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BOOK REVIEWS

THE TRANSFORMATION OF AMERICAN LAW, 1780-1860. By MORTON J. HORWITZ. Cambridge, Mass.: Harvard University Press. 1977. Pp. xvii, 356. \$16.50.

Academic study of American legal history has flourished in the last decade. Most law schools and many university history departments now offer American legal history courses. A section of the Association of American Law Schools circulates reports on curricular developments in law schools,¹ while the American Society for Legal History brings together a broader group of persons interested in legal history.² Literature in the field has grown as rapidly as these professional associations.³ In the last several years an unusually large number of excellent studies have been published.⁴ The field is even graced, perhaps prematurely, with the introductory survey by Professor Lawrence Friedman.⁵ Periodical literature has also prospered,

1. The latest of these reports is H. BOURGUIGNON, REPORT ON THE TEACHING OF LEGAL HISTORY IN AMERICAN LAW SCHOOLS (Nov. 20, 1976). Not all commentators are enthusiastic about this growth of interest in "legal history." Professor Grant Gilmore, for example, attributes this growth of interest to a crisis in Western thought. G. GILMORE, THE AGES OF AMERICAN LAW 103-04 (1977). In a footnote to the pages cited above Professor Gilmore goes on to state:

I have deliberately used the cumbersome phrase 'what has come to be called legal history' in order to give myself the opportunity to express my disapproval of the term 'legal history.' The only legal materials that are or ever have been or ever will be available are historical—cases that have already been decided, statutes that have already been enacted, and so on. There is absolutely no point in setting up a separate category of legal writing (or law teaching) to be known as 'legal history.' To the extent that we segregate the study of our legal past from the study of our legal present, we become not historians but antiquarians.

Id. at 145 n.6.

2. The American Society for Legal History publishes a newsletter, holds annual meetings, sponsors the publication of *The American Journal of Legal History*, and is associated with the publication of *Studies in Legal History* of which Professor Horwitz' book under review is the latest volume. Readers interested in membership may contact the Society's secretary: Professor Milton M. Klein, Secretary, Department of History, University of Tennessee, Knoxville, Tennessee 37916. There is also now a Supreme Court Historical Society. Information about membership may be obtained from the following address: Supreme Court Historical Society, Suite 333, 1511 K Street, N.W., Washington, D.C. 20005.

3. A number of critical surveys of the literature are readily available. The most recent include Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9 (1975); Holt, *Now and Then: The Uncertain State of Nineteenth-Century American Legal History*, 7 IND. L. REV. 615 (1974). See also L. FRIEDMAN, A HISTORY OF AMERICAN LAW 596-621 (1973).

4. See M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 (1976); G. GILMORE, THE AGES OF AMERICAN LAW (1977); W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1976).

5. L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973). See also B. SCHWARTZ, THE LAW IN AMERICA: A HISTORY (1974). Professor Friedman's book has been the subject of several critical reviews. See Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81; White, Book Review, 59 VA. L. REV. 1130 (1973). Some of the best historiographical literature has appeared in the form of book reviews. See also Friedman, Book Review, 77 YALE L.J. 1244 (1968), and the book reviews by Professor Horwitz cited *infra* note 13.

with *The American Journal of Legal History*, a quarterly now in its twenty-first volume, supplementing the general law reviews in the publication of shorter studies. No single set of course materials, however, has yet found general acceptance,⁶ although useful collections of secondary sources are now available.⁷

It is in this context that Professor Horwitz of the Harvard Law School has published *The Transformation of American Law, 1780-1860*. The book is the culmination of Professor Horwitz' work in this period, as evidenced by the publication in the last six years of four major law review articles on discrete topics within this period.⁸ These articles are reprinted as chapters of the book with only the addition of some further analysis of related material to one of them (ch. VI, pp. 188-210). A short introduction and four other chapters, all presumably written after the publication of the last article, round out the book.

Readers of Professor Horwitz' articles will not be surprised by the focus of the book. He is concerned with private law (property, contracts, and torts), with "law" understood to include not only doctrinal rules but also underlying ideas about what the function of law is and the proper role of judges. He deliberately does not consider constitutional or public law developments on the ground that constitutional historians focus on the "naysaying function of law" while "judicial promulgation and enforcement of common law rules constituted an infinitely more typical pattern of the use of law" (p. xii). He has also chosen not to re-examine topics which have already been "well covered" in the literature (p. xii), apparently referring to such topics as the development of corporation law.⁹ In addition to these confessed limitations, one quickly notes that the book is written at a level of generalization such that differences within the judiciary and geographic variations are ignored or obscured.¹⁰

6. The published collections of materials include both English and American materials. S. KIMBALL, *HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM* (1966); J. SMITH, *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* (1965). Several sets of mimeographed materials circulate in the law school community. See M. Horwitz, *American Legal History* (n.d.); J. Smith, *Cases and Materials on Early American Law and Legal Institutions* (1969). The variety of courses offered, however, probably precludes the possibility of generally accepted materials at least in the short run. See H. BOURGUIGNON, *supra* note 1.

7. *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* (D. Flaherty ed. 1969); *ESSAYS IN NINETEENTH-CENTURY AMERICAN LEGAL HISTORY* (W. Holt ed. 1976).

8. *The Emergence of an Instrumental Conception of American Law, 1780-1820* in *LAW IN AMERICAN HISTORY* 287 (D. Fleming & B. Bailyn eds. 1971); Horwitz, *The Rise of Legal Formalism*, 19 *AM. J. LEGAL HIST.* 251 (1975); Horwitz, *The Historical Foundations of Modern Contract Law*, 87 *HARV. L. REV.* 917 (1974); Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 *U. CHI. L. REV.* 248 (1973).

9. One author has recently remarked that "[t]here is a fuller literature on the history of the American corporation than on any other subject that plausibly belongs in the field of American legal history." Gordon, *supra* note 3, at 23-24 n.38. Although Horwitz does have some perceptive and stimulating points to make about the development of corporations and franchises, especially in chapter IV, a fuller discussion would have allowed the reader to contrast Horwitz' approach to history with that of Professor Willard Hurst, who is the most eminent of the older legal historians of this period. Professor Hurst has traced the themes of the development of corporation law in *J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* (1970). An extensive bibliography of studies of the development of corporation law may be found in *id.* 165-81.

10. One cannot, of course, disprove Horwitz' thesis by citing counter-examples from a single jurisdiction. A cursory review of Texas cases from the end of this period suggests that reported decisions are frequently difficult to classify and that not all the cases support the

A crude restatement of the stages through which law developed between 1780 and 1860 gives a glimpse of how Horwitz analyzes the historical data. In the eighteenth century, *Stage 1*, law is perceived as "a body of essentially fixed doctrine to be applied in order to achieve a fair result between private litigants in individual cases" (p. 1). Judges in this period "conceived of their role as merely that of discovering and applying preexisting legal rules," and there was strict adherence to the doctrine of precedent (p. 8). Between 1780 and 1820, *Stage 2*, however, there emerged an instrumental conception of law which allowed judges to disregard precedent in favor of "general doctrines based on a self-conscious consideration of social and economic policies" (p. 2). Judges came to see their role as that of legislators (p. 23). While the emergence of this second stage is described in general terms in chapter I, subsequent chapters, especially chapter II, *The Transformation in the Conception of Property*, trace the doctrinal consequences of this transformation of the underlying structure of thought. By 1850, *Stage 3*, however, there is "a drawing away from interests [*sic*] in substantive ends and a resurgence of formal or procedural concerns" (p. 259). In other words, by the end of the period which Horwitz examines, formalism begins to dominate, with its emphasis on the apolitical, "scientific" nature of law. Chapter VIII, *The Rise of Legal Formalism*, suggests some of the reasons for this change and some of the doctrinal consequences.

Although, much to his credit, Professor Horwitz' own fundamental ideas about law have evolved considerably, he has unfortunately chosen to publish without amendment his earlier essays tracing the movement from Stage 1 to Stage 2. After reading his later analysis tracing the movement from Stage 2 to Stage 3 it is difficult to believe that he would not amend or supplement these earlier essays. There are, however, some cases where this is done: Chapter II, which traces the transformation of American law relating to conflicting uses of property, is developed further in a subsequent chapter (pp. 101-02). But there is no consistent revision and the reader frequently wonders if he has the latest word on Horwitz' analysis of a topic.

This point can be illustrated by a comparison of chapter I, *The Emergence of an Instrumental Conception of Law*, with chapter VIII, *The Rise of Legal Formalism*. The first chapter explains the emergence of an instrumental conception in terms of the need for a new underlying basis for the legitimacy of the common law. Why there was a crisis in legitimacy is not clearly stated although one infers that the need arose because of the Revolution (p. 17). Horwitz suggests that the legitimacy of the common law was reconstructed on a consensual basis: The people, as the source of political authority, adopted constitutions which consecrated the common law system, and the acquiescence of the legislatures in judicial pronouncements legitimated common law doctrine (pp. 19-23). As a result of relying on this consensual

general themes drawn by Horwitz. See, e.g., *League v. Journeay*, 25 Tex. 172 (1860) (factory smoke nuisance); *Butt v. Colbert*, 24 Tex. 355 (1859) (exclusive ferry); *Haas v. Choussard*, 17 Tex. 588 (1856) (downriver dam). Horwitz draws few examples from frontier jurisdictions, perhaps because relatively little work has been completed in these jurisdictions for the antebellum period. For an informative commentary on the difficulty of classifying reported cases see Cartwright, *Afterword: Disputes and Reported Cases*, 9 LAW & SOC'Y REV. 369 (1975).

basis, "jurists began to conceive of the common law as an instrument of will" (p. 22) and their own role as that of legislators (pp. 22-23). Why these arguments for the legitimacy of the common law, formulated by jurists, should succeed in the face of political demands to curtail the role of judges and lawyers, as for example in the demand for codification, is left unexplained. No attempt is made to analyze the class interests of the judiciary or the legal profession and no reference is made to the demands or needs of emerging entrepreneurial classes. Indeed, the chapter stresses that "an instrumental perspective on law did not simply emerge as a response to new economic forces" (p. 4).¹¹

Chapter VIII, on the other hand, suggests different forces at work. "As political and economic power shifted to merchant and entrepreneurial groups in the postrevolutionary period, they began to forge an alliance with the legal profession to advance their own interests through a transformation of the legal system" (p. 253). The overthrow of precommercial and antidevelopmental common law values "both aided and ratified a major shift in power in an increasingly market-oriented society" (p. 253). Once the successful entrepreneurial classes no longer "needed" an instrumental conception of law they benefited from a formalistic intellectual system which disguised "both the recent origins and the foundations in policy and group self-interest of all newly established legal doctrines" (p. 254). We discover that a second, seemingly contradictory, strand of legal thought had coexisted with the instrumental conception: a line of thought which, found most clearly in public law, sought "to depoliticize the law and to insist upon its objective, neutral, and facilitative character" (p. 255). The rise of legal formalism, which seeks to show that law proceeds from "reason" rather than "will," results from "the convergence and synthesis of three major factors in antebellum America": the increase in power of the legal profession; a convergence of interest between the elite of the legal profession and the new commercial and entrepreneurial classes; and the successful effort of these economic classes to transform the law to serve their interests (pp. 258-59). Fear of legislative redistribution of wealth, perhaps triggered by the sharp increase in state taxation following the Panic of 1837, make these economic classes eager to curtail redistribution through an instrumental system of law (pp. 258, 260). As in chapter I, Horwitz is concerned with determining the "underlying legal consciousness" from which legal doctrine is derived. But law has become ideology linked to external factors, especially class interests. Law "aids and ratifies" shifts in power which coincide with the development of a market economy, and law not only protects the new distribution of political and economic power but it also actively promotes redistribution of wealth from the weakest to the strongest classes in society (pp. 253-54).

The summary of these two chapters touches on prominent themes in the book but can only suggest the rich variety of insights which Horwitz brings

11. I detect the influence of Professor Bailyn, co-editor of the volume in which chapter I was initially published, *supra* note 8. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

to accepted interpretations of this period. Rather than tracing the origin of modern contract law to special assumpsit in the sixteenth century, Horwitz suggests that development of a national market in the early nineteenth century radically transformed precommercial contract law (ch. VI). The development of a "subjective" theory of contract and its replacement by an "objective" theory is linked in a provocative way to the precommercial objective theory of value, the "will" theory of the early nineteenth century, the role of custom, and the development of a stable, national market (pp. 196-201). Even familiar cases are shown in a new light. *Swift v. Tyson*,¹² for example, does not reflect a conception of the common law as a "brooding omnipresence" but is an "attempt to impose a procommercial national legal order on unwilling state courts" (pp. 245-52).

Yet, despite these insights, the work does not satisfy the high standards to which Professor Horwitz would hold others.¹³ There are occasional lapses in style or thought: Surely Horwitz is not serious about judges responding to "felt needs" or being captivated by "the spirit of improvement" (p. 42)? Provocative thoughts are thrown to the reader but left undeveloped. A footnote at the end of the introduction mentions (pp. xvi-xvii) Professor Ronald Coase's seminal article on the problem of social cost,¹⁴ but questions which the Coase "theorem" raise are quickly dismissed. Despite the limitations of the "theorem," it does raise questions about the actual *impact* of the different legal rules on economic efficiency; to say, as Horwitz does, that nineteenth century jurists *assumed* there would be an impact does not answer the questions raised by Coase.¹⁵ Similarly, Horwitz asks later (p. 100) whether legal subsidization was socially efficient. Apparently the question is too difficult because the question is promptly dropped.

The major defect of the work, however, is its failure to develop and apply a consistent conception about how law relates to society. How are disputes channeled to judges? Do judges act consciously? How do legal rules affect society? Why do some areas of the law respond to changes in underlying thought patterns while others do not? What is needed is a sustained jurisprudential essay from Horwitz to clarify questions such as these. While one may disagree with the emphasis on economic forces in the works of Hurst and Friedman, those authors have sought to relate law and legal process to the broader context.¹⁶

12. 41 U.S. (16 Pet.) 1 (1842).

13. Horwitz sees his work as challenging historians of the "consensus" school which has dominated American historiography since World War II. The most explicit discussion of Horwitz' view of the limitations of studies by these historians is set out in the introduction of the work under review (pp. xiii-xvi). See also Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973); Horwitz, Book Review, 86 YALE L.J. 561 (1977).

14. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

15. Two articles to be published in vol. 6 (1977) of *The Journal of Legal Studies* take off from Coase's analysis and suggest reasons why common law rules are efficient in economic terms: Priest, *The Common Law Process and the Survival of Efficient Rules*; Rubin, *Why is the Common Law Efficient?*.

16. See L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* (1975); J. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN* (1964); J. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* (1960); J. HURST, L. GARRISON, C. AUERBACH, & S. MERMIN, *THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES* (rev. ed. 1956). A bibliography of Professor Hurst's work may be found in 10 LAW & SOC'Y REV. 325 (1976). See also L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (1969).

The fly-leaf of the book's jacket quotes Professor William E. Nelson of Yale Law School as indicating that Horwitz' book is "[o]ne of the five most significant books ever published in the field of American legal history."¹⁷ Despite my comments earlier in this review, I can agree that the book is significant. It is not an easy book to read and is not for the general reader. Within the growing profession of American legal historians, however, it will no doubt serve its function of challenging existing historiographical assumptions before being discarded as failing to meet the ideological needs of younger academics.

*Peter Winship**

17. One can imagine the speculation of legal history aficionados as to what the other four books are! Does Nelson include his own recent book? *Supra* note 4. My own tentative theory is that only historians whose names begin with "H" can succeed (J. Willard Hurst, Mark de Wolfe Howe, George Haskins, and now Morton Horwitz).

* B.A., LL.B., Harvard University; LL.M., University of London. Associate Professor of Law, Southern Methodist University.

BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING. BY ROBERT A. GORMAN. St. Paul, Minn.: West Publishing Co. 1976. Pp. xxxi, 914.

Little remarked upon in the psychiatric literature is that most dread affliction of legal instruction—Prosser's Syndrome. The malady has a very brief, sometimes almost instantaneous, incubation period in students, and, once stricken, a student may carry the effects, namely a habit of mind, for the remainder of his professional career. The disorder is communicated to the faculty by means of pure speech; the victim teacher suffers successively from bewilderment, depression, and, in severe cases, terminal cynicism.

My encounter with the contagion came in my very first "go" at teaching labor law. The precise issue we were discussing is lost in memory but I do recall that I thought I was doing pretty well—one approach led into another, the latest cases were brought to bear, the best discussion in the periodical literature was noted, and the question of the real impact on the parties and on the administration of the Act recurred with sufficient frequency to assure that we were not indulging wholly in speculation. Toward the close of the hour I called for remaining questions and a lone hand was raised. I had thought the student one of the more promising, probably because of the frequency of his knowing nods, but I was struck down the moment he uttered those fateful words—"Is there a hornbook in this course?"

Convalescence is often a stimulant to one's reflective impulses and so it was after my first bout of Prosser's Syndrome. I ruminated on the function of a hornbook and whether one could usefully be written for labor law. Surely, I thought, there is some use in a work which succinctly states the "rules" so as to provide students with some picture of the larger framework within which discrete problems arise. But I was dubious. I feared that any such work would convey the too-easy assurance that all was settled—or would be settled if the author was only attended to—buttressed by an encrustation of footnotes, which might or might not actually support what the author claimed for them, to add the support of seeming authority. In sum, I feared that such a work would be an opiate that, unless taken sparingly, would lull the intellect.

What should a proper hornbook in the law of collective bargaining be? To be sure, it must accurately summarize a complex statute, as interpreted, and beclouded, by the Labor Board and the courts. That alone would be a daunting task. But it would require more than a comprehensive knowledge of the entire field. It would require the most refined editorial judgment and the selection of just the right decisions to illustrate just the right points; neither overstatement nor obscurantism would do. It would also require a writing style that is at once readable, even (dare one hope?) interesting, while brooking no ambiguity. The book should impart some sense of the relationship between the Labor Board and the courts. To cap it off, such a book would have to convey the texture—the "feel"—of a body of law that

draws its sustenance from the problems of the work place. No reader should be able to come away from it confident that any problem save, perhaps, the most obvious had been "solved"; but the reader should come away with an enriched understanding and a sense of direction for further analysis. Such a work, I thought, would be invaluable not only to the law school student but to any explorer of labor law in the bar or on the bench. And, I thought, it most likely would never be written. I was right about the value but wrong in the prediction. Gorman has done it.

*Matthew W. Finkin**

* LL.B., New York University. Professor of Law, Southern Methodist University.