Kermit L. Hall

The MAGIC MIRROR

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KERMIT L. HALL

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Preface

This book is about the history of American legal culture and the law in action. It is not a technical history of substantive law, nor is it an intensive study of case law development in either private or public law. That important task remains to be done, and surely we would know a good deal more about American legal culture if we had a better understanding of the law's technical interstices. This book, however, has a different purpose: to elucidate the interaction of law and society as revealed over time through the main lines of development in American legal culture. Thus, much of what follows seeks to fit legal change with social, economic, and political developments from the first English settlement to the present.

This is a book of synthesis and interpretation. What follows expresses, I hope, our best current understanding about the evolution of American legal culture. One of the reasons it is possible to write such a book is that since World War II, and especially since the early 1960s, research and writing in legal history—of both private and public law, of legal and judicial institutions, and of attitudes and values toward the law—have exploded. Yet much remains to be done. There are huge gaps in our knowledge about the nation's legal past. We have no history of substantive criminal law, and only the beginnings of work in contract, tort, and procedure. We know far more about the functioning of the Supreme Court than we do about the day-to-day business in the thousands of lower state and local courts that mete out justice in matters such as medical malpractice, homicide, and speeding automobiles. Moreover, although legal historians have lavished attention on courts and judges, we still have no good history of the rise and impact of regulatory bodies and of administrative law. American historians have preferred, despite the repeated admonitions of James Willard Hurst, to treat legislatures—one of the greatest sources of lawmaking authority in the American system—as political rather than legal entities. We know the most about nineteenth-century legal culture; we know far less about the beginnings of American law in the seventeenth and eighteenth centuries, and its more recent manifestations in the twen-

tieth century. A good deal more attention has been given in the past decade or so to the history of the civil law in Louisiana especially and the Southwest more generally, but we still have only a vague appreciation of the contributions of civil law to our common law traditions. Important new work has appeared dealing with legal developments in the South and West; however, much of the best research has focused on New England, the Middle Atlantic states, and one Middle Western state—Wisconsin. In short, attempting to write a synthesis of American legal culture is a huge presumption, not just because of the scope of the subject but because so much remains to be done before historians can reveal that past with authority.

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. This book, of course, is not the first effort at such integration. Lawrence M. Friedman's *A History of American Law,* which first appeared in 1973 and was issued in a somewhat revised second edition in 1985, audaciously summarized what was then known about the history of American legal culture. Legal historians of all stripes owe Friedman an enormous debt; he played the vital role of constructing a broad-gauged sociolegal history of American law. This book, of course, is fashioned along the same lines; it, too, is about law and society. Moreover, whatever its limitations, this book is that much better because of Friedman's pioneering efforts. While similar in approach to Friedman's study, though, this book is fundamentally different in its organization, which is fitted much more closely to the main lines of the historiography of American history, and in its more systematic treatment of the twentieth century. On the whole, as the title suggests, this is a book about law in American history rather than strictly a history of American law. The book also combines themes of private and public law, of criminal justice and social control, of minority rights and majority control, and of political power and legal legitimacy far more explicitly than does Friedman.

I have no qualms about having written this book. But I do have considerably more humility than when I began it—humility based on admiration for Friedman's synthesizing efforts, for social historians who seek to extract generalizations from legal materials, and for legal historians who have accomplished so much in so short a time, but who have, it is now clear to me, so much left to do.

I tackled this project with a good number of friends. Over the several years that were required to complete it, many of them have surely grown weary of seeing me at their doors with a handful of manuscript. Nancy Lane of Oxford University Press, who originally proposed this project to me, probably wishes I had shown up at her door earlier. She has shown remarkable patience and great kindness, but she has been, when necessary, a demanding yet supportive editor. I have learned a great deal from several friends who doubtless concluded long ago that I was too early and too often at their doors with some or all of the manuscript. John W. Johnson, Paul L. Murphy, and James W. Ely, Jr., read the entire manuscript and provided valuable interpretive insights while spotting many egregious errors of fact. David Colburn, Augustus Burns III, and Jeffrey Adler read and commented on various parts of the manuscript, and Burns was especially helpful in breathing life into often-limp prose. Laura Kalman read and commented on all of the twentieth-century chapters, and she forced me to rethink and reorganize much of that material. Mel Leffler was supportive as always.

Without institutional support, this book would still be a glimmer in my mind's eye. Dean Jeffrey Lewis of the University of Florida College of Law provided a place and resources to get this project under way, and Rick Donnelly, Bob Munro, and Pam Williams of the University of Florida Legal Information Center were unstinting in locating materials. David Colburn, chair of the department of history at the University of Florida, has created the kind of atmosphere that respects scholarship in general and the study of legal history in particular. Most of the rewriting for this book was carried out during a year as a visiting scholar at the American Bar Foundation. I am indebted to Jack Heinz and Bill Felstiner for the opportunity to draw on their fine resources. While at the Bar Foundation, I benefited from the wonderful intellectual support of Ray Solomon (who unselfishly shared his considerable knowledge of twentieth-century legal history with me), Stephen Daniels, Lori Andrews, Bob Nelson, and David Rabban. John Flood was a relentless (and therefore therapeutic) squash partner during the year in Chicago.

To all of these persons and institutions I express my greatest appreciation and admiration. They are in the well-deserved position of deserving credit for whatever is of value in this book while bearing no responsibility for any errors of fact and interpretation that may follow.

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K.L.H.

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The Magic Mirror

Introduction

What is Legal History? A Magic Mirror

"This abstraction called the Law," Justice Oliver Wendell Holmes, Jr., once observed, is "a magic mirror, [wherein] we see reflected, not only our own lives, but the lives of all men that have been!"[1] Holmes believed that this "magic mirror" offered historians an opportunity to explore the social choices and moral imperatives of previous generations. This book is about what that magic mirror reveals to us; it is about law, constitutions, legal institutions, and the idea of the rule of law as separate subjects and as part of our social history.

The contemporary definitions of law fully stress its connection to society. The dictionary is very direct, describing the law as "a rule established by authority, society, or custom . . . governing the affairs of man within a community or among states. . . ."[2] The legal scholar Donald Black offered an even shorter definition. He described law as "governmental social control."[3] In sum, law is a system of social choice, one in which government provides for the allocation of resources, the legitimate use of violence, and the structuring of social relationships.

These simple definitions have one element in common: they define the law in social context. Without society we need no law; without law we would have no society. The rules of behavior for both individuals and government take on historical meaning as they affect and are affected by the social order. When we look back into Holmes's magic mirror, we seek in it answers to questions about how previous generations went about using the law to affect values and moral principles they deemed important. We tend, of course, to think of the law as something complex, as something that only lawyers and judges deal with in often obscure ways. But the internal workings of the law offer a beginning not an ending to historical understanding.

As the legal historian Lawrence M. Friedman has observed, we can think of these matters in a somewhat simple way.[4] The law can be viewed as a black box that contains various rules. Examining the chronological development of the rules would yield a literal, internal history of American law; until the mid-1960s most writers on legal history have done just that. Such an approach had the undesirable effect of confirming the mystery and complexity of law, making the black box all the more foreboding.

But the law can be understood in another way. What is important is not only what is in that box but what consequences its contents have had for the society it is meant to serve. Though an interesting intellectual exercise, what good does it do to know what went on in the box, if we do not understand what significance it had for the larger external world it aimed to serve? In the past two decades this concern with the *external* history of the law has taken on greater urgency. The legal historian still has to know what went on in the box, but now he or she must also address a large set of causal relationships. We want to know the law by what it has done, or by what has been done to it, rather than simply by what it was.

There is yet another reason to pursue this external approach to legal history. Law is, after all, a human institution; its history is a tale of human choices. Its abstract rules deal with the most central of human issues: the preservation of life, the protection of property, the exercise of individual liberty, the fashioning of creative knowledge, and the allocating of scarce resources. All encounters in the law, therefore, have been personal, human encounters. Its history is that 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.

The law, as Justice Holmes understood, is indeed a cultural artifact, a moral deposit of society. Because its life stretches beyond that of a single individual, its meaning reaches to the values of society. Thus, we cannot know the law only through the individuals 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. This book seeks to encourage you to think about both the internal and external history of American law.

Elements of the Legal System

This book is about more than rules and their place in American society. It concerns also the structures, institutions, and processes through which the law has operated historically. The component elements—the connective tissue, if you will—of this legal system have been its structure, substance, and culture.

Structure

The institutions *and* the means through which they have operated constitute the structure of American law. Most persons, if asked to name a "legal" institution, would doubtless respond with "court." The life of the law, to many of us, has been the adversarial process; the drama of lawyer confronting lawyer, of judge and jury. But

this view is needlessly and misleadingly narrow. The formal product of the law has emanated not just from courts and lawyers, but from legislatures, administrative agencies and the executive branch. In the legal history of the United States, courts have usually been reactive institutions; the great limit on the judicial power has been the necessity of judges waiting for litigation to reach them so they might decide an issue. Legislators, executives, and administrators, on the other hand, have most often had the initiative in the lawmaking process, although the courts, through the process of judicial review, have gradually developed the power to decide what the law is.

The legal structure has also included informal and nongovernmental institutions, such as the family, private associations, and trade groups. In some instances, moreover, these nongovernmental and informal associations have developed their own procedures. Witness, for example, the development of Roberts Rules of Order in the late nineteenth century, and the effort it embodied to bring procedural order to the operation of private, nongovernmental groups.

This book, however, gives attention to the formal, governmental structure of the legal system. 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.

Substance

The operation of the formal legal structure produces substantive results. Substance is what Oliver Wendell Holmes, Jr. meant by the legal system's "moral deposit." It is the primary rules—against murder, the treatment of agreement between bargaining parties, the awarding of damages to injured parties, the establishment of fault and liability, for example—that the legal structure produces. The substance of the legal system has been more than the sum of judicial pronouncements; it has also included statutes, executive orders, and administrative regulations produced at the federal, state, and local levels. It offers a direct measure of the extent to which cultural and moral values have penetrated the legal system.

Both the structure and the substance of the law have been multiform. There has never been only one American legal system, but permutations and deviations. From the beginning of white settlement, the substance of the legal system evolved through many forums: federal, state, and local. Geography and topography encouraged diversity in the substantive results of the legal system, but so too did the U.S. Constitution through the concept of federalism. The framers in Philadelphia in 1787 indeed fashioned a national government, but they did not create a national law. Rather, the principle of federalism recognized that the states retained important elements of sovereign authority, and that they could, within the terms of that authority, enact laws for themselves. The states retained authority under the police powers to deal with questions of health, safety, morals, and welfare. The federal government, on the other hand, had broad responsibilities for national concerns, such as war and peace, foreign relations, commerce among the states and with foreign nations. This bifurcated scheme left the states through much of the nineteenth century to develop large areas of the legal system. The law was not a free-for-all, but it did manifest important differences from state to state.

Culture

The third element of the American legal system, legal culture, is genuinely elusive. Legal culture is the matrix of values, attitudes, and assumptions that have shaped both the operation and the perception of the law.

Legal culture has had two components. First, it is a manifestation of ideology. Persons often hold strong ideas about how the world should and does operate, and those beliefs have had an impact on the legal system. That is why what prominent figures in the legal system have said about it is of such importance. Ideology is both a statement of expectations and a rationalization of what has occurred.

Second, legal culture has evolved in response to individual and group interest. American historians have argued endlessly about whether ideas or interests have provided the mainsprings of historical action. Have people within the American legal system acted as a result of what they believed or who they were? Or were interest and ideology so intertwined that separating them only caused further confusion? There seems little doubt that what persons have been has shaped what they expected of and how they viewed the legal system. Property holding, social class position, wealth, and race, for example, provide individuals with tangible interests to be secured through the law. What has been good for some property holders has not necessarily been good for others.

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. The plurality of interests and ideas in American history has bred controversy over the purposes of the legal system. Diversity has spawned disagreement, and one measure of the significance of the rule of law in our history has been the extent to which it has promoted consensus.

The nature, direction, and velocity of legal adaptation is one of the central issues of this book and it is also a measure of the effectiveness of the rule of law. The rule of law is one of our culture's most important concepts and one of the great forces in the history of western civilization. Its origins reach back to the Roman Empire, but beginning only in the seventeenth century, with the rise of humanistic rationalism, did it assume anything like its present identity. The rule of law meant that there existed a body of rules and procedures governing human and governmental behavior that have an autonomy and logic of their own. The rule of law—the rule of rules, if you will—proposed to make all persons equal before a neutral and impartial authority. Its legitimacy derived largely from the possibility of applying it on a reasoned basis free from the whim and caprice of both individuals and government. Social position, governmental office, family of birth, wealth, and race ideally had nothing to do with the dispensation of justice. By the eighteenth and nineteenth centuries the very notion of justice had become an abstraction. To do justice was to administer the law in a procedurally correct manner, because such attention to the process of law guaranteed a reasonable and hence just conclusion to any dispute. The rule of law made persons in authority—police, legislators, and judges—bound to it. It promised impartiality, fairness, and equality; all persons were to receive the same treatment.[5]

Legal historians have disagreed sharply about whether the rule of law has actually performed in such a manner. Some of them, notably scholars identified with the critical

legal studies movement, insist that the rule of law is so much humbug. As John Henry Schlegel has observed: "*LAW IS POLITICS*, pure and simple."[6] These critics of our legal system 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. The law furnished the elite with an amoral device that promoted their social hegemony. In such circumstances, these historians explain, minorities—blacks, Native Americans, women, and poor white working class—have suffered. Impartiality and fairness have not only been in short supply, but the rule of law has masked blatant class oppression.

A contrary interpretation reaches quite different conclusions. This so-called pluralist consensus view, most fully identified with this century's greatest historian of law in the United States, J. Willard Hurst, holds that given the enormous diversity of the population and the great geographic size of the United States, the abstract rule of law has fostered economic growth and the maintenance of free expression and dissent, and has limited the authority of government.[7] The law, in this interpretation, has functioned as an honest broker through which conflicting interests have sought to achieve their own ends. The results of the clash of pluralistic social interests appear in the historical rise of a large, prosperous middle class. The rule of law, in short, has opened fresh opportunities for large numbers of persons, certainly more so than was ever the case in Europe with its feudal past. This book suggests that neither interpretation quite captures the supple nature of the American historical experience nor the powerful contradictions that have beset it.

Private Law and Public Law

All law is a system of social choice backed by the power of the state. But the state has varying degrees of interest in those choices. Private law, though implemented through public courts, aims to resolve disputes in which the interests of individuals, rather than the state, are directly involved. The state, for example, has a direct interest in whether you speed in your car or murder your neighbor, but it has only an indirect interest in whether you keep a promised contractual agreement with that neighbor. Private law, therefore, encompasses the major categories of substantive legal rules, such as contracts, real property, and torts. Private law is private because of the character of the parties in dispute and the absence of a direct state interest.

Public law, on the other hand, involves social choices where the state has a direct interest. Public law embraces those rules that affect the organization of the state, the relations between the state and the people who compose it (including control over the means of legitimate violence and punishment of deviant social acts), the responsibilities of the officers of the state to each other and to the public, and the relations of states within the nation to one another. Public law, like private law, also has several categorical divisions. It consists of criminal, administrative, international, and constitutional law. The last of these, constitutional law, treats the establishment, construction, and interpretation of constitutions and the validity of legal enactments passed under them.

This book is about both private and public law, about private law rules and public law doctrines. Although historians have frequently treated these as subjects distinct

from one another, this book seeks to show the relationships among them, as they have been shaped by legal institutions and as they have formed a part of the legal culture. We might think of them as complementary themes played in different modes.[8] Both contribute to the ordering of society and each contributes to the life of the other. Both have formed the magic mirror of our legal past.

1

Social and Institutional Foundations of Early American Law

Origins

When the first settlers in the early seventeenth century pushed ashore on the North American continent, two great systems of law dominated the Western world. One was the civil law of western Europe; the other was the common law of England. The American legal system owed something to both, though much more to the latter than to the former.

Civil Law

The Roman Empire contributed its system of civil law to the growth of Western civilization. The Romans formulated their law through written codes susceptible to easy replication throughout their vast empire. Emperor Justinian of Constantinople in the early sixth century A.D. captured the essence of the Roman legal system in the *Corpus Juris Civilis,* a four-volume restatement that ordered most of the earlier law of the Empire. Justinian was a reactionary concerned about the decadence of the Empire, and he believed that a thorough codification of the law would strengthen its moral fiber. On the publication of the *Corpus Juris Civilis,* the emperor forbade any further reference to the older law of Rome. The *Corpus* failed in its social purposes, but its preparation was nonetheless propitiously timed. The civil law system went into eclipse following the Germanic invasion of the Empire, but thanks to the *Corpus* Roman law survived, though in a less sophisticated version.

During the Middle Ages, clerics in the Roman Church "rediscovered" Justinian's *Corpus* and with it the great civil law tradition. The rulers of the new Holy Roman Empire embraced it, not only because the civil law legitimated their connection with

the Caesars, but because it offered a ready-made device by which to extend their rule over western Europe. Thereafter waves of exploration from the sixteenth century on spread it to Latin America and elsewhere, including French-speaking Canada and the Mississippi River Valley and Spanish settlements in present-day Louisiana, Florida, the Southwest, and California. But only in Louisiana and Quebec did the civil law system win a lasting hold on the North American continent.

The civil law was a system of positive rules arranged in books called codes. Its commands, whether from a sovereign body or a royal ruler, spoke directly to the ruled. Its authority depended on neither broad notions of morality nor assumptions about human character rooted in nature, but on the powers inherent in the person or persons promulgating it. This comprehensive body of rules established what law or laws governed a particular situation. When a controversy reached a lawyer or judge, their immediate task involved finding the appropriate code provision and then applying it. The civil law system placed a premium on the judicial *administration* of the law rather than on the judicial *interpretation* of it, a feature that typified English common law. Civil law judges had limited discretion; they applied existing law rather than initiating it. The civil law system that emerged from medieval Europe was responsive to social change, but it trusted in legislative action and the scholarly endeavors of academic lawyers rather than judges to systematize, criticize, and develop it. Past cases were important, but judicial precedent lacked the influence it assumed in the common law system.

Civil law countries regularly updated their codes through major restatements. Perhaps the most influential in modern times was the French Civil Code, or Code Napoleon, of 1804. It had enormous influence throughout western Europe and beyond, serving as the major source of authority for the hybrid version of civil law practiced in Louisiana.

The civil law tradition contributed only modestly to the origins of American law. In the nineteenth and twentieth centuries American law reformers, however, repeatedly invoked the concept of codification—of a rational, written body of rules for all to see—as a way of imposing order on the unruly common law. Legal systems composed part of the cultural baggage of colonial expansion; the English settlers not only came in larger numbers, but they came to stay with concentrated settlement on the vital Atlantic beachhead. Therefore, although the Dutch briefly carved out a civil law system in New Amsterdam, the common law system flourished after control of the colony passed to the Duke of York in 1664.

English Common Law

English common law was more diffuse in its historical origins and in its application than was the civil law. Rome for three and a half centuries (A.D. 43–407) ruled England, but that occupation left few legal marks. More important was the later migration by, among others, the Angles and the Saxons from the European continent. They laid down a body of law based largely on custom, practice, and folkways, although it was partly codified. Unlike Roman civil law, which had the administration of an extended empire as a principal objective, the Anglo-Saxon laws reflected the diversity and diffusion of interests within England after the end of Roman occupation.

A two-tiered legal system grew from this early experience. The first level sup-