TRANSFORMATIONS IN

American Legal History

Law, Ideology, and Methods

Essays in Honor of Morton J. Horwitz, Volume II

EDITORS:
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Foreword: The Continuity of Morton Horwitz

WILLIAM FISHER

When Dan Hamilton first asked me to contribute a short essay to this festschrift, he suggested a topic: Why don't you chart the main methodological themes of Horwitz's work? I foolishly agreed, in part because I thought I already knew what those themes were and thus that the paper would not be hard to write. It turns out that I was mistaken on both fronts.

Here's what I thought I knew: during his career as a legal historian, Horwitz has moved through three main phases. From each has emerged (or will emerge) an opus: *The Transformation of American Law*, volume 1,[1] *The Transformation of American Law*, volume 2,[2] and the Holmes Devise volume on the Warren Court (of which we have a preview in the form of the short book *The Warren Court and the Pursuit of Justice*[3]). The dominant methodologies of the three books and the three periods have been different.

The orientation of the first period was materialist. More specifically, *Transformation I* was rooted in a variant of scientific Marxism, in which law is seen either as one of several weapons employed by a dominant class to maintain its dominance or as an outgrowth of the consciousness of that class. This explanatory framework undergirds Horwitz's famous "subsidy thesis": the argument that, in the middle of the nineteenth century, American judges replaced many common-law doctrines that impeded development with doctrines that better served the interests first of merchants and then of entrepreneurs. Developments that can be explained on this basis include the displacement of the equitable conception of contracts and the associated "sound price" doctrine by the will theory of contractual liability and the doctrine of caveat emptor, the rise of the negligence principle in torts, the limitations imposed on tort and contract damages, the slow development of the just-compensation principle in constitutional law, and the corrosion from the inside of traditional nuisance law.[4]

By contrast, the orientation of the second period was idealist. After long refusing it, Horwitz swallowed the pill; took the linguistic turn; and began to explore, as the

primary moving forces in history, ideologies. More specifically, in *Transformation II*, Horwitz made substantially greater use of the methodology of contextualist intellectual history, in which the community of lawmakers and law interpreters is seen as one of a set of intertwined discursive communities, and the main job of the historian is to map the languages and attitudes of those communities, show how they affected one another, and examine how they powered or constrained their members' behavior.[5] Class interests recede; belief systems come to the fore.

This shift in orientation is marked by a change in the kinds of things Horwitz focuses on. Instead of rules and doctrinal systems, he's now concerned with legal theories. Judicial opinions get short shrift; treatises and law review articles get lots of attention. Even more important, Horwitz now seeks explanations for the ebb and flow of legal theories in parallel changes in the ways in which people in collateral disciplines were talking. So, for example, legal realism is depicted partly as a projection in legal thought of Progressivism in politics and partly as an echo of "intellectual movements of the 1920s and 1930s that today we would identify as creating an interpretivist or hermeneutic understanding of the relationship between thought and reality."[6]

In the third period (still ongoing), Horwitz has focused on individual people as the prime movers of history. He has immersed himself in the biographies and diaries of the justices of the Warren Court. He is showing in great detail the ways in which their votes and their judicial opinions grew out of their hopes, fears, and frustrations; their rivalries; and their alliances. So, for example, he has sought explanations for the mid-twentieth-century transformation of American constitutional law in William Brennan's brilliance, shrewdness, and attachment to his labor-organizer father; Hugo Black's growing anxieties about social disorder, tied to his complex history as a populist southern politician; William Douglas's grumpy isolationism, rooted in his childhood disease and poverty; Felix Frankfurter's conceit and insecurity; Earl Warren's guilt at participating in the incarceration of Japanese Americans; and so forth. The underlying methodology seems to be what Bernard Bailyn (following Herbert Butterfield) has described as "heroic."[7]

I am not alone in my impression that Horwitz has changed along these lines. I think it has become conventional wisdom.[8] Indeed, Horwitz himself has contributed to this view. In the preface to *Transformation II*, he tells us that he "gives cultural factors somewhat more explanatory weight" than he did in *Transformation I*.[9]

But when I reread the books in preparation for the festschrift, the tale of Horwitz's methodological odyssey began to unravel. The periods began to blur, the differences among the approaches to diminish. In all three of his major works could be found materialist, idealist, and heroic arguments, intertwined and integrated.

Here are a few examples. In *Transformation I*, the subsidy thesis does not carry all the weight. It is leavened with a variety of arguments less easy to fit into the framework of dialectical materialism. For instance, in the justly famous chapter on contracts, we find this claim: the development of a national commodities

market around 1815 not only created a practical need for the enforcement of executory contracts used as futures agreements but also had the widespread (not class-specific) psychological effect of making all goods seem fungible and all values seem subjective. Those changing impressions, in turn, corroded commitment to fairness-based theories of contractual obligations.[10]

Indeed, the whole thrust of chapter 1 of *Transformation I* is hard to reconcile with the subsidy thesis or with a materialist methodology. You would expect to hear that the "emergence of an instrumental conception of law" resulted from a conscious effort by judges to construct a jurisprudence that would then enable them to dismantle private law doctrines hostile to business. But that's not what you find. Instead, the instrumental conception is tied to the decline of natural law theories and the spreading influence of positivism, trends more connected to revolutionary politics than to the machinations of entrepreneurs. The argument seems a lot like contextualism.

Transformation II, for its part, turns out to have lots of things in it other than contextualism. For instance, one of its most powerful chapters is on Holmes. The analysis offered there is just as heroic, in the technical sense, as anything in the Warren Court book. We are shown how Holmes's complex jurisprudence grew out of major events in his life—some well known, like his war wounds, which led him to associate conscience and morality with fanaticism and destruction of the fragile social order; others obscure, like his yearning, vulnerable relationship with Lady Castleton. Other arguments in the book are materialist in form, like the claim that the crisis in the legitimacy of classical legal thought can be traced to the dislocations of urbanization, immigration, and industrialization.

The place where you can see most clearly the interweaving and integration of disparate methodological themes is chapter 3, on the development of corporate theory. To summarize brutally a complex argument, it turns out that the rise of the natural entity theory derived partly from Romantic attacks in Europe on liberal individualism (asserted both by "conservatives, who loathed the atomistic features of modern industrial life and yearned for a return to a pre-commercial, organic society composed of medieval statuses and hierarchies" and by "socialists who wished to transcend the anti-collectivist categories of liberal social and legal thought"), partly from the emergence in the 1890s of a modern market in shares of large corporations (which catalyzes abandonment of the traditional view of shareholders as the ultimate owners of their companies), and partly a felt need to legitimate the rise of big business, a project that American economists happily contributed to.[11] Quentin Skinner and Antonio Gramsci sit down together.

Nor, finally, is the Warren Court book purely heroic. The central players in the drama are indeed the justices, but their maneuverings are constrained, Horwitz argues, by broad cultural and ideological movements. Underneath *Brown* and its progeny, for example, can be found a slow, painful, and conflicted but in the end seemingly inexorable shift in racial attitudes in the United States as a whole. That

shift, in turn, has multiple causes: the courage of black troops during World War II, horror at the racist dimension of the Holocaust, the impact of the great migration of southern blacks to northern cities, and so forth. Similarly, the Supreme Court's advances and retreats with respect to freedom of speech turn out to be linked to shifting popular attitudes toward dissent, which in turn are tied, at least in part, to the progress of the Korean War. The effect of such analytical interludes is to make the evolution of constitutional doctrine seem less contingent, more foreordained.

In sum, materialist, idealist, and heroic themes can be found in each of the major works. There are differences of emphasis to be sure, but they are much less prominent than I had remembered.

This impression of methodological consistency is reinforced by another dimension of Horwitz's writing that remains constant: passion. The majority of works of legal history are cool; Horwitz's writing is hot. He storms at the callousness of most antebellum judges and the complacency with which their doctrinal innovations were described by previous generations of historians, relishes the iconoclasm and irreverence of the legal realists, celebrates the victories and laments the defeats of the civil rights movement, and so forth. Passion, grounded in a combination of political commitment and empathy, is the baseline of all the work.

So, in the end, I've been obliged to abandon the title that I initially proposed to Dan: "The Transformation of Morton Horwitz." A better description, I think, is "The Continuity of Morton Horwitz."

NOTES

1. Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977).

2. Morton J. Horwitz, *The Transformation of American Law, 1870–1960* (New York: Oxford University Press, 1992).

3. Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998).

4. See *Transformation I,* 63–108.

5. See William Fisher, "Texts and Contexts: The Application to Legal History of the Methodologies of Intellectual History," *Stanford Law Review* 49 (1997): 1065, 1068–69, 1076–79.

6. *Transformation II,* 6.

7. Bernard Bailyn, *The Ordeal of Thomas Hutchinson* (Cambridge, Mass.: Harvard University Press, 1974), viii.

8. See, for example, Eben Moglen, "The Transformation of Morton Horwitz," *Columbia Law Review* 93 (1993): 1042–60.

9. *Transformation II,* vii.

10. See *Transformation I,* 161,

11. *Transformation II,* 72, 80–83, 95.

Preface

This second volume of essays in honor of Morton Horwitz grew out of a desire among many of Morty's friends and colleagues to write about his influence on them and on the practice of legal history. The idea arose as we were editing the first volume of essays, which Morty's students put together to reflect on his work and to suggest how the questions he asked led us in new directions. Even in the early stages of that first volume, it was apparent that there were many people who wanted to reflect on this gentlest and kindest of scholars. A single volume composed mostly of the contributions of his PhD students would simply not be enough. So with Pnina Lahav's help and assistance—and, of course, the indispensable moral and financial help of Deans Elena Kagan and Martha Minow of Harvard Law School—we all began planning a conference to celebrate Morty's contributions to American and international legal history.

That conference was in September 2008. It included many people who contributed to the first volume, along with scholars whom Morty invited—his colleagues, students, and friends. The conference took place on a beautiful weekend in late September. We had the kind of weather that New England is famous for. As the leaves were turning and as students were getting back to business in Cambridge, Morty's friends from a lifetime of teaching and writing assembled for the most magical of weekends to reflect on the insights that Morty brought to legal and constitutional history, to talk about the origins of his insights into the intellectual culture of Harvard in the 1960s and Brooklyn and CUNY in the 1950s, and to talk about how Morty transformed the study of American legal history. He transformed it by bringing insights from economics and political theory, and a keen reading of legal doctrine and human nature, to the subject. He also imparted to others, his colleagues and his students, a sense of the power that historical analysis has, to help us see more clearly the multiple ways that a seemingly neutral law sometimes tilts in favor of the powerful and well connected and against the interests of the community or the needy. He also helped us see how historical vision is a method by itself, much as law and economics provides a method for viewing law. For in the precedent-bound and conservative world of law, history can tell us about how we have done things, as well as about possibilities for how we might remake law and the world around us. There was some talk of the early days of critical legal studies, too, but not too much. There was more talk of the future. (The conference dinner concluded in time for us all to depart and watch a presidential debate.) For Morty, ever the optimist, is sure that better days are ahead.

Most of the papers here are revised versions of papers presented that weekend. The first volume was limited to people who had been in some formal sense Morty's students. The contributors to that volume were mostly his PhD students, along with a few people who wrote graduate law theses with him or were his undergraduate students and took the PhD elsewhere, and Morty's Harvard Law School colleagues. This volume draws on a different set of contributors: they are Morty's colleagues from the wider world of legal history—faculty at other schools, as well as Harvard. These essays come, then, from a rather different vantage from those in the first volume.

Given that we now have two volumes called *Transformations in American Legal History*, it is perhaps a good time to reflect a little on what transformations Morty wrought in the study of legal history. Many of the essays here and in the first volume as well address this topic. However, it is probably useful to highlight several of Horwitz's contributions to the transformation of American legal history. His first book, *The Transformation of American Law, 1780–1860,* introduced a sense that law evolves in conjunction with surrounding economic, cultural, and social circumstances. That is, that law is politics—that its seemingly neutral principles involve important (and often opaque) decisions regarding the distribution of wealth and power. That as the law and economics movement is searching for principles of efficiency, it may be systematically stacking the deck. And that decisions may have a large distributional effect even as they have an important efficiency. American law itself changed over time to become in the nineteenth century a preserve of values of classical liberalism and property rights at the expense of other communal values; this transformation took place in large part through lawyers, replacing other competing visions of political organization.

Horwitz's second volume, *The Transformation of American Law, 1870–1960,* dealt more heavily with jurisprudence and signaled his shift to constitutional history and interpretation. His extremely influential foreword in the *Harvard Law Review*, "The Constitution of Change: Legal Fundamentality without Fundamentalism," is the subject of several essays in this book, as is his *The Warren Court and the Pursuit of Justice*, a book he has taught to thousands of Harvard undergraduates in his standing-room-only course on the Warren Court. We are all eagerly awaiting Morty's volume on the Warren Court for the Oliver Wendell Holmes Devise History of the Supreme Court. That volume will surely tell us much about the way our country moved toward an expansive vision of the Reconstruction-era amendments and toward the realization of the dreams of those who—like Morty—see a better world ahead, ordered according to principles of humanity and justice under law.

And then there is the transformation in how legal academics use history. When Morty arrived in the field in the late 1960s and early 1970s, legal history was tradition bound—largely antiquarian and used to glorify the legal profession. One might say it was used to glorify the past, but it's not clear that it even rose to that level. Morty helped bring the New Historicism to law, just as others brought it to

literature and the social sciences. As economists, sociologists, and literature scholars turned to history, so did lawyers. Morty was and is at the forefront of the turn to history to help interpret the Constitution and understand the social function of law. He helped give historical analysis—a rich, deep understanding of the ways that history influences and burdens the present—a central place in law. And so Morty changed the questions we ask about law, the way we think about the role of economics and jurisprudence in our history, and the methods we use to understand law. These are transformations, indeed. The influence of Morty's scholarship is revealed by the contributors to this volume and in the essays written in honor of our friend and colleague.

Acknowledgments

When one is compiling a volume celebrating the scholarly life, the writing, and the teaching of a beloved teacher, the community of people to be thanked is even larger than it is for the average book. Of course, we are all bound together by our affection for Morton Horwitz. His scholarship has taught us all so much, and in person he is always warm and inclusive. With his characteristic generosity and openness, Morty has helped shape the scholarship of everyone who contributed to this volume, many of whom were not his students in a formal sense. And though this is perhaps not so evident in our writing, he has helped shape our teaching as well. There are students all over the country who hear every semester echoes of Morty's lectures and Socratic dialogues in our teaching.

We are particularly thankful for Morty and Pnina Lahav's encouragement of this project and the September 2008 conference in his honor. Dean Martha Minow of Harvard Law School provided an extraordinarily generous grant that allowed for the publication of this volume; Dean Elana Kagan provided an exceptionally generous grant for the conference. We are all grateful for their and the Harvard Law School community's support of this project. Sara Davis at Harvard University Press has been enormously helpful. Sonia Fulop has been a terrific editor to work with and has expertly guided this project. The Illinois Legal History Project at the University of Illinois College of Law and the *Harvard Civil Rights–Civil Liberties Law Review* have provided important support and were co-sponsors of the Harvard Law School conference in honor of Morton Horwitz.

We are of course grateful to the authors of the excellent contributions to this volume. All the contributors have provided encouragement and support throughout. Their scholarship and intellectual energy are perhaps the best tribute to the work and career of Morton Horwitz. His scholarship and teaching have provided an important model for us all as we have worked to continue Morty's transformation of American legal history.

DWH and ALB

Contents

Part I

LEGAL HISTORY AND MORTON HORWITZ

1

A Civilized Man: Morton Horwitz Struggles with "Fundamental Law"

FRANK I. MICHELMAN

THE YEAR IS 1975. THE CRITICAL LEGAL STUDIES MOVEMENT GATHERS steam in the United States. Meanwhile, in England, an esteemed senior Marxist historian unexpectedly—and much to the consternation of the young Morton Horwitz—tops off a monograph on the eighteenth-century Black Act (a notorious piece of class legislation) by proclaiming the notion of the rule of law to be "an unqualified human good."[1] "Unless we are prepared to succumb to Hobbesian pessimism," writes Horwitz in 1977, by way of retort to E. P. Thompson,

> I do not see how a Man of the Left can describe the rule of law as "an unqualified human good"! . . . [The] system of law may prove to be all that we can hope for in this desperate century. It may be true that restraint on power (and simultaneously on its benevolent exercise) is about all that we can hope to accomplish in this world. But we should never forget that a "legalist" consciousness that excludes "result-oriented" jurisprudence as contrary to the rule of law also inevitably discourages the pursuit of substantive justice.[2]

(Make a note, if you will, of "substantive justice.")

Stirred by Horwitz's famed rebuke to Thompson, Sanford Levinson and Jack Balkin have looked into its relation to subsequent engagements by Horwitz with rule-of-law ideas.[3] They provide, in the result, a superb aid to all who find themselves caught up in comparable puzzled reflection. "Morton Horwitz's struggles with the rule of law," conclude Levinson and Balkin, "are also our own." Amen to that, say I, and sign me on. And allow me to add: and so—and relatedly—are Morton Horwitz's struggles with the static fundamentalist impulse in constitutional law. For these are not, as I see them, two separate struggles. At bottom, they are one and the same.