legislatures, which distributed resources and privileges to individuals and groups. In return, these groups rewarded their chosen party at the polls." *Id.*

126. *Id.*

127. *Id.*

West, and the predominantly urban and middle class progressives.¹²⁸ Both groups sought a far more regulatory role from government.¹²⁹ Crucially, however, they represented otherwise very distinct approaches to the relationship between politics and government. Progressives advanced a general critique of partisan politics not shared by the populists and an ideology of efficiency in public life—government by authoritative experts and a “disposition of calculation” in public policy.¹³⁰ Progressive ascendancy after the turn of the century brought these new methods of government into being, increasing the penetration of law and legal institutions into everyday life while simultaneously diluting politics, eroding popular participation, and making government more responsive to well-organized economic interests, “a pattern that continued to develop through the twentieth century.”¹³¹ Hall offers a typically guarded evaluation of these processes, finding in progressivism an “only partly unrealized [promise] that impartial experts would solve problems on a neutral, scientific basis.”¹³²

E. The Judiciary and the Regulatory State

Legal-historical scholarship has given considerable attention to the judiciary's role in the emerging regulatory state of the late nineteenth and early twentieth centuries.¹³³ Hall argues that the stereotypical portrayal of that role stresses judicial obstruction of regulatory initiatives, but that by and large the historical record does not justify any such conclusion.¹³⁴ Courts, it is true, became far more active players in the formulation of public policy, but their involvement reflected the growing incidence of legislative regulation and the consequent increase in demand on the appellate judiciary for interpretation and review.¹³⁵ Although critics fearful of popular majorities pressed courts to restrain legislative authority, courts in most instances supported federal and state legislative initiatives.¹³⁶

128. *Id.* at 195-97.

129. *Id.*

130. *Id.* at 195-97, 203.

131. *Id.* at 196.

132. *Id.* at 210.

133. For a recent example, which stresses the “unique centrality” of the courts in the structure of the American state, see Forbath, *supra* note 8, at 1235-36.

134. K. HALL, *supra* note 6, at 226.

135. *Id.*

136. *Id.*

When courts did strike down regulatory legislation, the doctrine most often used in justification was that of substantive due process.¹³⁷ "Substantive due process meant that there existed an irreducible sum of rights that vested in the individual and with which government could not arbitrarily interfere."¹³⁸ Though substantive due process traditionally has been seen as an expression of a judicial desire to protect the wealthy from regulatory legislation redistributing the costs of economic development, Hall argues that in fact it was far more often used to strike down special legislation that gave particular advantages to one interest over another.¹³⁹ Therefore, although decisions invoking the doctrine undeniably "had the distributive consequence of favoring capital," historians also should understand those decisions as affirming "individual rights over special privilege."¹⁴⁰

Although the results belie the claim that courts granted little leeway to legislatures in matters of economic regulation, there is no denying that "the judiciary clung to the notion that they had a special responsibility to protect traditional economic rights"¹⁴¹ and fashioned doctrines such as substantive due process as the means to that end.¹⁴² Retreating from the antebellum period's "flexible, adaptive, and freewheeling view of the law" as a result-oriented instrument, judges came instead to emphasize the "formal procedures that led to a result."¹⁴³ This jurispruden-

137. *Id.* at 232.

138. *Id.*

139. *See, e.g., State v. Santee*, 111 Iowa 1, 82 N.W. 445 (1900) (Iowa law privileged one lamp manufacturer over all others).

140. K. HALL, *supra* note 6, at 234-35, 238. Hall claims that the contrast between historical perception and judicial behavior is particularly acute in the case of protective and labor legislation. *Id.* Historians have generally concluded that state and federal courts savaged legislatures' police power efforts to redistribute the costs of industrialization through protective legislation for women, children, and hazardous occupations. Hall differs:

Freedom to contract was the major constitutional hurdle that all protective legislation had to negotiate. The results of sustained judicial inquiry produced the same results as in the economic regulation cases: judges in a few spectacular instances . . . overturned legislation, but in the vast majority of cases they left these measures and the police powers upon which they rested intact. Only in matters involving unions were the courts consistently hostile.

Id. at 238. Hall's contention, however, attracts no support from the most recent comprehensive research in this field. William Forbath has shown that between 1885 and 1900, American courts struck down 35 protective and labor laws and upheld only 7, and that "by 1920 courts had struck down roughly three hundred labor laws." Forbath, *supra* note 8, at 1132-48, 1237-48.

141. K. HALL, *supra* note 6, at 246.

142. *Id.*

143. *Id.* at 221.

tial formalism was antilegislativ in its implications and clearly sympathetic to judicial review.¹⁴⁴ Nevertheless, formalism did not lead to a wholesale supplanting of legislative authority. Moreover, "judges began to recognize that extrajudicial materials could be useful in understanding the intentions of legislators and in coming to grips with the social implications of the law in action."¹⁴⁵ This recognition, embodied in sociological jurisprudence and associated with the rise of progressivism and its attempts to create a bureaucratic administrative state of scientific experts, began to make inroads on the formalist position in the years after 1900.¹⁴⁶

F. Legal Culture, Professionalization, and Cultural Pluralism

The significance of the interpretive contest between formalism and sociological jurisprudence was heightened because processes of professionalization accompanying law's structural and substantive transformation in the years after 1860 greatly enhanced the authoritative voice of both bench and bar in public discourse on law. By 1920, the legal profession had emerged in its modern form as arbiter of a body of scientific rules—"the 'new high priests' of an increasingly legalistic, industrialized society."¹⁴⁷

Hall describes this "professionalization of the legal culture" by reference to the formalization of occupational qualifications, the growth in scale and transformed organization of law practice, the creation of professional organizations at state and national levels, and the transformation of legal education, all processes under way during the period of 1860-1920.¹⁴⁸ Like previous writers, notably Jerold Auerbach,¹⁴⁹ Hall recognizes that the desires of elite lawyers to reinforce their position and influence in a chang-

144. *Id.* at 221-22. "Appellate judges were supposed to be oracular, to propound impartially a set body of doctrine. When legislative activity, carried out in the name of popular and partisan majorities, interfered with formal legal doctrine, then judges were supposed to strike it down mechanically." *Id.*

145. *Id.* at 246.

146. *Id.* at 223.

147. *Id.* at 225.

148. *Id.* at 211-25, *passim*. Hall's discussion of professionalism draws conceptually on B. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA* (1976). For a more skeptical account, see M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977). See also M. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988). R. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 3-31 (1988), provides an excellent brief evaluation of competing theories of the professions.

149. J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

ing world of practice strongly influenced these processes.¹⁵⁰ Unlike Auerbach, however, he sees that purposefulness directed in a reformist direction toward "a limited agenda with a moderate theme"—professional standards and a scientific and uniform approach to law.¹⁵¹ To Hall, bar association activities were at least as much the expression of a professional group's rational planning, a response to industrialism, as they were symptoms of the group's racism and xenophobia.¹⁵²

In Hall's account, professionalization is the key to the legal culture that emerged in the twentieth century. It was, however, not the only factor, for professionalization was taking place at a moment of profound change in the general culture, and it showed. Social pressures of internal and external mass migration, growing cultural pluralism, and war and national security combined "to raise anew the meaning of the rule of law and to reshape values within the legal culture."¹⁵³ Nativism, for example, expressed itself in increasing attempts at immigration restriction and, during World War I, a patriotic assault on foreign political radicalism. Enactments such as the Espionage Act of 1917¹⁵⁴ indicated how national security measures were to become a major means of expanding federal authority.¹⁵⁵ Internal migration, specifically the movement of rural southern African-Americans into northern and midwestern industrial areas, also brought new cultures and, in reaction, conflict to American cities.¹⁵⁶ Race rioting and instances of overwhelming police racism underlined the problems of local law enforcement.¹⁵⁷

150. Of the newly minted American Bar Association, for example, he says, "The new organization, like local and state bar associations, was purposefully exclusionary." K. HALL, *supra* note 6, at 215.

151. *Id.* at 216.

152. All the same, how Hall comes down on the salience of racial and ethnic prejudice in bar admissions processes is by no means clear. For example, Hall states that "[t]he organized bar, with its elite of corporate lawyers, could urge reforms, but state legislatures were usually sensitive to the demands of their ethnic constituencies for an open and diverse bar. At no time were bar groups permitted to control admission." *Id.* at 257. On the next page, however, we learn that between 1920 and 1940, in response to bar pressures, state legislatures did in fact enact a series of measures tightening admission requirements and that "[e]xclusionary sentiments, rooted in racial and ethnic prejudice, lay behind many of these actions." *Id.* at 258.

153. *Id.* at 248.

154. Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 11, 791-794, 2388, 3241; 22 U.S.C. §§ 213, 220-222, 401-408; 50 U.S.C. §§ 191, 192, 194).

155. See K. HALL, *supra* note 6, at 249.

156. *Id.* at 253.

157. *Id.*

Prohibition further mobilized criminal law in response to cultural diversity, becoming another contributor to the local law enforcement crisis while also adding to federal authority.¹⁵⁸ First, by sustaining prohibition, the Supreme Court confirmed the concept of a federal police power already developing during the Progressive era.¹⁵⁹ Second, by proving a powerful stimulus to organized crime operating on an interstate basis, prohibition prompted the creation of such new bureaucratic and federal institutions as the FBI¹⁶⁰—a development congruent with the progressive model of government.

Hall argues perceptively that ethnicity, crime, and the criminal justice system in urban areas were elaborately interwoven.¹⁶¹ Both crime and the criminal justice system were rooted in the cities' ethnic neighborhoods and offered alternative routes of upward mobility to that population.¹⁶² Each route continually intersected with the other, most notoriously at the level of organized crime's corruption of criminal justice.¹⁶³ Together, however, they represented a culture apart from that of reformers.¹⁶⁴

Just as cultural and racial diversity collided with "the values and assumptions of the legal culture"¹⁶⁵ in the specific area of prohibition, so it challenged those values in the wider arenas of civil liberties and civil rights.¹⁶⁶ Late nineteenth- and early twentieth-century legal and political opinion generally conditioned the enjoyment of civil liberties upon the fulfillment of civic duty, with all the conformist connotations that implied.¹⁶⁷ Growing

158. *Id.* at 250-51.

159. *Id.* at 251.

160. *Id.*

161. *Id.* at 254-55.

162. *Id.* at 254.

163. *Id.*

164. *Id.* at 255. According to Hall,

Most reformers came from outside the ethnic and racial ghettos in which crime was rooted. They only dimly grasped the dynamics of crime in an increasingly heterogeneous society. Their moral values "were not shared by a number of their fellow citizens and their legal values were not shared by politicians and officials." Gambling, liquor, and even prostitution were accepted in many ethnic and black neighborhoods.

Id. (citing Haller, *Urban Crime and Criminal Justice: The Chicago Case*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 305 (M. Friedman & H. Scheiber eds. 1978)).

165. *Id.* at 265.

166. *Id.* at 262-65.

167. For example, in *Patterson v. Colorado*, 205 U.S. 454 (1907), Oliver Wendell Holmes held "that anyone uttering words dangerous to the public interest was susceptible to punishment." K. HALL, *supra* note 6, at 262.

cultural and political pluralism tested that consensus in the prewar years—for example, in Industrial Workers of the World (IWW) free speech campaigns.¹⁶⁸ Legal thought began to shift, however, only when sweeping wartime restrictions on freedom of speech brought the middle classes into the fray.¹⁶⁹ The young Harvard law professor Zechariah Chafee, in particular, was instrumental in persuading Oliver Wendell Holmes to reconsider the import of his “clear and present danger” test, turning it into “a device to protect rather than restrict future civil liberties.”¹⁷⁰ The Supreme Court also responded to pressure from the newly founded American Civil Liberties Union (ACLU) to create first amendment protections against infringements of free speech included in state criminal syndicalism and sedition laws.¹⁷¹

Hall calls the ACLU a “prototype for the public-interest litigation groups” that proliferated after World War II.¹⁷² The National Association for the Advancement of Colored People (NAACP) was another special interest group that was prompted into existence by “[a]n awakening sense of civil rights consciousness”¹⁷³ and that turned to the judicial process to achieve goals that the political process denied.¹⁷⁴ Nor was the work of these groups without reward. Nevertheless, major barriers to racial and ethnic group equality and to civil liberties remained in place. To Hall, for example, the Supreme Court’s acquiescence in the forced relocation of Japanese-Americans during World War II is a clear reminder of how easily “[r]acism, nativism, and national-security hysteria [could influence modern] legal culture in ways that mocked the rule of law.”¹⁷⁵

Yet his conclusion points in another direction. American legal culture at the end of World War II “mirrored the rich diversity

168. In fact, Hall ignores the IWW and generally downplays the prewar period. The leading account of the changes in first amendment doctrine during this period, which Hall does not cite, is Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981). See also Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983). For a perceptive account of the IWW free speech campaigns and their place in IWW legal and political ideology, see S. Zweig, “Free Speech” and the Patterson Silk Strike of 1913: A Question of Limits (rev. ed. Oct. 29, 1990) (unpublished manuscript) (copy on file with the author).

169. See K. HALL, *supra* note 6, at 262; *Abrams v. United States*, 250 U.S. 616 (1919).

170. K. HALL, *supra* note 6, at 263.

171. *Id.* at 264. The Court accepted the incorporation argument in *Gitlow v. New York*, 268 U.S. 652 (1925). See K. HALL, *supra* note 6, at 264.

172. K. HALL, *supra* note 6, at 264.

173. *Id.* at 260.

174. *Id.* at 261-62.

175. *Id.* at 265.

of the general culture, displaying a continuing capacity to adapt, though sometimes imperfectly, general principles of equality and fairness to social change."¹⁷⁶ As importantly, "a belief that the national government should promote individual rights and equality, and an awakening realization of the instrumental relationship between legal and social change," accompanied the tendency toward centralization of authority in the federal system.¹⁷⁷ Minorities in particular saw in the growing authority of the federal courts "the potential for securing protection against local majorities."¹⁷⁸

G. Depression and New Deal

Many of these trends became clear beyond doubt only in the watershed of the 1930's. Before the Depression, Hall argues, the legal culture had given less than complete attention to the currents of social and economic change swirling around it. For this reason, "[t]he Great Depression [became] as much a legal as an economic crisis,"¹⁷⁹ and its product was a legal as well as an economic revolution.

Central to the legal history of the Depression was the New Deal, and central to the New Deal was the question of the proper relationship between politics and law, between the public interest in policies dedicated to recovery and alleviation of want on the one hand and traditional protections of property rights and constitutional separation of powers on the other.¹⁸⁰ Hall argues that New Dealers "assumed that the federal government was responsible for virtually every important phase of the national economy" and further "for promoting the individual well-being of each citizen."¹⁸¹ For its part, the judiciary was split between conservatives opposed to any measures that regulated market conditions or undermined principles of contract and liberals prepared to sanction widespread governmental regulation.¹⁸² The latter were, of course, in the minority.¹⁸³

176. *Id.* at 266.

177. *Id.*

178. *Id.*

179. *Id.* at 271.

180. *Id.*

181. *Id.* at 272.

182. *Id.* at 274-77.

183. *Id.* at 277. Hall remarks on the "massive generational gap . . . between lawyers and politicians of the New Deal and federal and state judges, many of whom by political disposition and training looked to sustain the very values that were slipping away." *Id.* at 271.

The climax of the contest between these two positions came after the 1936 election. By then, the Supreme Court had struck down most of the first New Deal's enabling legislation because the legislation violated separation of powers standards.¹⁸⁴ Nor was the commission regulation and administrative lawmaking of the New Deal's second phase any less vulnerable to criticism based on the traditional scheme of constitutional powers.¹⁸⁵ Confronting this threat on the one hand and possessing a firm mandate from the 1936 election to construct an administrative welfare state on the other, Roosevelt sought to neutralize judicial obstruction with his Court-packing plan.¹⁸⁶ Hall expresses misgivings about the scheme's implications for the rule of law: "Even those supporters of the president who objected to the Court's decisions found in the Court-packing plan a dangerous assault on the idea that law was a neutral body of principles that could be impartially administered."¹⁸⁷

Although the plan was not implemented, it served its purpose in persuading the Court to yield to the new administrative welfare state.¹⁸⁸ In practice, this constitutional revolution turned out to be less sweeping than it seemed at first, for federal courts were still to supervise the activities of the new federal agencies and interpret the statutes in which Congress delegated powers to these agencies.¹⁸⁹ Symbolically, however, the Court had affirmed acceptance of the programs that would come to comprise the core of the American administrative welfare state.¹⁹⁰ "More

184. *Id.* at 276-77.

185. *Id.* at 276.

186. *Id.* at 281-82.

187. *Id.* at 282.

188. *Id.* at 282-83.

189. *Id.* at 284.

190. The Court's new restraint in matters of economic regulation did not mean restraint across the board. Taking advantage of the extensive discretionary powers to set its own agenda granted in the Judiciary Act of 1925—"the most important piece of judicial legislation passed in the twentieth century"—the Court signalled an intention to concentrate in constitutional law on matters of civil liberties and civil rights. *Id.* at 277. The Court would defer to legislatures in matters of economic policy, but apply special scrutiny to legislative action involving noneconomic rights. *Id.* at 284. Justice Harlan Fiske Stone's famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), was the point of departure. Stone wrote that when legislative action preferentially affects individual liberties and rights, special judicial attention is necessary to inquire "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.*

so than ever before in U.S. history, lawmakers emerged as social engineers, who believed that government had a positive responsibility to fix a basic standard of living and to smooth out the erratic swings in the business cycle."¹⁹¹

H. Liberal Legalism

The trend toward the centralization of lawmaking and policy-making power in the national government; the development of "a relativistic and instrumentalist view of law"¹⁹² and of an administrative welfare state to implement it; the Supreme Court's retreat from a dogmatic defense of economic rights and its new sensitivity to noneconomic rights—in all these respects, Hall concludes, the 1930's announced the emergence on the American legal scene of liberal legalism, which became the dominant force in American legal culture after World War II. Hall defines liberal legalism—"an inchoate and largely unarticulated concept"¹⁹³—more or less as the sum of the reform impulses that had preceded it. "[I]n its essence it fused the social reformist impulse of Progressivism, the relativism and instrumentalism of legal realism and sociological jurisprudence, and the regulatory responsibility of the state associated with the New Deal."¹⁹⁴ This fusion "held forth the promise of broad-scale social justice by relying on the administrative-legal process and judicial power to resolve conflict among contending social interests."¹⁹⁵ Under its influence,

191. K. HALL, *supra* note 6, at 284. Hall's description of the birth of the American social welfare state is inadequate on two counts. First, Hall associates its appearance and early development exclusively with the New Deal and neglects the domestic impact of World War II. Second, Hall offers little in the way of critical analysis of the American social welfare state's inadequacies and skeletal nature when compared with welfare states elsewhere.

192. *Id.*

193. *Id.*

194. *Id.* (citing P. IRONS, *THE NEW DEAL LAWYERS* 295 (1982)).

195. *Id.* at 285 (citing P. IRONS, *supra* note 194, at 295). Hall notes, quite correctly, that such reliance on the administrative-legal process first required the establishment of an effective consensus on the acceptability of the administrative welfare state and points to the passage of the Administrative Procedure Act of 1946 (APA) as a key component in creating that consensus. *Id.* at 303-04. Hall's description of the APA, however, is rather bloodless: the Act "imposed procedural order on often unruly administrative agencies and facilitated the expanded role of lawyers in the regulatory state"; it "rationalized and harmonized the role of administrative bodies . . . dividing the administrative process into two broad categories: rulemaking and adjudication." *Id.* This description fails to convey adequately the role of administrative reform strategies in the antiwelfare state politics of the 1940-48 period and the relationship between the APA and earlier explicitly hostile attempts at administrative law reform such as the 1940 Walter-Logan Bill. *See generally*

Americans after World War II "expected more and came to rely more on their legal system," and by the mid-1960's this resulted in a "general expectation of justice" and an accompanying "general expectation of recompense" for wrongs.¹⁹⁶

Hall's penultimate chapter provides details of this postwar explosion in demand for law and of the resulting qualitative changes in the legal culture.¹⁹⁷ For example, the profession grew dramatically and diversified somewhat in composition and objectives.¹⁹⁸ Although the overwhelming trend in practice was toward consolidation in ever larger corporate firms, younger lawyers helped start a countertrend toward public interest law, specializing in "civil rights, poverty, consumer rights and environmental issues."¹⁹⁹ In the 1960's, the federal government's decision to underwrite legal service delivery to help fight the War on Poverty complemented and encouraged this new mentality.²⁰⁰ "Federally sponsored legal aid became the cutting edge of the public interest law movement."²⁰¹

Postwar developments in private law displayed the themes of liberal legalism. On one hand, property, contract, and tort law saw a deemphasis of the salience of private bargaining.²⁰² Hall argues that this deemphasis was in large part a consequence of the "constitutional revolution of 1937, which dethroned substantive due process and freedom to contract [and] enhanced legislative and administrative intervention into society."²⁰³ That intervention, however, became the basis for arguably the most significant legal development of the postwar period: namely, the welfare state's creation of entirely new species of property in the shape of entitlements.²⁰⁴ Liberal public interest lawyers claimed that special constitutional protections tantamount to recognition of an entitlement as an inviolable right should shield certain

R. CHAPMAN, *CONTOURS OF PUBLIC POLICY, 1939-1945* (1981) (background to postwar consensus on the administrative state). The APA's impact on agencies targeted by Congressional conservatives, such as the NLRB, was immediate, and the Act was at least as important in confirming the substantive limits of the administrative process, later to be fleshed out in greater detail by specialist legislation like the Taft-Hartley Act, as it was in regularizing procedure. *Id.*

196. K. HALL, *supra* note 6, at 308 (citing L. FRIEDMAN, *TOTAL JUSTICE* 43 (1985)).

197. *Id.* at 286-308.

198. *Id.* at 288-89.

199. *Id.* at 289.

200. *Id.*

201. *Id.*

202. *Id.* at 297, 291-99, *passim*.

203. *Id.* at 292.

204. *Id.*

recipients (mainly dependent children, the poor, unwed mothers, and veterans) from state caprice.²⁰⁵ In *Dandridge v. Williams*,²⁰⁶ however, the Supreme Court held "that most entitlements were the product of social and economic regulation that state and federal government were free to exercise as long as they did so on a reasonable basis,"²⁰⁷ and, thus, the government could revoke them. "Simply being poor . . . did not grant a person any special claim to constitutional protection."²⁰⁸

The late 1960's saw the beginnings of an erosion of a quarter-century of consensus on the value of the administrative welfare state.²⁰⁹ "Consumer and environmental advocates complained that businesses under regulation had captured their regulators,"²¹⁰ whereas business claimed that "agencies had driven up costs by imposing unworkable and costly regulations."²¹¹ For its part, the federal judiciary began to question anew the extent of due process in agency rulemaking and expert adjudication.²¹² The upshot of these developments was the growth of the public interest law movement that intended to "recapture" regulatory agencies for the public interest.²¹³ The late 1970's and early 1980's saw a different development in the form of a "market efficiency" deregulation drive in response to sagging productivity, inflation, and loss of market share.²¹⁴

205. *Id.*

206. 397 U.S. 471 (1970).

207. K. HALL, *supra* note 6, at 292.

208. *Id.* We should note, however, that the Court did establish that the fourteenth amendment's due process clause afforded recipients of welfare benefits procedural protection against administrative terminations of benefits. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). Unfortunately, Hall does not discuss *Goldberg*.

209. K. HALL, *supra* note 6, at 304.

210. *Id.* at 304-05.

211. *Id.* at 305.

212. *Id.* at 306.

213. *Id.* at 306-08.

214. *Id.* at 307. Although Hall does not make this connection directly, new developments in legal theory have clearly been related to the collapse of the postwar consensus on the administrative regulatory state. The 1970's and 1980's have seen the growing influence of the "law and economics" school, which holds that law should be (and that common law historically has been) based on the efficient operations of the market, and of the "critical legal studies" movement, professing antagonism both to the key discourses of the administrative welfare state—liberal legalism and policy science—and to the law and economics alternative, and seeking instead to develop strategies of personal and group empowerment. The radically different theoretical trajectories of these two movements are illustrated in their early texts, including R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972) and *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kiarys ed. 1982). M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987), offers a critical appraisal of law and economics in the course of a sympathetic but thoroughly academicized account of CLS scholarship.

Hall claims that both the critique of the regulatory state and the deregulatory initiatives it spawned have added up to "more show than substance."²¹⁵ Examined in historical perspective, the administrative welfare state has not produced any dramatic alteration in social relations. It has forced no redistribution of wealth or social power.²¹⁶ Liberal legalism's regulatory state has been "a means by which to restrict unacceptable activities rather than a program of planned social activity."²¹⁷ Nor has the "Reagan Revolution" produced any far-reaching alterations in the nature of the state. As throughout his book, Hall emphasizes the evolutionary character of legal development when seen in historical perspective. And in historical perspective, "the major features of the legal system [in the 1980's] seemed remarkably unchanged and wholly connected to trends extending back at least to the Progressive era."²¹⁸

I. The Imperial Judiciary

Considered substantively in *The Magic Mirror*, the postwar decades appear to demonstrate a more marked transformation in American law as federal courts, and in particular the Supreme Court, reflected and promoted "the heightened sense of rights consciousness that pervaded the contemporary United States."²¹⁹ This "substantive liberal jurisprudence"²²⁰ left its clearest mark in the areas of civil liberties and civil rights. In civil liberties,

215. K. HALL, *supra* note 6, at 307.

216. For example, government controls over property (zoning and landlord-tenant reforms) were "clearly within the broad traditions of U.S. legal history and did nothing to redistribute property between haves and have-nots." *Id.* at 294.

217. *Id.* at 308. This conclusion is markedly at variance with Hall's earlier contention that Depression-spawned liberal legalism had turned lawmakers into "social engineers." *Id.* at 284; see *supra* note 191 and accompanying text. If indeed the one did become the other in the course of the postwar epoch, it suggests the distinct possibility that American welfare state ideology was marked by the same substantive degeneration that British social democratic welfarism exhibited during this period. For a succinct sketch of postwar British welfarism, see I. TAYLOR, *LAW AND ORDER: ARGUMENTS FOR SOCIALISM* (1981), particularly pages 36-85.

218. K. HALL, *supra* note 6, at 308.

219. *Id.* at 309.

220. *Id.* at 311. In reaction to the "process jurisprudence" of the 1940's, which emphasized the limits to the judiciary's role in a democratic polity, substantive liberal jurisprudence represented a strategy of liberal activism. *Id.* By the 1970's, substantive liberal jurisprudence had generated its own reaction, as debate about judicial review and judicial power shifted increasingly toward original intent, accompanied by growing criticism of the "imperial judiciary." *Id.* (citing Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 38 (1981)).

the Court pioneered innovations in areas of freedom of speech, particularly libel and pornography, in church-state relations, in criminal procedure, and in privacy. Here, Hall concludes, judicial review has proven to be an effective instrument for judicial policymaking, one "by which the justices have restrained majority will in order to preserve individual liberty."²²¹ Efforts to restrict the judiciary's capacity so to act have generally failed, underscoring that, on the whole, "Americans seem to approve its actions."²²²

Civil rights saw the NAACP's assault on *Plessy v. Ferguson*²²³ climax in the 1954 school desegregation cases²²⁴ and in the Court's careful direction the following year that the principles enunciated in its original *Brown* decision be implemented "with all deliberate speed."²²⁵ Notwithstanding the Court's caution, white opposition developed quickly, and by the early 1960's civil rights had become a major battleground that culminated in the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965.²²⁶ These initiatives, together with federal judicial and police enforcement, added up to "[a] fundamental legal revolution Constitutional law in 1987 was substantially different on matters of race relations than it had been in 1945 and radically different from what it had been in 1896."²²⁷ Hall notes, however, that even though courts ended de jure segregation, "de facto segregation persisted."²²⁸

Gender was the other major area of social relations to feel the impact of substantive liberal jurisprudence, though this was a late-breaking development.²²⁹ As late as 1961, while the Supreme Court was busy dismantling the law of race-based discrimination, it still found in *Hoyt v. Florida*²³⁰ that a state could exclude women from obligatory jury service "because of their place at 'the center of home and family life.'"²³¹ Nor, indeed, did social changes in women's roles during the 1960's have an appreciable

221. K. HALL, *supra* note 6, at 322.

222. *Id.*

223. 163 U.S. 537 (1896).

224. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

225. K. HALL, *supra* note 6, at 324.

226. *Id.* at 325-26.

227. *Id.* at 327.

228. *Id.*

229. *Id.* at 327-30.

230. 368 U.S. 57 (1961).

231. K. HALL, *supra* note 6, at 328 (quoting *Hoyt*, 368 U.S. at 62).

impact on women's disadvantaged legal position, for the "larger culture" continued to consider working women "less than full-fledged members of the work force."²³² Change began only after women founded the National Organization for Women (NOW) in 1966,²³³ with "one of its principal goals to build a legislative foundation for women's rights, while pursuing a litigation strategy in the federal courts that would make gender-based discrimination as subject to searching judicial inquiry as was racial discrimination."²³⁴

Gender and race together provided the forum for affirmative action—"[t]he most controversial contemporary aspect of civil rights law."²³⁵ According to Hall, as long as it was confined to equal opportunity measures that did not intrude on nonminorities' rights, affirmative action "seemed wholly justified as means of compensating for wrongs done in the past."²³⁶ Measures that took race and sex into consideration "affirmatively" in the distribution of benefits, however, were "[m]uch more controversial One person's affirmative action was another's reverse discrimination."²³⁷ In *Regents of the University of California v. Bakke*,²³⁸ the Supreme Court held that race could be taken into consideration in recruitment or award of benefits,²³⁹ but rejected the use of "rigid" quotas.²⁴⁰ Since *Bakke*, however, the Court has approved *private* affirmative programs,²⁴¹ minority set-asides in public works contracting,²⁴² and preferential promotion programs designed to advance African-Americans and women into positions in which they have previously been underrepresented.²⁴³

Though the path it has followed has been "somewhat tortured,"²⁴⁴ Hall concludes, the Court's affirmative action jurisprudence reveals how "recompense for past harms, rights

232. *Id.*

233. *Id.* at 329.

234. *Id.* Hall notes that although the Court now applies equal protection standards rigorously, it has not extended to gender discrimination the standards of scrutiny it uses in cases of racial discrimination. *Id.*

235. *Id.* at 330.

236. *Id.*

237. *Id.*

238. 438 U.S. 265 (1978).

239. *Id.* at 316-17.

240. *Id.* at 318.

241. *See* *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

242. *See* *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

243. *See* *United States v. Paradise*, 480 U.S. 149 (1987); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

244. K. HALL, *supra* note 6, at 331.

consciousness, substantive liberalism, and judicial power have converged to reshape American legal culture."²⁴⁵ His judgment on the merits is characteristically guarded. It is unclear, he says, "whether the justices' actions have moved U.S. law toward ideals for which the nation stood in 1787 and for which its citizens would want to stand today."²⁴⁶ But his conclusion is cheerful enough, if a bit vapid. The very fervor of current debate "is itself a sign of the health of the constitutional order and of the continuing connection between social and legal change."²⁴⁷ Culture wars notwithstanding, the state of the Union, it appears, is sound.

IV. LOOKING DOWN TO CAMELOT

But in her web she still delights
To weave the mirror's magic sights,
For often thro' the silent nights
A funeral, with plumes and lights
And music, went to Camelot;
Or when the moon was overhead,
Came two young lovers lately wed:
"I am half sick of shadows," said
The Lady of Shalott.²⁴⁸

245. *Id.* That the outcomes in recent Supreme Court cases have altered quite dramatically in almost every respect the decisional basis upon which this evaluation rests is surely unarguable. See *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (denying that 42 U.S.C. § 1981 provides a cause of action for racial harassment relating to employment conditions); *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (permitting challenges to consent decrees in employment discrimination cases); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (reinterpreting the scope of title VII of the 1964 Civil Rights Act in regard to disparate impact claims); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (invoking fourteenth amendment to apply standards of strict scrutiny to state and local minority set-aside ordinances). Erwin Chemerinsky has interpreted the course of these and other recent decisions as follows:

The decisions of [the 1988-1989] Term will profoundly affect human lives. Many women will find it harder to obtain abortions; more workers will be subjected to drug tests; fewer civil rights plaintiffs will prevail, perhaps lessening the deterrent to employment discrimination; more individuals, in particular juveniles and the mentally retarded, will be executed. For conservatives, this is a year of rejoicing. The Reagan legacy of a conservative Court seems secure for many years to come. For liberals, it is a time of despair. The 1988-1989 Term was devastating for civil rights and civil liberties.

Chemerinsky, *The Supreme Court, 1988 Term Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 45 (1989).

246. K. HALL, *supra* note 6, at 332.

247. *Id.*

248. A. TENNYSON, *supra* note 1.

For Hall, to study legal history is to study "the nature, direction, and velocity of legal adaptation" to social circumstances.²⁴⁹ The results show a record "of systematic change, of law and society reacting to and reinforcing one another,"²⁵⁰ with social change determinative in the final analysis. The legal system has been "more a river than a rock, more the product of social change than the molder of social development."²⁵¹

Hall arrives at these final conclusions in the same voice of judicious deliberation that characterizes the rest of the book. Throughout *The Magic Mirror*, disagreements are muted, contrasting interpretations balanced, the evidence weighed and summed up. When the summary cannot surmount evidentiary or interpretive contradictions, Hall leaves the contradictions in the text.²⁵²

Yet as I have argued, this book does seem to contain a clear interpretive position—one animated by the values of liberal legalism and committed to the rule of law, one that sees the story of law in American history in essentially the functionalist, distributive, and responsive terms of Willard Hurst's "Wisconsin School." As Michael Grossberg has recently summarized, law in that view was "a rational instrument that could be seized by members of the dominant middle class" to achieve consensual goals of "economic expansion and individual liberty."²⁵³ Hall's restatement adds descriptive flesh where predecessors left bones. He develops regional variation as a source of persistent diversity in American law. He takes ideas more seriously. He builds greater pluralism into both sides of the Wisconsin School's equation: more hands clutch for the instrument, particularly in the twentieth century, and their owners' motives are more varied. And he addresses law's repressive potentialities—the "dark side,"²⁵⁴ so to speak, of the force. All this muddies the waters somewhat. Yet at the end of it all, as we have seen, interest groups and instrumentalism supply the answers and the rule of law provides the framework.

Hall's restatement appears motivated, in part, by a desire to counter the considerable criticism directed at the Wisconsin par-

249. K. HALL, *supra* note 6, at 6.

250. *Id.* at 336.

251. *Id.*

252. See, e.g., *supra* notes 177-78 and accompanying text (discussing the penultimate and final paragraphs of Hall's chapter, "The Formation of Modern Legal Culture"); see also K. HALL, *supra* note 6, at 127-28 (discussing the Horwitz thesis).

253. Grossberg, *supra* note 9, at 366-67.

254. K. HALL, *supra* note 6, at 336.

adigm, and more generally at the ideology of liberal legalism that is its inspiration, by scholars writing from the CLS perspective. Negative references to that perspective in *The Magic Mirror* are kept brief, and, as always, balanced judiciously by implied reservations about Hurst's views.²⁵⁵ Hall's bibliographic essay,²⁵⁶ however, points his audience to more detailed comments elsewhere, which leave no doubt that Hall finds the questions raised and conclusions drawn by CLS historians to be highly distasteful.²⁵⁷ Their attitude toward the rule of law attracts particular condemnation: "These critics of our legal system," he states in one of *The Magic Mirror's* few direct comments on legal historiography, "insist that the rule of law is so much humbug."²⁵⁸ Expanding on this elsewhere, he argues that by refusing to recognize that constitutional values lie at the core of American legal development, these critics ignore how constitutionalism acts "as a limitation upon government and as a safeguard for the protection of individual rights."²⁵⁹

255. *Id.* at 7.

256. *Id.* at 362-76.

257. CLS historians, he has stated with little qualification, reject "traditional canons of objectivity and neutrality," practice politics and not history, have no interest in scholarly dialogue, and in the main produce shabby scholarship beset by fatal methodological weaknesses which generally amounts to "little more than a rationalization of contemporary radical legal ideology in the guise of scholarship." Hall, *American Constitutional and Legal History*, *supra* note 52, at 38-39. Their whole approach is destined for "scholarly irrelevance and public apathy." *Id.* at 39. Hall's opinions appear to be based largely on William Nelson's assessment of CLS, since subjected to charming but nonetheless trenchant criticism by Robert W. Gordon. See THE LITERATURE OF AMERICAN LEGAL HISTORY, *supra* note 62; Gordon & Nelson, *Exchange*, *supra* note 45, at 157-68 (Nelson); *id.* at 139-56, 169-83 (Gordon).

258. K. HALL, *supra* note 6, at 7.

259. Hall, *American Constitutional and Legal History*, *supra* note 52, at 39. To criticize CLS historians for concentrating on private law and ignoring the public law-private law nexus seems a little unfair when that has actually been a feature of legal historical writing in general, including the writing of the Wisconsin School. In any case, however, Hall is equally disdainful of those writing from a CLS perspective who *have* embarked on a study of constitutional values. In Hall, *supra* note 9, Professor Hall described recent calls for the development of a "new" constitutional history informed by critical scholarship as an attempt "to bring to bear historical insights that apparently will motivate the dispossessed to lift themselves to positions of equality, even if their actions require overthrowing the existing constitutional order." *Id.* at 236. He dismisses such work as no more than "history as . . . practical politics," to be contrasted with "objective" or "scientific" history, by which he means history written according to the, ideally quantitative, methodologies of the behavioral sciences. *Id.* at 234-36. Well honed quantitative methods, Hall argues, can bring an objective and scientifically based understanding of law in its social context. *Id.* at 238. On a "new" constitutional history, see Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* 74 J. AM. HIST. 1013 (1987). See also D. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE*

In fact, much of Hall's book, as well as the books of other Wisconsin School historians, demonstrates the contingency of individual rights and limitations upon government. Whether the subject is property relations, race relations, domestic relations, sex/gender relations, or employment relations, one hardly finds a consistent paradigm of individual rights affirmation at the core of legal practice. Instead, one finds a host of competing paradigms—community, efficiency, family, security, civility, duty, authority, individual autonomy—offered up in the course of ongoing struggles among individuals and groups, both for relative advantage and for self- and other-definition, each paradigm a contingent justification of outcomes requiring that one individual or group's claim limit the freedom or infringe upon the rights of another.²⁶⁰ Further, as Hall shows, governments participate in those struggles too. When they do so, they mobilize police powers that at times have indeed been seen as subject to limitation in respect of individual rights, but at other times have been subject ultimately to no such restraint at all.²⁶¹

INDEPENDENCE (1989); Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987).

Given the epistemological currents running for most of the last century across all fields of human knowledge, such a bald restatement of scientific faith in the objectivity of positivist methodology is, quite simply, astonishing. On these currents, as they relate to recent developments in legal theory, see Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987). For other recent discussions of "objectivity" and "science" in the particular realms of law and society studies and history, see P. NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 415-629 (1988); Sarat & Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97 (1988); Silbey & Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165 (1987).

260. Mark Kann has commented recently that although individualism has become the official transcript of public discourse in America, "[a] closer reading of our history suggests that individualism actually symbolizes a remarkably small segment of American life." Kann, *Individualism, Civic Virtue, and Gender in America*, 4 STUD. AM. POL. DEV. 46, 46 (1990). He calls it "a legacy claimed primarily by middle-aged males who have settled into family life, achieved some economic success, and feel they have earned the right to resent the authority of others. Individualism *does not* describe the historical norms or cultural practices of women and young men." *Id.* Kann indeed posits the thesis "that the individual rights of men were thought contingent on the sacrifices of women and young men," *id.* at 47, and that the upshot is not an individualistic America but rather "a persistent web of engendered obligations that I refer to as liberal patriarchy." *Id.* at 81. Advancing a similar critique from a somewhat different angle, Martha Minow has pointed out that not only is the received version of family law as a story of progress toward the liberal commitment to individual rights deeply flawed, but it also cannot account for women's decisions to *forego* the paradigm of individualism in instances when it was made available to them in favor of other role choices emphasizing values of connectedness and caretaking. See Minow, *supra* note 33, at 827-39.

261. For example,

It seems to me difficult, therefore, to demonstrate that as a matter of historical practice a consistent tradition of limitations on government and affirmations of individual rights lies at the core of American legal culture. Rather, much of the recent work of legal historians has helped underscore the inconsistencies of practice that lie at that core. Nevertheless, Hall wants to retain the determinate rule of law inviolate. Hence his insistence that, notwithstanding the contrary evidence, such a tradition is the core of American law and *must* be recognized as such.

There are some indirect parallels here with the figure from whom Hall takes his title. As I mentioned at the outset, the metaphor of "the magic mirror" is borrowed from a speech that Oliver Wendell Holmes, Jr., gave at a Suffolk Bar Association dinner in 1885.²⁶² In fact, the mirror was an incidental rather than dominant metaphor of Holmes' speech. In this speech, law to Holmes was the lone and somewhat shrouded figure of a woman. In one guise, she was "a mistress only to be wooed with sustained and lonely passion,"²⁶³ with success only to the most committed. In another, she was "a princess mightier than she who once wrought at Bayeux, eternally weaving into her web dim figures of the ever-lengthening past."²⁶⁴ In yet a third, she was a hooded woman "sitting by the wayside," who was "the providence and overruling power" of a drama in which Holmes and his brethren were the players. "Fair combatants, manfully standing to their rights, see her keeping the lists with the stern and discriminating eye of even justice. The wretch who has defied her most sacred commands . . . finds that his path ends with her, and beholds beneath her [overshadowing] hood the inexorable face of death."²⁶⁵

In this imagery, law is removed from contact with the world—one could hardly think of a metaphor more effective in conveying the separateness of law as an ideal, given the utterly male world

The recognition that there exist rights of life, liberty, property and happiness which are possessed by the individual and which are guaranteed against arbitrary and unreasonable invasion by other persons, public or private, does not imply that these rights are absolute in character . . . This is so for the reason that, more fundamental than the right of the private individual, is the right of the public person, the State, and more important than the convenience or even the existence of the citizen, are the welfare and life of the civic whole.

W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1588 (1929).

262. See OCCASIONAL SPEECHES, *supra* note 3.

263. *Id.* at 21.

264. *Id.* at 22.

265. *Id.*

of the late nineteenth-century bar. Isolated from human weaknesses, law is knowable, if at all, "only . . . by straining all the faculties by which man is likeliest to a god."²⁶⁶ To practice law was a different matter: that was to plunge oneself "deep in the stream of life."²⁶⁷ But law herself remained apart, her inexorable power derived from her lonely autonomy.

Two of the metaphors Holmes chose for his Suffolk Bar Association speech—the magic mirror and the weaver of the web—are clearly recognizable as allusions to Alfred Lord Tennyson's superb Arthurian romance, *The Lady of Shalott*. Deep within an isolated castle standing on an island in a river not far from Camelot lives the Lady of Shalott, eternally weaving into her web the "shadows of the world" beyond the castle that appear to her as reflections in a magic mirror. "Half sick of shadows," she is attracted one day by the sight of Lancelot in the mirror and by the sound of his voice. She turns from the mirror to gaze for the first time upon the world outside her castle and is struck down by a curse. Dying, she steps into a barge which drifts down the stream to Camelot, where her corpse confronts a startled and fearful population.

To Holmes, it would appear, the attraction of the story of the Lady of Shalott was what he perceived as its theme of romantic isolation. At any rate, those are the images he chose from the poem when depicting the law in his speech. At first sight, this choice strikes one as at odds with the Holmes who wrote in *The Common Law*²⁶⁸ of a law whose life was experience. It also seems at odds with the Holmes who, in the first lines of *The Path of the Law*,²⁶⁹ offered what looked like a deliberately demystified account of law as an object of study: "When we study law we are not studying a mystery . . . [Rather,] in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees."²⁷⁰ Hence, the study of law was an exercise in "the prediction of the incidence of the public force through the instrumentality of the courts."²⁷¹

266. *Id.* at 21.

267. *Id.*

268. See O.W. HOLMES, *supra* note 4.

269. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

270. *Id.* at 457.

271. *Id.*

Holmes the demystifying pragmatist, however, was also Holmes the detached idealist.²⁷² In *The Path of the Law*, for example, Holmes interrupted himself throughout with a countertext of disclaimers. "I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism," Holmes stated at one point.²⁷³ Midway through his speech he paused again to reassure his audience that he did not harbor "disrespect" of the law, that he venerated the law. And at the end, Holmes invoked the sublime: through the study of the law's "remoter and more general aspects . . . you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."²⁷⁴

Holmes' idealism was conservative rather than transformative. The situated quality of his law—"not a Hegelian dream, but a part of the lives of men"—lent it a "Burkean and cautionary," rather than a liberatory, character, one reinforced by a strong streak of romantic antiquarianism.²⁷⁵ This tempered his pragmatism and, I would argue, restored a quality of removal and apartness to law as he understood it.²⁷⁶

Tennyson, however, read his poem differently than did the Justice. For Tennyson, the isolation in which the Lady of Shalott lived was sterility incarnate. He wrote to laud her conscious decision to reject the pointlessness of a life spent eternally apart, not to offer a Burkean warning against meddling with fate. "The new-born love for something, for some one in the wide world from which she has been so long secluded, takes her out of the region of shadows into that of realities."²⁷⁷ This was a poem about

272. On Holmes' personal and intellectual isolation, see Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 227-33 (1964) and Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

273. Holmes, *supra* note 269, at 459.

274. *Id.* at 459, 473, 478.

275. *Id.* at 473; Grey, *supra* note 272, at 812-13.

276. As commentators on Holmes' jurisprudence have pointed out, his positivism, although demystifying law, found other ways to distance it from humanity. Take, for example, Holmes' desire to see law expressed in hermetically sealed language. "For my own part," he wrote, again in *The Path of the Law*, "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law." Holmes, *supra* note 269, at 464. Holmes' highly conceptual doctrinal writing may be seen as another form of distancing. Rogat, *supra* note 272, is excellent on these points. See also Hartog, *supra* note 33, at 932.

277. 1 H. TENNYSON, ALFRED LORD TENNYSON: A MEMOIR 117 (1897); see also D. STAINES, TENNYSON'S CAMELOT: THE *Idylls of the King* AND ITS MEDIEVAL SOURCES 10-12 (1982).

human agency, about overcoming a distorted existence removed from life and nature.

Professor Hall's text reads Tennyson's poem through Holmes' eyes. Like Holmes, I think, Hall does not wish to see the mirror crack. To preserve it, he rejects those who would tempt him to relocate law in the world outside the castle—"a teeming jungle of plural, contradictory orders, struggling for recognition and dominance."²⁷⁸ His is a judicious apprehension of risk. Sadly, it is also an apprehension of vitality.

POSTSCRIPT

They crossed themselves, their stars they blest,
 Knight, minstrel, abbot, squire and guest.
 There lay a parchment on her breast,
 That puzzled more than all the rest,
 The wellfed wits at Camelot.
 "The web was woven curiously
 The charm is broken utterly,
 Draw near and fear not—this is I,
 The Lady of Shalott."²⁷⁹

278. Gordon & Nelson, *Exchange*, *supra* note 45, at 181 (Gordon).

279. This final stanza of Tennyson's poem was omitted from the 1842 version after John Stuart Mill's review of the original in 1 LONDON REV. 402 (1835) criticized it as redundant. See D. STAINES, *supra* note 277, at 11.