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The Transformation of Morton Horwitz

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In 1977, Morton Horwitz published his astonishing first book, *The Transformation of American Law, 1780-1850.* Looking back, two things could be said of the reception of the *Transformation*: the book was subjected to extremely searching and ultimately quite successful destructive criticism, while at the same time it dominated the field of American legal history for more than a decade, as no book had before, or has since. Like almost all other historians of American law trained in the years following 1977, my education in the craft of legal history was decisively affected by the *Transformation.* My first published work was a callow attempt at criticism of some of its factual and interpretive conclusions;[1] its categories and conceptions guided my own research in colonial legal history for ten years, even as I rejected an increasing number of its premises. In this I was not alone. The extraordinary distinction of Horwitz' work rested on its capacity to organize the debate, shaping the issues and questions to which all historians of antebellum American law responded in their own work, however oppositionally.

Now, after a decade and a half, we have before us Horwitz' second book, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*. By its nature, this is an occasion of the greatest significance, and on such occasions the reviewer bargains with the devil. In exchange for an opportunity to speak an early word comes the likelihood of being ludicrously wrong in judgment of the event. But the risk must be run, and the lesser virtue of candor may be some defense even when posterity will show one to have read shallowly, or to have missed what turned out to be the point. I believe that *The Crisis of Legal Orthodoxy* (for in this case it is the subtitle that conveys the sense of the work)[2] is in every respect a stronger book than the first *Transformation*—better argued, more spaciously conceived, wiser. Paradoxically, perhaps, I also think it will be less influential in setting the

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1. *See* Eben Moglen [Note], *Commercial Arbitration in the Eighteenth Century*, 93 **Yale L.J.** 135 (1983).

2. In the text that follows, I adhere to the convention of citing the book under review simply by page number. Textual references to "the *Transformation*" are to the first volume. Where a title reference is necessary, I refer to the present volume as *The Crisis of Legal Orthodoxy*.

terms of the debate in which it is engaged. The following essay is directed at establishing the basis for those two conclusions.

I. Introducing the Transformations

Before turning my attention to the substance of Horwitz' historical account, it is appropriate to begin by considering the historiographic premises on which Horwitz perceives himself to be working. "In terms of its chronology," Horwitz begins (Preface, P. vi), "this book can be regarded as taking up the story of the history of American law as I left it [in the *Transformation*]. But it is a very different book." Not least, as Horwitz' adroit Preface and Introduction show, in the kinds of historical explanation now invoked and preferred. The *Transformation* was a resoundingly materialist book, committed to the proposition that the conflict of economic interests, occurring along class lines, shaped the content of American law in the antebellum period. And, as the Introduction to that volume made clear, it was also conceived as an attack on the "Consensus School" of American historiography that dominated the historical profession during the 1950s, carrying out a program for the relentless minimization of evidence for class ideological or class conflict in American history. Though not published until the movement had begun to die, the *Transformation* joyously carried into combat many of the banners of the New Left historiography that began the disassembly of the Consensus School's achievements during the latter 1960s.[3] The *Transformation* hinged its argument concerning the structure of antebellum American law on the economic instrumentalism of judges, mobilized in part by a self-conscious alignment of interests between the legal profession and the leaders of a rapidly-expanding mercantile capitalist class. The transformation it described was a single unique event—the

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3. Indeed, I have long considered, and urged my students to consider, the *Transformation* as a direct response to the most visionary of the Consensus School expressions of American legal history—Willard Hurst's remarkable Rosenthal lectures published in **James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States** (1956), though further discussion of that proposition lies outside the bounds of the present essay.

"great transformation" of Karl Polanyi—as a conceptual alternative to the "release of energy" principle established by Willard Hurst as the driving force behind the law "W " made.[4]

New times, new mores. For Horwitz, other styles of explanation have arisen from the collapse of theoretical certainties still (at least as he sees it) in place in 1977:

> In social thought, belief in the explanatory possibility of very general "covering laws" capable of making "if-then" predictive statements has plummeted (except as economics deploys ever more elaborate tautologies to conceal this fact). The result has been a dramatic turn toward highly specific "thick description" in which narratives and stories purport to substitute for traditional general theories. … At the same time, several of the most important assumptions underlying nineteenth-century social thinkers' and historians' confidence in the objectivity of their explanations has been severely challenged.
> Not only has the separation between fact and value … been drawn into question, but self-consciousness of the contingency of categories, theories, and frames of reference has been accelerating as the message of the sociology of knowledge has been absorbed into interpretive and deconstructive intellectual movements. … A complex, multi-factored interdependent world has lost confidence in single-factor "chains of causation" that were embedded in most nineteenth-century explanatory theories.
> My acceptance of multi-factored complexity has produced a certain tendency in this book toward multiple (and perhaps sometimes contradictory) explanations. … Is it just my story, with all the connotations of skepticism and subjectivity that the word "story" implies? No; I still aspire to give the best possible explanation, but without the wish to suppress all difficulties by intoning pieties about what a terrible place the world would be without an objective account. (Pp. vii-viii)

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4. *See* **Karl Polanyi, The Great Transformation** (1944). The pronominal shift from Hurst's "W " to Horwitz' "they" was the icon of the historiographic confrontation.

In short, the once self-proclaimed "vulgar Marxist" has gone post-modern. But let no one sneer or gloat. If, to adopt Horwitz' phrase, there has been a "dramatic turn," it has been good for both author and reader. The explanatory structure of *The Crisis of Legal Orthodoxy* is indeed richer, and Horwitz pursues his fundamental interest in the intellectual history of law with what, at least to me, reads as a sense of liberation. If this is the consequence of no longer intoning pieties, then let piety perish forevermore.

Quite apart from the change in historiographic outlook, *The Crisis of Legal Orthodoxy* also stands in a different relation to the history of doctrine than did the *Transformation*. Certainly there is more than a little "law-stuff" in this book, but as a look at the sources cited in the footnotes reveals, the balance has shifted in the direction of treatises, academic articles, and polemical writings, and away from the string citations of common-law decisions that were the staple of the *Tranformation*'s diet. In part, this is an outgrowth of the periodization—the comparatively thin resources of the antebellum academic legal culture provided much less basis for the intellectual history of legal theory than the comparatively well-developed legal culture of the period from 1870-1960, and Horwitz therefore had to seek his data in the earlier volume among the stony soils of the state appellate courts. But there is a more profound difference here. For while law is still not an autonomous intellectual discipline in Horwitz' new structures of explanation, the internal dynamic of legal ideas is the true subject of *The Crisis of Legal Orthodoxy*, not the role of the law in underwriting particular forms of socio-economic development. So that, while the Preface and Introduction make no explicit statement on this point, the present work is also part of the movement back toward intellectual history, away from the "new social history" of which we had at least enough in the years from 1965 to 1985. Though surely a book about people (including most prominently Oliver Wendell Holmes, Roscoe Pound, and Karl Llewellyn), the primary agents in the history Horwitz wants to recount are Classical Legal Thought, Progressive Jurisprudence, and Legal Realism. Our leading legal historian is now practicing the history of ideas, and this too is cause for great celebration.

II. Legal Orthodoxy: The Age of Classicism

The story that Horwitz wishes to tell in the present volume concerns the consolidation in the post-Civil War period of a high classical style in American legal thought, and the subsequent decay of that classicism under the impact of rapid socioeconomic and intellectual change. As a rough periodization, Horwitz dates the beginning of concerted external attack on legal classicism at 1905, with the hostile response to the Supreme Court's decision in *Lochner v. New York*.[5] The attack on orthodoxy proceeded through the era of the First World War under the banner of Progressive Jurisprudence, and was completed, with the essential destruction of classical legal thought, under the standard of Legal Realism in the era of the New Deal. In the period from 1945 to 1960, however, Horwitz locates an anti-Realist revival of orthodoxy, inspired at least in significant part by the ideological stresses of the Cold War. As in the *Transformation*, Horwitz prefers to organize his narrative by conceptual as well as chronological categories, devoting chapters to changes in late nineteenth-century corporate and property theory, the thought of Oliver Wendell Holmes, and the intellectual development of administrative law. But for present purposes, it may be easier to grasp the nature of his arguments, as well as the problems raised, to consider developments in their chronological sequence.

A. *Classical Legal Architecture*

As Horwitz now sees the broad sweep of American legal development,

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5. Perhaps the most influential of the voices raised against the decision in *Lochner v. New York*, 198 U.S. 45 (1905), was that of Roscoe Pound, in his famous article *Liberty of Contract*, 18 **Yale L.J.** 454 (1909). Horwitz treats this article as the effective beginning of Progressive Legal Thought. Pp. 33-34.

> [t]he separation between law and politics has always been a central aspiration of American legal thinkers. Operating uncomfortably within a democratic political culture that has been obsessed with the threat of "tyranny of the majority," American jurists since the Revolution have striven to embody 'a government of laws and not of men' in a conception of an autonomous system of law untainted by politics. (P. 9)

This basic dogma of American legal development has lent support to various intellectual regimes in our history; by the 1850s, Horwitz told us in the last chapter of the *Transformation*, it was supporting the growth of a legal "formalism," which allowed the victors in decades of prior socio-political struggle in the legal system to present and defend their gains as neutral consequences of logically consistent rules. Horwitz does not explicitly state in the present book whether he adheres to his prior view of formalism in the immediate antebellum period, but in any event there is no inconsistency between that position and the architecture of postwar classicism as he now describes it. Classicism, whatever its relation to antebellum formalism, rested on a new set of intellectual devices for creating the separation between law and politics.

The essence of classicism was the use of higher legal abstractions to replace the "functional" classifications—contracts conceived as combining the law of sales, insurance, agency, etc.—of antebellum theory. These classifications had themselves replaced the traditional forms of action which failed to survive post-Revolutionary reform of civil procedure. In the immediate pre-classical period, treatises might present the law applicable to railroads or bankers—"organizing the law according to particular statuses and functional relationships." (P. 13) Post-Civil-War classicism, to the contrary, mounted an attempt to isolate the dominant abstract conceptions around which doctrine could be organized: will, duty, negligence, fault, offer, acceptance, consideration, and so forth:

> The process of generalization and abstraction in late-nineteenth-century law was identified with the goal of rendering private law more scientific and less political. It also had the effect of freeing legal rules from the reality testing that regular encounters with the concrete particularities of social life might entail. For example, generalization permitted judges to apply the same set of rules that were applicable between sophisticated businessmen ... to labor and consumer contracts between vastly unequal parties. Indeed, such indifference to context was regarded as an important safeguard that would ensure that law would remain neutral and non-political. (P. 15)

This movement in the direction of abstract conceptualization that Horwitz calls "Classical Legal Thought" thus served both to strengthen the conformity of legal theory to the central dogma of an apolitical rule of law, and to cushion the legal system against the intellectual effort necessary to adjust to extraordinary changes in social reality. Conceptualism in the law of tort and contract, in Horwitz' account, allowed doctrines that diverged from the norms of negligence and the will theory of contract formation to be shunted aside, as anomalous outcomes of historical contingency or the results of past judicial confusion. This removed pressure to use such doctrines in new and explicitly redistributive ways, as counterweights against the explosive growth of private economic power in the postwar industrialization. For Horwitz, the early writings of Oliver Wendell Holmes, and particularly *The Common Law*, functioned to this end.

In other respects, too, classicism in the postwar legal culture attempted to evolve conceptualist solutions for problems spawned by the rapidity of social and economic change. Two such explorations of the conceptual frontier are accorded particularly extended treatment in Horwitz' account: the evolution of a theory of corporate personality, and the development of new conceptions of property.

The transformative reorganization of American economic life along corporate lines between 1870 and 1914 created an important challenge to the analytic premises of the antebellum legal culture. As corporations ceased to be creatures of individual grant, and became instead products of state general incorporation law, an explosion of uncertainty ensued concerning the juridical status of the corporate form. No longer an "artificial" entity, created by the state for limited purposes, and legally regulated by the requirement to stay within the four corners of its charter, the corporation became threatening to the stability of legal categories, just as corporate economic power threatened the Jacksonian assumptions of the evils of monopoly privilege that dominated antebellum political economy. Without the grant theory of corporate existence, the courts of the late nineteenth century embarked—with some assistance from German theorizing by Otto Gierke and others—on a search for new conceptual limitations. The easiest approach seemed to be to treat the corporation as an analog to partnership. This approach, as Horwitz elegantly demonstrates, lay behind the Supreme Court's famous but little-understood decision applying the guarantees of the Fourteenth Amendment to state regulation of corporate activity in *Santa Clara County v. Southern Pacific Railroad*, in 1886. The key to *Santa Clara* is the recognition that the Court based its apparently off-hand application of the Amendment to the railroad not on the theory that the railroad corporation was itself a person, but rather on the view that the railroad's corporators were persons entitled to protection, who could not be deprived of their constitutionally-recognized natural rights simply because they chose to express those rights through a corporate form. (Pp. 69-70)

The partnership analogy, as Horwitz shows, promised to solve problems of protection of corporate property against state regulation, while retaining a conceptual link with the assumptions of the antebellum political economy, but it created at least as many as it solved. Treating the corporation as essentially equivalent to a partnership of natural individuals not only put pressure on the central notion of limited liability, but also seemed likely to shatter (through adherence to the requirement of unanimous shareholder consent) against the apparently inevitable reality of massive corporate consolidation at the end of the century. And so, despite suspicions rather than from love of large corporate business, classicism drifted toward the entity theory of the corporation at the turn of the century:

> The contractualist view of the corporation as essentially no different from a partnership began to come under attack from the moment it was presented. Its most forceful claim was that any entity theory of the corporation was fictional and an anachronistic carryover from a bygone era of special corporate charters. Yet the picture of the corporation as a contract among individual shareholders was itself becoming a nostalgic fantasy at the very moment the partnership view was most forcefully put forth. (P. 92)

As with his approach to the entity theory of the corporation as a response to organizational society, Horwitz sees the "de-physicalization" of property as classicism's conceptual response to rapidly-changing economic conditions. The expansion of the industrial economy produced questions of intangible property (business goodwill, copyright, patent protection) that had been much less significant or entirely absent in the antebellum legal culture, as issues of state taxation and rate regulation of corporate property challenged the conceptual basis of antebellum takings law. In broad strokes, Horwitz paints the picture of the courts' retreat from a property law concerned with physical possession of real estate, toward a conception of property as any instance of exchangeable value. Such a conception, while fitting new forms of social activity into the natural-rights framework of the Fourteenth Amendment, also created internal contradictions which the older definition of property rights managed to avoid. Once, as Horwitz points out, following the analysis initially offered by John R. Commons in the 1920s,[6] property had been defined for constitutional purposes as exchange value, rather than the possession of things having use-value, natural-rights protection of property established theoretical limitations not only on eminent domain, but also on taxation and regulation under the police power. Since, as Holmes was to say in *Pennsylvania Coal Co. v. Mahon*, the 1922 case which may be

6. *See* **John R. Commons, The Legal Foundations of Capitalism** 14 (1924).

said to show the endpoint of the evolution beginning with dephysicalization, "government could hardly go on" without promulgating regulations decreasing the exchange value of some tangible or intangible property, the abstract conceptualization of property cast the courts into a sea of troubles, in which the central commitments of classicism began to war with one another, bringing on the crisis of orthodoxy.

B. *The Internal Contradictions of Classicism*

In the account Horwitz presents, classicism rested primarily on three pillars: a sharp distinction between coercive public law—exemplified by criminal and regulatory interventions—and neutral private law; abstract conceptualizations; and the natural-rights philosophy implicit in American law since the Revolution. Even as the elements of classicism came together in the period from 1870 to 1900, however, rapid socioeconomic change, and the intellectual adjustments necessary to respond to that change, began to shake the edifice apart.

Horwitz shows convincingly the close relation between classicism's conceptualism and the desire to maintain a "neutral" private law in accord with the night-watchman state of antebellum liberal aspiration. The search for neutral private-law conceptions led increasingly to "objectivist" analyses of legal problems. Across the range of private-law doctrine—from "apparent authority" in the law of agency (Pp. 46-51), through objectivist interpretation of contract terms (Pp. 35-39), to the problems of objective causation in tort (Pp. 51-63)—classicism struggled to express principles that left no scope for law explicitly conscious of the persons with whom it dealt.

But objectivism, however apparently successful as an intellectual bolster for the neutrality of private law, created problems more fundamental than those it solved. Though initially intended as support for the conception of contract as a domain for the implementation of the will of the parties, Horwitz argues, objectivism both subverted freedom of contract from within, and encouraged its destruction from without. Internally, objectivism undermined both of the other intellectual pillars of classicism. If objective standards of reasonableness and meaning determined the extent of contractual liability, for example, then the individual's natural right to contract could no longer be treated as the sole basis of legal doctrine. On the other side, objectivism attacked the division between coercive public and neutral private law. If, as objectivism ultimately claimed, the decisions of the state, rather than the wills of the parties, were the source of contractual liability, the distinction between neutral private and coercive public law was no longer tenable.

Even as the objectivist version of neutral conceptualism created internal stresses with classicist legal thought, it also encouraged external attack on the entire intellectual system. By once acknowledging that legal decision-making required courts to assess conduct in light of objective social realities—rather than neutrally to give effect to idiosyncratic individual expressions of natural rights—classicism self-destructively encouraged scrutiny of whether, and how well, the courts correlated the law to external social conditions. As Horwitz brilliantly argues in his pivotal central chapter, the root of both internal and external attacks on classicism lay in the thought of one man—Oliver W ndell Holmes, Jr.

III. Challenges to Orthodoxy

A. *Holmes*

No other individual so dominates the intellectual history of our law as Holmes. Horwitz follows necessity in devoting one of his nine chapters to the development of his ideas from the early 1870s through the *Lochner* dissent of 1905.[7] Two

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7. This chapter, a republication of the Julius Rosenthal Lectures, delivered at Northwestern University in 1981, is rather misleadingly entitled "The Place of Justice Holmes in American Legal Thought," though it treats almost entirely Holmes' intellectual development before he ascended the Supreme Court Bench in 1902. Horwitz' belief in the discontinuity of Holmes' thought—a belief I indicate below I do not share—implies that

chapters in fact, though not in form, because the essence of Horwitz' most original argument is that Holmes' thought in these years of his life should be subdivided into early and late periods, of which the early period culminated in *The Common Law* of 1881,[8] and the later in the famous 1897 address, "The Path of the Law."[9]

For Horwitz, the essence of the early period is found in the unstinting objectivism of *The Common Law*. For the early Holmes, Horwitz argues, objectivism represented a hard-fought compromise between subjectivism—based on individual conscience and morality, undergirded by a belief in natural rights—and an Austinian positivism that would displace the entire common-law tradition through sovereign codification. (P. 123) There can be no doubt, as Horwitz points out, that one motivation for the enterprise was Holmes' complete discomfort with the natural rights tradition, which expressed itself in another guise through his disdain for radical abolitionism.[10] Ultimately, the tradition of natural rights threatened Holmes with the abyss into which society plunges when the social order dissolves in fratricidal conflict over conscience. This was no mere anti-Utopian vision for a wounded veteran, and the search for a basis to human law protected against such dissolution was Holmes' unending project. Transcendence of moral by legal reasoning was a constant theme of his theoretical writing, whether of Horwitz' "early" or "late" periods.

But if natural rights and other subjectivist legal theories threatened chaos, the Austinian alternative was pregnant with the possibility of tyranny. Horwitz conceives Holmes'

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we must await another opportunity to hear more thoroughly what Horwitz makes of the intellectual contributions of Holmes the Justice.

8. **O.W. Holmes, Jr., The Common Law** (1881).

9. **O.W. Holmes, Jr.,** *The Path of the Law*, in **Collected Legal Papers** at 167 (1920).

10. This close relationship reminds us of the critical importance to our law's intellectual development of the events of the Civil War. This is but one of the respects in which we stand in need of the indispensable but unwritten book on the meaning of the War in the secular history of American law. Horwitz tells us in his preface that he wishes to write that book. Nothing could be a more fitting masterwork, as capstone to the work of the most important legal historian of this generation.

intellectual development in terms of conflicting attempts to navigate between this Scylla and Charybdis of postwar theory. The solution attempted by *The Common Law* was reliance upon the generative force of custom. The unwitting evolution of the law, essential to *The Common Law*'s portrait of legal development, was said, in Holmes' famous words, to be "the unconscious result of instinctive preferences and inarticulate convictions." Thus, if the weight of the customary law could be shown to rest on objectivist premises—and the deviations explained as anomalies or errors—the dangers of subjectivist chaos and codificationist tyranny could both be avoided.

So Horwitz reads the "early" Holmes. By 1897, however, when the truly revolutionary essay "The Path of Law" was read at Boston University Law School, Holmes had been transformed. A "profound loss of faith in traditional doctrine ultimately caused Holmes to abandon his youthful determination to unite justice and rationality in the law in favor of the detached olympian skepticism that was to characterize him for the rest of his life." (P. 127) Horwitz essentially attributes this discontinuity to Holmes' fuller realization of the consequences of objectivism: The state's power to select objective norms of conduct inevitably implies that all law is ultimately a choice of social policy. Moreover, since rejection of the natural-rights tradition implies that "[l]egal duties are logically antecedent to legal rights" (a position Holmes had reached at least by the time "Privilege, Malice, and Intent" was written, in 1894) no barrier could be raised against the state's reallocation of such duties, displacing their correlative rights. The result is "late" Holmes, transformed by the process of interior intellectual confrontation into the Y nkaee from Olympus.

This is an original and attractive reconstruction of Holmes' intellectual life. It concentrates our attention on Holmes' relationship to contemporary legal writing more successfully than any prior account. But I must admit that I am not entirely convinced by it. The "early" and "late" Holmes seem to me essentially continuous intellectually. But, in keeping with the postmodern style, Horwitz has provided the groundwork for this conflicting line of interpretation, and has even made some of the arguments. Holmes sees in 1881 that concepts as basic to the English law as the protection of possessory interests in realty (arguably the single most important problem with which the common law ever dealt) depend for their justification solely on grounds of utilitarian policy, to which individual interests are ruthlessly sacrificed. (P. 128) This was not a difficult thought for the former Union officer to entertain; any more than his later statement that "we march the recruit up with bayonets behind to die for a cause he doesn't believe in." The author of the idea that "the life of the law has not been logic: it has been experience"[11] was aware that "[t]he time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction of organized society knowingly seeking to determine its own destinies."[12]

There are, to be sure, changes in the content of Holmes' thought over the period of twenty years during which this greatest of American legal minds matured. Horwitz is quite right to call attention to changes in Holmes' ideas about the validity of custom as a source of law.[13] The matter is one of emphasis, and Horwitz chooses to emphasize the alterations. For me, however, the continuing prepossessions and styles are of greater importance. Hostility to natural rights, as Horwitz recognizes, is the one primary commitment in Holmes' thought. Objectivism, the evolutionary outlook on legal development, anti-absolutist views of property, and above all, the anti-conceptualist insistence that "general propositions do not decide concrete cases"—all have traceable roots to the one central concern. "The Path of the Law" certainly expressed, with radical clarity, some of the consequences of the intellectual developments through which Holmes had passed by 1897, but I think Horwitz errs in attributing differences primarily to change of idea, rather than alteration of context.

11. The Common Law, ch. 1, para. 2.

12. Privilege, Malice and Intent.

13. The idea of custom as a source of law has a fascinating history in American legal thought. I hope someday to write a book about it. I believe that the rise and decline of interest in custom to mediate the strains of post-Civil-War legal development—in which Horwitz is interested—constitutes a last revival and senescence of the concept, in terms of whose earlier history the antebellum confrontation over codification and the common law should largely be seen.

Holmes' primary subject in "The Path of the Law" was legal education, as his correspondence shows.[14] The essay was directed at describing the process of becoming a lawyer in the new intellectual world, and the purpose for which it was written decisively affected its content. The consequences of Holmes' vision of a self-consciously objectivist legal system are brilliantly spelled out in "The Path of the Law"; perhaps we should see the essay as Holmes' closest approach to Edward Bellamy.[15] But the component ideas, as Horwitz recognizes, can be seen long before.[16]

B. *Progressive Jurisprudence*

As I suggest below, how one interprets Holmes may affect the contours of the larger argument over the crisis of orthodoxy. But there can be no doubt that the ideas and actions of Mr. Justice Holmes—both the theoretical writing Horwitz

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14. Holmes to Lady Clare Castelton, September 17, 1896, refers to "a discourse on Legal Education" that was to become "The Path of the Law." P. 143. These unpublished letters, which came to light after the completion of the lectures reprinted as Horwitz' chapter on Holmes, have tempted Horwitz to the quite postmodern exercise of leaving his original text unrevised, while dropping a long final footnote that considers the possibility, on the strength of the letters, that what happened to Holmes was not only an intellectual transformation, but one prompted by sudden awakenings of love for Lady Castelton, generating "oceanic" feelings, and basic reorientation of thought. Pp. 142-43. The layering of such qualitatively different styles of explanation achieves a very unusual effect.

15. I am not aware of any prior work drawing a connection between the objectivist vision Holmes elucidates in *The Path of the Law* and Edward Bellamy's widely-read anti-utopian novel **Looking Backward** (1886). I would not want to place too much emphasis on the comparison, though I do think Holmes' relationship to postwar literary movements might repay more attentive scrutiny than it has had.

16. Some cursory comment on the concept of "detached olympian skepticism" must suffice for now. The detachment that came with age is certainly a part of Holmes' stylistic development, but the notion of skepticism is perhaps more technical, and involves consideration of Holmes' philosophic positions. I would argue that Holmes bears close relationship to the logical positivism of Ludwig Wittgenstein, and is in that sense committed to positions that counter skepticism. The issue bears on the development of ideas, particularly concerning the philosophy of language, that have been at issue in debates over Critical Legal Studies in recent years. *See* Eben Moglen and Christopher Zapf, *To Nonsense and Back: Wittgenstein and Holmes in Contemporary Legal Theory*, forthcoming.

discusses, and the dissent in *Lochner v. New York*, in 1905, to which Horwitz attributes widespread crystallizing effects—had much to do with sparking legal theory's version of Progressivism.

Horwitz carefully describes the internal history of the legal ideas stimulated by Progressive politics, and shows how elements in the thought of Pound, Hohfeld, Frankfurter, and others responded to themes initially sounded by Holmes. He also elegantly demonstrates the close connections between Progressive jurisprudence and Progressive "Institutionalist" economics in the Wilson Era. For the economists, including John R. Commons and Robert L. Hale, the very definitions of property resulting from dephysicalization destroyed the meaning of traditional language concerning property rights. Rate regulation, which affected the expectancy-values of which all property now consisted, was indistinguishable from other, less obviously traditional, forms of interference with owners' "rights". But the theoretical primacy of "rights" had been destroyed anyway, by the recognition that social creation of objective norms implied that duties were anterior to rights. Thus it became possible to dissolve entirely the notion of property as a natural right, glimpsing property instead as solely a consequence of actions by an Austinian sovereign. Arrival at this endpoint by Morris Cohen, in his 1927 essay "Property and Sovereignty,"[17] may be taken as the full flowering of one branch of Progressive Jurisprudence. The argument is brilliantly deployed.

It remains for others, more deeply versed than I in the material, to concur with or dissent from Horwitz' reconstruction.[18] His central claims seem indisputable: that Progressive Jurisprudence formed part of an anti-conceptualist, "scientific" movement in American social thought, often called the "Revolt against Formalism"; and that it actively repudiated the distinction between law and politics,

17. Morris R. Cohen, *Property and Sovereignty*, 13 **Cornell L.Q.** 8 (1927).

18. It will be interesting to consider the issues in light of Natalie E. Hull's argument that Progressive Jurisprudence failed as legal theory, and primarily should be regarded as a pedagogic movement in the law schools. *See* Natalie E. Hull, *Vital Schools of Jurisprudence*, **UC Davis L Rev** (forthcoming).

increasingly expressing suspicion of the possibility of non-political decisions by judges. The particular turn which these ideas took with respect to the theory of property came to play a critical role when the secular expansion of the American economy suddenly stopped, replaced by the most calamitous condition in the long history of American economic pathology.

C. *The Depression and Legal Realism*

Horwitz has made several critically important points about the intellectual history of Legal Realism. With great deftness he establishes the critical continuities between Progressive Jurisprudence and its progeny in Realism. This requires Horwitz to confront and vanquish the contemporary historiography of Realism, as provided by Karl Llewellyn, whose cheekily intemperate reply to Roscoe Pound's call for a realistic jurisprudence has become the unchecked standard version of Realism's birth. This Horwitz carries off with a *tour de force* of enlightened *ad hominem* argument, showing that Llewellyn was uneasily situated in the intellectual movement in which he self-consciously—but quite accurately—denied he had influence. Realism, to him, was largely his Yale professors and Columbia colleagues, whose occasional penchant for rather high-falutin' quantitative methodologies grossly unsuccessful in their results he relentlessly exaggerated, to the point of establishing a caricature of Legal Realism as a fully-enthusiastic reflection of lawyers' belief in the mirage of value-free social science.

Horwitz does an enormous service in clearing the brush Llewellyn heaped up around the trunk of Realism, which had concealed its roots and impeded its development. Continuity with Progressivism provided lively internal defenses against the illusions that Llewellyn not only failed to diagnose, but even took upon faith as the essence of the movement. Just as elsewhere, the confrontation between Progressive and New Deal sensibilities was not entirely smooth.[19] But by restoring

19. The standard work on the complex relationship between Progressives and the culture of the New Deal is **Otis L Graham, An Encore for Reform; the Old Progressives and the New Deal** (1967).

Morris and Felix Cohen to the appropriate place at the center of Realist jurisprudence, Horwitz triumphantly demonstrates the weakness of the criticism, oft repeated but rarely justified, that Realism was so mired in the illusion of science that it entirely ignored all normative questions in a riot of positivity. Horwitz also makes an absolutely critical point, also not sufficiently appreciated despite the extensive literature on the Realists, when he asserts that the real legacy of Realism is a focus on the problems of interpretation—the beginnings of a "hermeneutic" approach to law.

The point is obvious enough, once someone has the lucidity to demonstrate it as Horwitz has done. Realism is American legal thought's response to the intellectual currents we call "Modernism," and with Realism enter all the challenges to orthodoxies of every kind that Modernism presented. Horwitz deals exceptionally well with that avatar of the imp of the perverse, Jerome Frank. In one perfect sentence, Horwitz explains why the law reviews of the 1930s make those of the 1980s and 1990s completely unsatisfying to read: "Frank's irreverence was everywhere experienced as being in bad taste, which is precisely why it seems so alive to us today.." (P. 177) Horwitz is quite successful in analyzing the effect of Frank—whose *Law and the Modern Mind* attempted to duplicate the achievement of Freud's *Interpretation of Dreams*, revolutionizing the intellectual environment of the law overnight, and instead became the most vilified piece of legal scholarship in the twentieth century. He recaptures the intellectual excitement of legal modernism as it burst forth, even as he shows the awful mess created by Realism's more skeptical adherents, including Frank, as they destroyed the cognitive coherence of the law in ways post-Modernists, such as ourselves, have all learned to understand. Surely, despite all the talk from liberal Democrats about controversial appointments during the Reagan years, there never was a more iconoclastic judicial appointment than that which brought Jerome Frank to the Second Circuit, to sit with Learned Hand.

But Realism was also a child of the period of great national misfortune, when the intellectual destruction of property rights had a pressing political significance. Horwitz shows the inevitable conflicts raised for Realism by power, enlisting its contemporary critics, such as Lon Fuller, to show that "the cleft between Is and Ought causes acute distress to the realist," whose positivism saddled what "starts out as a reform movement" with an "essentially reactionary principle."[20] The problem of doing without natural rights and the public-private distinction while retaining the rule of law rose again, as Horwitz shows in his summary of the conservative impulses leading to the enactment of the Administrative Procedure Act, as influential New Dealer Realists began to reconsider their unalloyed satisfaction with administrative tribunals based on "expertise." Holmes' black-letter man had been replaced by his "man of statistics and economics," but the results were not fully satisfactory on the way to Holmes' version of "Looking Backward."

D. *The Postwar Confrontation*

So the nation turned around. Horwitz adds new depth of description to our account of the nation's postwar hostility to Modernism, as it related to our legal thought. He convincingly connects recantatory statements by Llewellyn and others to the more severe forms of postwar intellectual repression. He neatly demonstrates the relationship between process-based postwar democratic theory, emptied of substantive commitments to such matters as equality, and the "legal process" approach of Hart and Sacks, which trained a generation of lawyers and (more ominously) law professors. Most importantly, he shows how the astonishingly hostile academic response to *Brown v. Board of Education*, led by Herbert Wechsler's "Neutral Principles" attack,[21] was the culmination of a classicist revival, a movement to restore the

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20. Fuller, *American Legal Realism*, 82 **U. P. L. Rev.** 429, 461 (1934).

21. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 **Harv. L. Rev.** 1 (1959). I have always found it more than slightly repellent that this piece, which depends for its entire intellectual enterprise on the proposition that the pursuit of human equality is not a neutral principle of law—and hence is an insufficient basis for ordering the end of *de jure* racial segregation of schools, is the most-frequently cited law review article of all time.

formalisms that had previously maintained the law-politics distinction.

This classicist revival was also accompanied by a revival of American historiography that underemphasized precisely the forms of social conflict Progressive history had been about. Thus there grew up the "Consensus School" of legal history, and with it the particular form of "law and society" writing of Willard Hurst. While he does not comment on this explicitly, Horwitz thus brings us to the sociological analysis of the historical conditions that motivated the history against which the first *Transformation* was written. The interpretation grasps the tail of its own creation, as a postmodern object should: "riverrun, past Eve and Adam's, from swerve of shore to bend of bay, brings us by a commodious vicus of recirculation back to Howth Castle and Environs."[22]

IV. Where We Stand — The Place of the *Transformations* in American Legal History

In the end, Horwitz tells us a proper postmodern story, in which the texts warred on themselves, ever bringing about their own downfall. Classicism perished of its efflorescence, as styles must, and Realism likewise. Realism has Horwitz' unstinted affection, as it has mine, and the combination of irreverent insistence on practical demonstration and the inherent commitment to revolutionary reform, which was Realism at its best, has no equal in our legal literature. But Horwitz, like other thinkers on this point, is aware that Realism did violence to its own past in an important way. In complicity with their foes, the Realists subscribed to a myth in justification of the vast changes in constitutional arrangements after 1937—they accepted the proposition that the judges of the Classical Age had undone the "true" nationalist order of the good Chief Justice Marshall. This order once restored by the New Deal Court, the great achievements of American Classicism could be not only

22. **James Joyce, Finnegans Wake** 6 (1946).

overturned, but entirely forgotten behind their screen of dismissive misrepresentation.

Part of Horwitz' achievement, in common with other writers of our period, is to look behind this myth, to recover the monuments of our Classicism. For Bruce Ackerman, this process means resurrecting the constitutional law of our "Middle Republic," when our Constitution was becoming a nationalist constitution centered on the natural right to property.[23] For Horwitz, whose historical grasp is stronger as his description is more sophisticated, the process is much more complicated. The Classical tradition itself put pressure on ideas of natural right, through an increasingly objectivist set of conceptions; its critics, from Holmes on, were relentlessly concerned with attacking the central dogma of American law—its separation from politics—at the natural-rights root from which it grew. Indeed, to the extent one restores continuity to Holmes' thought, qualifying Horwitz' "early" and "late" models more thoroughly than he does himself, the whole of the attack on legal orthodoxy turns out to have its intellectual origins in the doubts the disillusioned post-Civil-War generation felt about the concept of natural rights.

In part because he resists focusing on constitutional history, Horwitz has rather little to say about the effect of this theoretical background on the development of Fourteenth Amendment jurisprudence after 1905. But we have the benefit of his evidence, if not always of his narrative, in reading the crisis of legal orthodoxy as substantially a crisis over the usefulness of the Amendment's vision—which Ackerman rightly defines—in the unimaginably altered world in which the new Constitution was actually applied. Suspicion of the natural rights tradition was suspicion of the Fourteenth Amendment for the Progressives. That suspicion was handed down into the Realist camp, but it was also part of the endowment of the postwar revivers of orthodoxy. Hence the

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23. *See* **Bruce Ackerman, We The People: Foundations** 151-164 (1992). There are numerous respects in which Ackerman's project for the renovation of American constitutional history could be strengthened by attention to the history Horwitz presents in the present volume. For further suggestions along these lines, see Eben Moglen, *The Incompleat Burkean: Bruce Ackerman's New Constitutional History*, **Yale J. L. & Hum.** (forthcoming, 1993).

astonishing content of an unpublished letter, quoted by Horwitz, and sent by Felix Frankfurter to Learned Hand scarcely a month after the decision in *Brown v. Board of Education*:

> You know my deep sympathy with your outlook on the XIV Amendment. I once shocked Cardozo by saying that I would favor the repeal of that Amendment—and had wished that only the XIII and XV had issued from the Civil War. But since we have it, we have it—and I literally go through torture from time to time.[24]

Plainly, we cannot complete the account on which Horwitz invites us to embark until we have joined his intellectual history to our constitutional history, and considered the Fourteenth Amendment's role in our constitutional law free of its portion of the encrusting mythology. The period over which Horwitz spreads his fascinating argument also saw development in those lines of thought to which natural rights were not anathema. The great crusade was not over property, however, and thus is not continuous with the earlier elements of the history Horwitz is writing. Instead, the natural rights tradition remained vital in its connection to the civil rights issues that had originally motivated the authors of the Fourteenth Amendment. Perhaps the greatest weakness of Horwitz' book is that he does not discuss these other elements of twentieth-century legal thought. There are reasons for this, but the concentration on nonconstitutional law hides many of the most important intellectual developments. Perhaps Horwitz should have reconsidered the division; as it is, he leaves much of our twentieth-century legal history to be explored when he comes to write the book we now await, on the Civil War in American legal history.[25]

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24. Felix Frankfurter to Learned Hand, June 25, 1954, Hand Papers, Folder #20, Harvard Law School Library, *quoted* P. 259.

25. A single observation may make the importance of these issues clearer. Work on this book review was interrupted that I might attend the funeral of Thurgood Marshall. Perhaps events have made me more sensitive on these points than I should be, but I cannot help asking whether there is something wrong, when a book entitled *The Transformation of American Law, 1870-1960* never once mentions Thurgood Marshall's name.

This reflection brings us to the question, though fraught with danger of premature judgment, of the long-term significance of this second *Tranformation of American Law*. As I hope to have showed, Horwitz has elaborated his history in very different ways this time around. The richness and complexity of his arguments so far exceeds that of his first volume as to justify his faith in the newer styles of discourse. He is both comfortable and authoritative in his role as historian of ideas. He has consistently illuminated the intellectual history of our law, and made many important revisions to the accepted wisdom. The concept of Classicism, which Horwitz graciously acknowledges borrowing from the much discussed but unpublished work of Duncan Kennedy, [26] enriches our literature even as it generates controversy. But the mature wisdom shown in the more tempered arguments of *The Crisis of Legal Orthodoxy* will have, I suspect, a less galvanizing effect on the field than the more strident expressions of the *Transformation*. In return for a more spacious conception of the nature of legal development, we have lost some of the immediacy of the earlier work. The willingness to consider, and express, multiple conflicting explanations opens the structure of the book, and sets a foundation for a dialogue that will go on for years. Yet the terms of that dialogue will be established in a mode less confrontational than the one prevailing fifteen years ago. In this, as in so many other matters, Morton Horwitz sets his profession a remarkably humane example.

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26. Duncan Kennedy, The Rise and Fall of Classical Legal Thought (unpublished ms.).