Book Reviews

The Elusive Transformation

Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*. New York: Oxford University Press, 1992. Pp. ix, 361. $30.00.

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Morton Horwitz's new book is the sequel to his 1977 Bancroft Prize-winning *The Transformation of American Law, 1780-1860*. But as his Preface observes, "it is a very different book."[1] *Transformation I* tells a story in the populist spirit of Charles Beard. It shows how ante-bellum judges and elite lawyers fashioned an "instrumental" view of law that recruited traditional common law doctrines of property, contract, tort and commercial law to the service of promoting commercial development. By such means the legal elites helped business interests to accumulate wealth, property and power at the expense of workers, farmers, and consumers. *Transformation I* ends with the legal establishment beginning to construct a novel orthodoxy,

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1. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY vi (1992) [hereinafter TRANSFORMATION II].

HeinOnline -- 6 Yale J.L. & Human. 137 1994

"legal formalism," to protect the wealth thus accumulated from new threats to redistribute it.

This brings us to the central narrative of *Transformation II*: the crisis and downfall of the late-nineteenth-century way of looking at law, which Horwitz still at times describes as "formalism" but now prefers to call "Classical Legal Thought" ("CLT"), and its critique and displacement by a rival paradigm—"Progressive Legal Thought" ("PLT"). Although others have, of course, written parallel histories of the constitutional law of this period, those are but bits and pieces of the story Horwitz tells—of the "Classical" worldview, of Legal Realism, and of post-World War II legal thought.[2] *Transformation II* is the first full-scale account of this great shift in legal thought.

Transformation II is a mightily impressive achievement, as one has come to expect from Morton Horwitz. Horwitz displays a magisterial command of an incredibly complicated set of developments. He has synthesized a great deal of scholarship, including much original work of his own, into a story that is organized by a clear point of view. He has strung on this story line a set of detailed and often brilliant illustrations from different fields of law. Though the whole enterprise has a rather patchwork quality, revealing its origins in separately written essays, some of these essays are quite stunning. The section on Legal Realism (Chs. 5 & 6) is one of the best syntheses on the subject available. The chapters on Justice Holmes (Ch. 4) and on corporate personality (Ch. 3) are especially original in their research and strikingly so in their conclusions.

At the same time this book is a gnarled, cross-grained object, full of twists and knots. Its illustrations and subplots are continually at odds with its dominant themes. To borrow Isaiah Berlin's famous description of Tolstoy, Morton Horwitz is really a "fox"—a historian of many subtle and diverse insights and *aperçus*—who wants to be a "hedgehog," the kind of thinker who tries to organize all experience by means of a single, grand, all-encompassing Idea. Horwitz's Idea is

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2. Among the most interesting of these are LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980); William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, *in* A CULTURE OF RIGHTS (Michael J. Lacey & Knud Haakonssen eds., 1991); Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 1 (1980); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L.J. 257 (1989); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991); Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

HeinOnline -- 6 Yale J.L. & Human. 138 1994

that at the end of the nineteenth century the consciousness of the legal profession was structured by a single governing paradigm. The "transformation" of this consciousness into PLT was a massive paradigm-shift in the pattern of one of Thomas Kuhn's scientific revolutions: after a period of accumulating piecemeal critiques and disconfirming experiences, CLT finally fell apart when a rival theory emerged that was powerful enough to replace it. The problem is that Horwitz is too conscientious a historian for his Idea to work. The intricate details of his story keep messing up its architectonic simplicity. In the end, Horwitz's orderly structuralist garden (to switch metaphors) is overrun by its sprawling post-structuralist undergrowth: a luxuriant, unruly proliferation of divergent interpretations.

I. The Idea of Transformation II

The differences in approach between *Transformation I* and *Transformation II* are subtle but significant. The earlier book takes its main material from appellate doctrine and practical commentaries—Dane, Story, Kent, Greenleaf, and the like. The sequel's domain is legal "thought," a notch above doctrine in generality and abstraction but a notch below legal philosophy or jurisprudence. This is the thought of the high mandarins of the legal system—the efforts of scholars, commentators, and judges to synthesize, systematize, and criticize the law in theoretical and doctrinal writing in treatises and law reviews. *Transformation II* presents the legal system largely from the view of professors or occasional lecturers at the Harvard Law School—except in the chapters on Legal Realism, where the viewpoint shifts to Columbia and Yale. Unlike most historians of high-level legal conceptualization, however, Horwitz does not view this domain as an autonomous island, whose inhabitants go about their business unconcerned with anything else that happens in the world. He aims rather to connect the history of legal concepts with the history both of social change and political reform in the wider society and to parallel movements in philosophy and social science.

Nevertheless, the relation between law and society in *Transformation II* is considerably more diffuse and indirect than it is in *Transformation I*. In *Transformation I*, the legal elite has a political-economic project—the redistribution of property into the hands of entrepreneurs and the protection of it once it gets there—which it executes in a relatively straightforward manner, changing the rules of the legal game in order to immunize industrial developers from liability for takings and torts. In *Transformation II*, Horwitz assigns CLT the much more general ideological function of "legitimating" the legal framework of an entire system of market relations, which the Classical law-

HeinOnline -- 6 Yale J.L. & Human. 139 1994

yers attempt to serve by promoting the appearance that law is distinct from politics.[3]

The central drama of *Transformation II* is the struggle of "Progressive" legal writers to discredit and replace this dominant "Classical" orthodoxy. As Horwitz tells it, the Classics aimed at giving systematic and formal expression to a legal world-view that had gradually evolved over the nineteenth century to validate a particular political-economic order, that of decentralized laissez-faire entrepreneurial individualism. The desire to reform that order—to remold the legal system into an active regulatory force capable of taming concentrated corporate power and redistributing wealth—moved the Progressives to their critique. The Classical view of private law was vital, contested ground in this struggle. To the Classics, the common law rules of property, contract, tort, corporations, and unfair competition, together with the common law concepts of objective causation and harm, added up to a natural framework of ground rules, supposedly completely neutral among competing interests, for regulating interactions among individuals and between individuals and the state. In the Classical view, this natural framework was the optimal legal regime for a free and prosperous society. The courts and treatise-writers had even woven the common law ground rules into their theories of constitutional limitations on state power, so that legislatures (by these theories) might not enact regulations tampering with the natural private law order without extraordinary justification.

In Horwitz's account, two main forces worked to break up the Classical paradigm. The first was change in the organization of the economy: the rise to dominance of some sectors by a few giant corporations, the bitter struggles of this newly organized capital with its labor force, and the resultant, evermore conspicuous inequalities in the distribution of wealth and income. All this sharply challenged the Classical claim that because the rules simply encoded the uncoerced choices of contracting individuals, markets structured by common law rules would lead to optimally free, fair, and efficient results. The other force was more internal to legal thought. So successful were the

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3. A nice example is *Transformation II's* treatment of Ryan v. N.Y. Central Railroad, 35 N.Y. 210 (1866). The railroad had negligently caused a fire. The New York Court of Appeals held the railroad liable only to the owner of a nearby house, and not to more distant owners whose houses were also destroyed. The Classical jurists, Horwitz says, disdained this decision. Though they too wanted to limit business liability, they wanted even more to promote the view that causation was an objective and apolitical concept. Horwitz comments:

> The explanation gives us some insight into the relative autonomy of legal ideas. *The conception of objective causation was too central to the legitimation of the entire system of private law for it to be abandoned even in the interest of erecting another barrier to entrepreneurial liability*. Many judges, to be sure, manipulated the proximate-remote distinction in other cases to limit entrepreneurial liability, but few did so as brazenly as in *Ryan*, threatening to bring the entire intellectual system into disrepute.

TRANSFORMATION II, *supra* note 1, at 57 (emphasis added).

HeinOnline -- 6 Yale J.L. & Human. 140 1994

Classics in clarifying their system that in the process they laid bare the weaknesses and contradictions of its underpinnings. For example, they generalized the rights of property that should be protected against private invasion or legislative redistribution to every form of economic expectancy, such as the right to run a business and the right to a reasonable return on invested capital. Once "property" began to mean every form of value, the idea that it all must be legally protected against diminishment disintegrated into incoherence. The distinction between legally protected and unprotected property was revealed for what it was, the result of "political" or "policy" judgments.

The Classical system thus lay exposed to the critiques of Progressives armed with the anti-formalist insights of pragmatist philosophy and institutionalist economics. PLT, in process of formation from the 1880s onwards, reached its peak in the Legal Realist thought of the 1920s and thirties.[4] Progressive/Realist critics sought to show that the private law system was not "natural," but socially and politically constructed; not neutral, but biased in favor of the economically powerful. They challenged CLT's conceptualism and its claims to be able to derive all the detailed rules of law from a few basic principles such as "property," "will," or "fault." Citing Holmes's famous aphorism that "general propositions do not decide concrete cases,"[5] the Progressives denied that concepts such as "free will" and "property" could determine any unique set of legal outcomes, much less the particular rules of Classical doctrine. Labor strikes and boycotts obviously injured business "property," but so did ordinary competition; thus, knowing that an "owner" had "property" in his business could tell you nothing about whether strikes or boycotts should be treated as enjoinable nuisances or as privileged tactics of competition. The decision had to turn on a debatable, political policy judgment. Similarly, Classical law supposedly enforced the "will of the parties" to freely made contracts but at the same time it objectified contracting parties as "reasonable" people using standardized signs of agreement. How the legal system constructed those objectified intentions and the "ordinary meanings" of their expression, the Progressives pointed out, was a creative, discretionary task, requiring—once again—judgments of policy. The Classics sought to limit business tort liability by restricting it to harms that defendants "objectively" caused; Progressives argued that objective causation was a mirage, since the decision to attribute an event to any one of its potentially infinite causes was inevitably a decision

4. Horwitz views Legal Realism both as "simply a continuation of the reformist agenda of early twentieth-century Progressivism," TRANSFORMATION II, *supra* note 1, at 169, and as a "distinct intellectual outlook" characterized by a far greater "skepticism about reason and morality" than pre-World War I Progressivism, *id.* at 170.

5. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

HeinOnline -- 6 Yale J.L. & Human. 141 1994

made for a particular purpose, and in law that purpose had to be some goal of policy.

The most powerful Progressive critique—and here Horwitz follows other recent critical scholars paying homage to Robert L. Hale, the Columbia Realist and legal economist of the 1920s and thirties[6]—was of the Classics' public-private distinction. The Classics strictly separated the legal universe into spheres of private (market) and public (state) action. In the Classical world, private action was presumptively voluntary. Private law enforced contracts and corrected (through compensatory damages) harms to private property caused by voluntarily produced (intentional or negligent) wrongs. Public (regulatory) law, on the other hand, was coercive. It was primarily through this division of spheres that the Classics naturalized market relations and made public (legislative and administrative) regulation of those relations seem suspect and artificial—an extraordinary "intervention" into the private sphere. The Progressives insisted that all law, private as well as public, was regulatory and coercive. Contract law enforced some contracts and not others; tort and property law protected against some invasive harms and not others. When the law did enforce, it put state force behind selected types of private actors and decisions. The law privileged some bargaining tactics and coercive threats and prohibited others. Indeed the "rights" of property and contract were best understood as delegations of state power to individuals and corporations, as the Realist John Dawson put it, to "coerce one another" in the marketplace.[7] Wealth and market power were thus always a function of: 1) the legal system's distribution of rights to exclude others or to impose conditions on others' access to one's property, and 2) rights and prohibitions affecting the ability to coordinate and organize.

By such insights Progressives dissolved the naturalness of the rules constituting the private market. The common law rules were no different from any other kind of regulation, in that they delegated powers to invoke public force according to usually inarticulate, underrational-

6. A previously neglected figure in the history of legal and economic thought, Hale first resurfaced in the 1970s in a study by Warren Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261 (1973). He was recognized as a trailblazer of the modern Critical Legal Studies movement in Duncan Kennedy and Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Singer, *supra* note 2; MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 103-04 (1987). His insights have since been absorbed into leading works of mainstream legal scholarship. *See, e.g.*, CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993). For detailed accounts of Hale's work and thought see Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 MOD. L. REV. 421 (1990) and especially BARBARA FRIED, ROBERT HALE AND PROGRESSIVE LAW AND ECONOMICS (forthcoming, Harvard University Press) which resurrects not only Hale's thought but that of the whole tradition of neo-marginalist and institutionalist legal-economic thought of his period, and will be the definitive treatment.

7. John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947), *quoted in* TRANSFORMATION II, *supra* note 1, at 197.

HeinOnline -- 6 Yale J.L. & Human. 142 1994

ized, and highly contestable notions of public policy. Some Progressives thought common law judges could do a better job if they understood and analyzed the policy bases of their work. Others assumed Classically trained judges were hopelessly conservative and incompetent to decide important policy issues; only administrators equipped with more realistic and more specialized knowledge of social contexts could do the job.

After a generation of nibbling away at the Classical system, the Progressives brought it crashing down in the New Deal. Yet Horwitz's story ends with an ironic twist. By the time the Progressive/Realist paradigm finally triumphed in legal thought, it had lost most of its critical edge and reformist potential and had instead become technocratic, tamed, and coopted for relatively conservative political uses. As post-Progressive legal thinkers grew disenchanted with expert bureaucratic rationality, they retreated into the "legalism" and "proceduralism" they had once ridiculed. Some, like Louis Jaffe, expressed renewed support for judicial review of administrative action. Others, like the Harvard "Legal Process" scholars Henry Hart and Albert Sacks, restated all substantive issues of social value and policy as issues of compliance with procedural requirements: in a liberal-pluralist society, the only criterion for evaluating legal decisions was whether they were the "duly arrived at result[s] of duly established procedures."[8] The aging Judge Learned Hand retained the earlier Progressive view that Classical law was laden with conservative political judgments, but now found the remedy not in re-orienting the legal system towards more liberal ends, but in judicial deference to the "political" branches—even as those branches, in the McCarthy period, were trampling the rights of dissenters.[9] Horwitz's purpose in describing this declension is unmistakable. The underlying aim of his book, sometimes wistfully, sometimes passionately argued, is to recover PLT before it lost its edge, at its moment of highest critical brilliance in the epic contest with Classical formalism, and to dust it off and sharpen it up for battle with the resurgent conservative formalisms of the present day.

II. The Elusiveness of the Paradigm Shift

To keep up the appearance of a harmonious whole, Horwitz continually, at times even rather casually, readjusts his master Idea—redefining the essence of the Classical and Progressive world-views, their relation to social contexts and their political implications, and reposi-

8. Henry M. Hart, Jr. & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958), *quoted in* Transformation II, *supra* note 1, at 255.

9. Transformation II, *supra* note 1, at 258-65.

HeinOnline -- 6 Yale J.L. & Human. 143 1994

tioning the decisive moment of transformation. The running argument between governing Idea and rebellious examples raises many fundamental questions. The following are just a sample.

A. *What is "Legal Thought" and What Is Its Relation to the Rest of Social Life?*

Horwitz's category of legal thought, as I said before, seems mostly to be secondary writing by academics or judges, a step in abstraction removed from the body of appellate decisions that constitute the high-level ideology of the practicing profession, and many steps from the field or working-level practices of lawyers, judges, and administrative agencies. One of the many interesting questions Horwitz raises—and then responds to in interestingly, if bewilderingly, diverse ways—is that of the relation between legal thought and other social practices, such as the routine work of the rest of the legal system. Other legal historians, such as Lawrence Friedman, doubt that mandarin legal thought has much social significance. For Friedman, the flourishing of legal theory in the Classical period is a sort of child's dress-up game. Lawyers pretended to be scientists because the new prestige of natural science gave them a borrowed glory; otherwise, the mandarin theories were pretty much irrelevant to the working level of the legal system.[10]

Obviously, Horwitz thinks otherwise. He is clearly convinced that high-level legal thought is socially significant as a form of ideological ordering. He is rarely very explicit about how legal ideology works, but the main idea seems to be something like this: the function of legal thought is to synthesize a rationalizing order out of the vast miscellany of lower-level practices (doctrine). This ordering is intended to "legitimate" the legal system by showing how its contingent practices may be brought into harmony with what appear to be general social norms—though in reality those norms are only the particular political visions of the legal elite and the social groups they represent. ("Ideology," for Horwitz, thus has both its usual meanings: a commonly held coherent set of views of the world that processes experience, and a partial, self-interested set of views that masquerades as a universal vision.) Once assembled, the legal-thought system becomes a self-fulfilling prophecy, exerting a pervasive structuring influence throughout the legal system and society in general, affecting the routine ways in which legal (and other social) actors conceptualize problems, categorize realities, relate causal narratives, argue cases, and justify conclusions. Yet legal thought works as ideology only so long as there is a plausible fit between thought and doctrine, between thought and social reality. When social reality or doctrine (which responds faster

10. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 618 (2d ed. 1985).

HeinOnline -- 6 Yale J.L. & Human. 144 1994

than thought to social change) falls out of tune with the thought-system, thought begins to lose its legitimating power.

Horwitz's chapter on corporate theory[11] is probably the most straightforward illustration both of his theory of law as ideology in action and of some of the difficulties his own applications pose for the theory. The chapter opens with CLT already under severe strain—even before it has had a chance to be developed into an influential rationalizing ideology. From its inception CLT lagged behind economic and doctrinal changes in intra-corporate relations. Seeking to locate the business corporation firmly in the private sphere, to sever it from its origins as a state-created enterprise formed to serve public purposes, the Classics reconceived it in terms of a partnership, nothing more than a contract among individual shareholders.[12] But this contractualism, Horwitz tells us, was "becoming a nostalgic fantasy at the very moment" it was advanced.[13] It could not compass the revolution in corporate structure that was centralizing managerial control in an oligarchy of managers practically unaccountable to the scattered multitude of passive investors who, increasingly, held its stock. In fact, Horwitz suggests in one of his most surprising insights, the contractualist theory was the creation of "old conservative" individualist lawyers who were hostile to big business and wanted it kept under shareholder control.[14] For a friendlier legal reception and successful legitimation of the new corporation and its control by managers, a new theory was needed (and, evidently, a more sympathetic legal elite to supply it). The theory was in time supplied by jurists who—borrowing from the German jurist Otto von Gierke's neo-medieval conception of associations as "group-persons"—reconceived the corporation as a "natural entity," an organic being with its own identity and purposes, as real as any of the natural persons who composed it.

In this new phase, Horwitz suggests, legal thought actually did achieve the power required for it to play a major *causal* role: its "main effect [rather a strong word, for an intellectual historian] was to legitimate large-scale enterprise and to destroy any special basis for regulation of the corporation that derived from its creation by the state."[15] The natural-entity theory also justified the weakened role of share-

11. TRANSFORMATION II, *supra* note 1, at ch. 3.

12. This, Horwitz makes clear, was the view taken in the famous *Santa Clara* case in which the U.S. Supreme Court said that corporations had the rights of "persons" protected by the Fourteenth Amendment. Santa Clara v. Southern Pac. R.R., 118 U.S. 394 (1886). The reasoning was not that the Southern Pacific Railroad itself was a person, either "artificial" or "natural," but rather that it was *composed* of natural individuals, real persons. TRANSFORMATION II, *supra* note 1, at 69-70.

13. TRANSFORMATION II, *supra* note 1, at 92.

14. *Id.* at 103.

15. *Id.* at 104.

HeinOnline -- 6 Yale J.L. & Human. 145 1994

holders in governance and the trend away from requiring unanimous shareholder approval for mergers.[16] Indeed, Horwitz wants to insist—against his playful anarchic colleagues in the Critical Legal Studies movement who like to assert that any legal conception can be twisted into the service of almost any purpose or interest—that in context there is usually a "tilt" inherent in a theory toward some specific set of consequences, a natural fit between form and function. In this instance, none of the rival theories, such as contractualism, could have accomplished the necessary legitimating tasks so well. Thus in specific historical settings, "legal theory does powerfully influence the direction of legal understanding."[17]

Yet, is even the case of "natural-entity" theory a good one for Horwitz's view of the influence of legal thought? There are some reasons to doubt it. William Bratton's work on the relation between corporate theory and practice finds, as does Horwitz, that when basic forms of corporate structure change, new theories arise to rationalize them. But, Bratton argues, despite many shifts in high-order theory, there has been an amazing *continuity* in thinking about the corporation in American history at a level of legal thought closer to the problems of practice, that is, ordinary corporate law doctrine. At that level, Bratton shows, lawyers have regularly, cheerfully, and eclectically mixed up contract, fiduciary, group-entity, and fictive-collective notions of the firm, as necessary, to confront practical problems.[18] Moreover, if there was a "tilt" to natural-entity theory it may quite possibly have been one *away* from apologists for unrestrained corporate power. Mark Hager has looked at the Gierkean "natural entity" from another angle, and has found among its most enthusiastic boosters in the early twentieth century a group of social-democratic Progressives. These "left Gierkeans" drew from the theory new rationales for imposing criminal and tort liability on corporate wrongdoers, and for allowing trade unions the same range of natural freedom to act that business corporations had. They realized the theory had some "pro-capital" implications too, but saw these as slight compared to its tilt toward their social-democratic program.[19]

Indeed, in recent years legal apologists for unregulated business have turned not to natural-entity or managerialist notions, but back to the very contractualism—the view of the corporation as nothing more than a "nexus of contracts" between shareholders, managers, credi-

16. *Id.* at 106.

17. *Id.* at 107.

18. William Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989).

19. Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575 (1989).

HeinOnline -- 6 Yale J.L. & Human. 146 1994

tors, and employees—that Horwitz claims would not have served their purposes in the 1880s.[20]

Modern critics agree with Horwitz and the Progressives that contract theory is terribly deficient as a description of the realities of corporate organization and even of corporate doctrine.[21] But the usefulness of contractualism as ideology may lie precisely in that deficiency: the theory belongs to the long history of classical-liberal ideological enterprises that tries to suppress the non-individualist components of our routine social practices—the collective, authoritarian, communitarian, and fiduciary elements that form the actual glue of economic life. Is legal ideology most useful when it explains and accommodates problematic aspects of social life or when it denies them? Like Ronald Reagan's imagined American past of intact, small-town families whose self-reliant breadwinners made their way on their individual merits, ideology may be most powerful when it appeals to mythic—nostalgic or utopian—fantasies that lift people out of ordinary experience. "The power of [Reagan's] appeal," as Garry Wills has suggested, "is the great joint confession that we cannot live with our real past, that we not only prefer but need a substitute."[22] Horwitz himself suggests something very like this mechanism of legitimation-through-denial in his section on agency law,[23] where he pictures legal thought as Hegel's Owl of Minerva, rationalizing an individualistic social vision that was on the point of vanishing as both economic change and new case law made it obsolete. Late-nineteenth-century doctrine adjusted to the realities of delegated power in large corporate organizations by charging a company with its agents' contracts even if the agent had only apparent, not actual, authority. The Classical treatises of the time could not reconcile this practice with their grand principle that contractual obligation could only be created by consent. Horwitz comments:

> Perhaps this is a clue to one of the primary functions of the classical legal treatise, which sought not simply to report on the state of the law but to advance a highly abstract and integrated version that was grounded in a picture of a decentralized, individualistic economic and political order.[24]

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20. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

21. *See* William Bratton, *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989); Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985).

22. GARRY WILLS, REAGAN'S AMERICA 458 (2d ed. 1988).

23. TRANSFORMATION II, *supra* note 1, at 39-51.

24. *Id.* at 45. This, of course, was a common critique of the Realists: treatises like Williston's were not only out of touch with practical social life, but out of touch with the *case law* itself.

HeinOnline -- 6 Yale J.L. & Human. 147 1994

So Horwitz's own examples, in contrast to his generalizations, suggest a much more complex set of relations between theory and practice than that theory structures practice with a tilt. Don't get me wrong: I am not at all arguing here that practical action is not influenced by theory, including quite formal and abstract theory. The evidence seems overwhelming, for instance, that legal doctrine in fields like antitrust, restraint of trade, labor, and public utilities law has throughout our history been saturated in vulgarized versions of dominant theories of political economy.[25] Legal actors' pictures of cause and effect, of the judge's appropriate role, of what counts as a persuasive description of social reality or the likely consequences of a decision, have to come from somewhere; and the source is often something surprisingly abstract. Many of the grand categories fashioned by the Classical theorists—such as their division of civil liability into tort, contract, and quasi-contract, and of torts into intentional, negligent, and strict liability—continue to pervade legal thought even into the present. Many of the Progressive and Legal Realist devices for analyzing legal problems, such as multi-factor balancing tests, have also dropped into lawyers' common speech. But, of course, not every theory percolates downward from the heights. I very much doubt that the most profound Legal Realist critiques of the given-ness of property and the market, or of the public-private distinction, ever spread very far into the world of practice, though one may detect residues of their influence in particular settings.[26]

Horwitz's own views on the relation of "legal thought" to context remain mysterious partly because the book delivers only very selectively on its promise to show the "close connection . . . between social struggle and jurisprudential controversy."[27] Clearly it is the legal story that mainly interests Horwitz, and that story's social and intellectual surroundings are given only brief capsule summaries or, more often, just footnote references. Indeed, the footnotes are crammed with citations to an enormous literature on social and intellectual context, as if the bare cites could somehow raise up that context for the reader and represent all its richness.

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25. *See, e.g.*, HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991); May, *supra* note 2; Rudolph Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263. Economic historians are now inclined to explain the major social catastrophe of the Great Depression as having resulted *primarily* from policymakers' adherence to an archaic economic doctrine, the gold standard. *See* PETER TEMIN, LESSONS FROM THE GREAT DEPRESSION (1989).

26. *See* Shelley v. Kraemer, 334 U.S. 1 (1948), which invalidated racially-restrictive covenants in real-estate contracts on the ground that although private contracts, they had to be enforced by courts and thus could be seen as a form of "state action" under the Fourteenth Amendment. *Shelley* appears to adopt Robert Hale's view that contract rights are a form of delegated state power. This is not entirely coincidental, since Hale helped brief the case. The case, however, has been much criticized for what the Realists would have thought its outstanding virtue: its blurring of the public-private distinction.

27. TRANSFORMATION II, *supra* note 1, at 6.

HeinOnline -- 6 Yale J.L. & Human. 148 1994

One pages through the book wishing fervently to know more about this briefly conjured-up surround—to know more, just to take one example among many, of the elements of classical political economy underlying CLT, and of both the neoclassical (marginalist) and institutionalist challenges to that system. The book scarcely mentions the political movements to which Progressive law and social science were allied—especially Progressive social-legal reform at the state level and in the labor movement. Horwitz wants us to appreciate "the intimate relations between Realists and New Dealers,"[28] but surprisingly says nothing about what specific Realists (such as Jerome Frank, Thurman Arnold, William O. Douglas, or Walton Hamilton) actually did in the New Deal. The chapter on corporate theory has solid accounts of late-nineteenth-century changes in corporate organization; the Holmes chapter recounts contemporary conflicts over tort liability and the labor injunction. But all this economic context is from the late nineteenth century; after 1900, economic change simply vanishes as an element of context, save for five glancing references to the importance of the Great Depression in delegitimating the Classical scheme.[29] Another large-scale social change agent, the administrative state, enters the narrative for the first time in the New Deal, long after the giant corporation has left it. Where, one has to ask, is the bureaucratic rehearsal for the New Deal in state and municipal agencies, in the Interstate Commerce Commission and War Industries and War Labor Boards, in Commerce Secretary Hoover's "associationism"? Even after the administrative state belatedly appears, Horwitz's main focus is on the dispute over reforming administrative *procedure*, on the Walter-Logan and Administrative Procedure Acts; there is hardly an actual bureaucracy or program in the story. The New Deal itself puts in only a cameo appearance as an accompaniment to a discussion of the public-private distinction in the *Schechter*[30] and *Carter Coal*[31] cases.

Now plainly these are peripheral matters to Horwitz's main concern in this book—he is not writing a study of reciprocal influences of legal thought on social reform movements or of legal on social thought; the reform movements and social thought are background to his main story, and there is nothing wrong with that. Still, his own thesis depends on the argument that they are essential background, with decisive influence upon the pictures of reality and conceptive modes of legal thinkers, and that legal thought in turn is a formative influence on the conduct of social struggles. Of course, a writer cannot do

28. *Id.* at 7.
29. *Id.* at 187, 190, 207, 220, 240.
30. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935).
31. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

HeinOnline -- 6 Yale J.L. & Human. 149 1994

everything at once, and the task Horwitz has set himself is formidable enough for one book. It will be left to the armies of scholars who come after to mine Horwitz's footnotes for the chunks of context missing from his own account.[32]

B. What Are the Defining Characteristics of CLT and PLT?

As with Horwitz's theory of thought-context relations, so too with his account of the substance of his two great protagonists, CLT and PLT: Horwitz the polemical theorist wants the story to be simpler than Horwitz the historian is willing to allow. Thus contradictions suppressed in one passage to enable the theorist to have his reductive way tend to surface inconveniently a few pages later. Here are some of the key features of CLT and PLT as described in *Transformation II*, along with disconfirming examples, often drawn from the same text, that suggest those descriptions are problematic or incomplete.

1. CLT's "Fear of Redistribution"

In his opening summary of CLT, Horwitz says the "fundamental issue of American political thought was how this most politically democratic country in the world could avoid the threat of coerced economic equality."[33] The obsession of nineteenth-century law, in Horwitz's view, was the fear of Robin Hood democracy, of legal taking from the rich and propertied to give to the not-so-rich. Just as it did in *Transformation I*, the specter of democratic levelling haunts *Transformation II* as the secret motive underlying much juristic thought.

I do not doubt that this *was* an obsession of many nineteenth-century lawyers, but it is a subset of a larger and more general theme, what Corwin called "the basic doctrine of American Constitutional law,"[34] that the state should not simply take property away from A and give it to B. As Horwitz recognizes in his excellent sections on taxation and on nuisance as the basis of the police power,[35] it is more accurate to say that the nineteenth-century legal elite feared democracy as a corrupt cover for "rent-seeking" or special-interest legislation, and feared that private interests—including rich corporate private interests—would seek wealth for themselves through the legis-

32. A splendid example of what one might call "legal-thought-in-action" scholarship is Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 LAW & HIST. REV. 59 (1993). Ernst shows how theoretical differences among Progressive lawyers eventually led them to pursue divergent reform strategies.

33. TRANSFORMATION II, *supra* note 1, at 9.

34. Edward Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

35. TRANSFORMATION II, *supra* note 1, at 20-31.

HeinOnline -- 6 Yale J.L. & Human. 150 1994

lative process at the expense of the general welfare. This more general view of the "basic doctrine" casts the judges not so much as defenders of existing property—for the doctrine was developed in part by Jacksonians hostile to legally established "privileges" and "monopolies"—than as enforcers of legislative generality and neutrality.[36]

The innovation the Classical period's constitutional lawyers grafted onto the "basic doctrine" was to generalize it into a constitutional limitation on "class legislation," on takings from A-*group* to give to B-*group*. Horwitz sometimes seems to subscribe to this broader view of what Classical legal principle was about. As we have seen, his chapter on corporate personality is striking for its argument that the Classical "individualist" theory of the firm expressed in the *Santa Clara* railroad tax case, though handy for giving businesses a Fourteenth Amendment shield against regulation, was actually developed by judges hostile to corporate concentration.[37] At many other points, however, Horwitz accepts the Legal-Realist/Progressive critique of CLT as mainly concerned with defending the rich against levelling. Did CLT *shift* from being a general anti-redistributive regime to a defense-of-the-rich principle? Was it so all along? Or, is Horwitz's point just that its naturalization of common law property endowments and market outcomes legitimated existing distributions, which were becoming *de facto* more unequal in the late nineteenth century?

2. *The "State" of CLT: Neutral State or Minimal State?*

Throughout the book,[38] Horwitz speaks sporadically of the aim of CLT as that of promoting "laissez-faire" or the "night-watchman" state, or minimum interference with the market. This is not quite the same as the aim of promoting "neutrality" among special interests. Of course, the neutrality doctrine could be used and often was used in the service of antiregulatory aims, and Horwitz provides many examples of this. But the doctrine is not inherently antiregulatory; it just insists that state action has to be for *general* benefit—eminent domain exercised for "public" purposes, taxes "equal, general, and uniform," the police power deployed to serve the public welfare, etc. The official legal ideology, as many scholars[39] (including Horwitz himself, at irreg-

36. For elaboration of this point, see Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); *see also* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); Alan Jones, *Thomas M. Cooley and Laissez-Faire Constitutionalism*, 53 J. AM. HIST. 751 (1967); Charles McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AM. HIST. 970 (1975); May, *supra* note 2; Siegel, *supra* note 2.

37. TRANSFORMATION II, *supra* note 1, at 75-76.

38. *See, e.g.*, *id.* at 19.

39. *See* sources cited *supra* note 36.

HeinOnline -- 6 Yale J.L. & Human. 151 1994

ular intervals in the book, such as in his treatment of the taxing and police powers[40]) have read it, was that the state of CLT was not the minimal state, that it was instead a state "absolute within its sphere,"[41] with plenary and "inalienable" powers.[42] The generality-neutrality principle was indeed deployed to limit the total size of the public sphere. Yet in the early nineteenth century, as Horwitz might have emphasized much more than he does, both the common law and Whig-mercantilist policy gave broad scope to the "police power" and to "public rights" of property, on the often-voiced premise that all private property was held subject to reasonable limitation for the public good.[43] And the late nineteenth century, the heyday of CLT, was anything but a period of laissez-faire in legislation, either in practice or legal ideology: the period's outpouring of regulatory statutes and commissions to enforce them were reviewed and almost all approved by orthodox Classical courts.[44] Indeed the great Classical treatises on constitutional limitations and the police power have a quite expansive conception of public goods and of the legitimate scope of state action.[45]

It is positively distressing to see Horwitz helping to perpetuate the surprisingly durable myth that laissez-faire once dominated American economic and legal policy, since he has done as much as any historian to dispel the myth. (*Transformation I*, after all, is all about how the legal system had aggressively intervened to restructure property rights in order to promote the elite's developmental agenda.) To be sure, one can find plenty of instances where American lawyers have mouthed the *rhetoric* of laissez-faire and the night-watchman state, and where that rhetoric has helped to defeat some piece of regulatory legislation or support an argument that the legislation should be held unconstitutional. But at whatever level one cares to inspect it, the marrow of our legal order has never been libertarian—not in legal

40. TRANSFORMATION II, *supra* note 1, at 20-31.

41. Kennedy, *supra* note 2.

42. On the doctrine of the "inalienability" of state powers, see especially McCurdy, *supra* note 36, and Stephen Siegel, *Understanding the Nineteenth Century Contract Clause*, 60 S. CALIF. L. REV. 1 (1986).

43. *See* William J. Novak, *Public Economy and the Well-Ordered Market: Law and Economic Regulation in 19th Century America*, 18 LAW & SOC. INQUIRY 1 (1993); Carol M. Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 75 CAL. L. REV. 415 (1984); Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSP. AM. HIST. 329 (1971).

44. Charles Warren made this point many years ago. *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913). For a more detailed restatement, see Janet Lindgren, *Beyond Cases: Reconsidering Judicial Review*, 1983 WIS. L. REV. 583. *See also* MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA (1977); May, *supra* note 2; Melvin Urofsky, *State Courts and Protective Legislation during the Progressive Era*, 72 J. AM. HIST. 63 (1985).

45. *See* THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (1868); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886).

HeinOnline -- 6 Yale J.L. & Human. 152 1994

theory, not in doctrine, and certainly not in the details of regulatory practice.

3. *Was CLT's View of Property "Natural"?*

Throughout the entire book Horwitz speaks of the pre-Realist belief that property and other rights recognized in the common law ground rules were "natural" rights. True enough, nineteenth-century lawyers did often speak of them as "natural," and the Progressive critics seized on this language. But there are several different plausible meanings of "natural" in this context.

a. One set of ideas is that the market and legal rules constituting it are "natural" in the sense of "pre-political" (as Horwitz often puts it), as opposed to artificial, constructed, and conventional. These rules are nothing less than the rights one would find in a state of nature, which law only recognizes, not constructs. Few sophisticated nineteenth-century lawyers would have endorsed this view, unless in the grip of careless rhetoric. The view that the modern property rights expressed in law are positive, not "natural," is explicit in Hume and Blackstone.[46] Kent's *Commentaries* makes clear that although the instincts to acquire, possess, and defend individual property are "natural," the forms of rights that modern *law* recognizes (such as those of absentee title-holders against cultivator-squatters) are those conventional rights fashioned for the "convenience" of advanced commercial societies.[47] Horwitz sometimes writes as if it was the Realists who discovered that property was a social creation; but this insight is ancient.[48] He also attributes variously to CLT and to the Realists the notion that "property" could be generalized to extend to all legally protected expectations. It is probably true that the idea did not gain general currency until late in the nineteenth century, but it is already fully explicit in Bentham's work, as is the insight that property gives the holder a sovereign discretion to injure others.[49]

b. I think nineteenth-century lawyers held a much more historicist view that the basic common law ground rules were "natural" in the sense that society was a naturally developing organism which gradually evolved customs that were "naturally" adapted to every stage of its development (there are many references to this idea in the work of James Coolidge Carter, whom Horwitz quotes at length in his Holmes

46. DAVID HUME, A TREATISE OF HUMAN NATURE 489 (Lewis A. Selby-Bigge & Peter H. Nidditch eds., 1978) (1739-40); WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAW OF ENGLAND 1-20 (1766).

47. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 263 (1827).

48. *See* RICHARD TUCK, NATURAL RIGHTS THEORIES (1979).

49. *See* JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE, *in* 1 WORKS OF JEREMY BENTHAM 297, 308 (John Bowring ed., 1837).

HeinOnline -- 6 Yale J.L. & Human. 153 1994

chapter[50]). The common law encoded these customs.[51] It was this view of evolving social custom as natural that the Progressives turned against the Classics when they claimed that in modern organized society, the natural economic unit was no longer the individual but the large-scale organization, i.e., the corporation or labor union.

c. The hoary view of the common law as gradually adaptive tradition came to merge with a novel view of nature, i.e. the scientific "laws" of modern political economy. The common law rules were natural in this extended sense when they conformed to the "laws of the market"; legislation was "artificial" and hence likely to be futile or pernicious when it contravened these natural laws. Here, the Classical claim was that, while the rules are conventional, they are the optimal rules for a free-market economy, in the sense that following them will assure a return to the talents and efforts of labor in exact proportion to its value.

d. "Natural" can also refer to natural *law*—higher-law principles above and controlling those of mere positive law. Progressives often accused the Classics of invoking higher law of this sort in judicial review of social legislation. Horwitz considers this charge a Progressive fabrication: the Classics felt constrained by positive law commands, though they thought it appropriate to use natural law principles to fill gaps and resolve conflicts and ambiguities in the positive law.[52] On this point I think Horwitz has it exactly right.

4. CLT Is Formalist, But What Exactly Is "Formalism"?

Formalism is used throughout the book as the main feature of CLT, but it is used in a lot of different ways, and sometimes the differences are very confusing. As I went through the book I found seven (or maybe nine, depending how one counts) different uses. Some of these could be seen as complementary or overlapping uses, diverse facets of a complex portmanteau concept. Others seem—at first glance at least—contradictory. This is a (non-exhaustive) catalogue of the uses of the term in Horwitz's account: Formalism is sometimes (i) what one might call Weberian (or High German) formal rationality, that is, law emptied of all overt non-legal content, a field consisting of strictly juristic categories autonomous from politics, morals, and economics—in short, a self-contained realm of abstract "artificial reason,"[53] wholly indifferent to the probable social consequences of legal decisions.[54]

50. TRANSFORMATION II, *supra* note 1, at 188-221.

51. The most comprehensive account of the leading role in CLT of historical-customary ideas is Stephen Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431.

52. TRANSFORMATION II, *supra* note 1, at 156.

53. *See, e.g., id.* at 142

54. *See, e.g., id.* at 17.

HeinOnline -- 6 Yale J.L. & Human. 154 1994

Sometimes it is exactly the opposite, (ii) a legal order committed to enacting a very particular substantive view, that of classical liberal views of freedom and political economy; or (iii) a legal order that draws its substance from the bottom up, from gradually evolving social customs.[55] Sometimes its chief defining mark is (iv) conceptualism, the belief that all the specific rules of the legal system may be subsumed under a few headings of very abstract and general concepts such as "free will" or "fault," and then deduced from those concepts (Horwitz calls this "vertical" reasoning); it is also, however, (v) a strong confidence in the power and determinacy of analogical ("horizontal") reasoning from similar cases.[56]

In other places the main formalist idea becomes "categorical thinking," which is really two ideas. On the one hand, the main formalist idea is (vi) a kind of essentialism, the view that legal categories describe natural kinds of things, and that all social phenomena may (with some hard borderline cases) be reliably assigned for legal purposes to one and only one of each kind. On the other hand, it is (vii) formalism in the sense of what Weber called "formal realizability" (and Roscoe Pound derisively labelled "mechanical jurisprudence"), the preference for easy-to-operate "bright-line" rules and objective tests that facilitate certain and predictable (if inevitably somewhat arbitrary) decisionmaking, in contrast to open-ended particularistic multivariate standards and balancing tests.[57] Elsewhere, formalism represents CLT's commitment to generality in rule-formulation, which may also be subdivided into two somewhat distinct commitments:[58] (1) to generality in the service of neutrality among classes and special interests, that is, to the framing of rules that cut across customary social groupings, treating all parties as abstract A's and B's, and (2) to generality in the service of predictability of results.[59]

Horwitz is hardly alone in the loose pluralism of his account of formalism and, more generally, CLT: late-nineteenth-century American legal thought has proved maddeningly elusive to historians' attempts to chase it down, especially since we are used to seeing it through the eyes of Progressive critics inclined to hostile caricature. Horwitz's multiple and somewhat blurry usages of terms like "natural" and "formalism" may well be more faithful to his sources than clearer and conceptually sharper uses would be. Classical lawyers rarely stopped

55. *See, e.g., id.* at 121.

56. *See, e.g., id.* at 155, 202-03.

57. *See id.* at 17-18, 199-200.

58. If these additional uses of formalism are added to the previous seven, Horwitz has, in all, nine different uses of formalism. I am not sure, however, whether it is fair to count "generality" as a separate use of formalism, since it may be an inherent attribute of other uses like autonomous-law, conceptualism, and categorical thinking.

59. *See, e.g.*, TRANSFORMATION II, *supra* note 1, at 230.

HeinOnline -- 6 Yale J.L. & Human. 155 1994

to ask what exactly they meant by saying rights were "natural," and the Progressive critics of "formalism" likewise were not too troubled by inconsistencies in their critique (formalism was both unduly vague and abstract *and* "mechanical," both removed from politics *and* the tool of an obsolete political economy, both dependent on abstract and ahistorical principles *and* tied to a conservative historicism, etc.). But the reader is often left unsure whether what seems like a conflation or confusion of terms is one found in the Classical sources or imposed on them by later critics or the historian himself. It would help us to understand these movements better if we could pick apart their components and then figure out how they were mushed together. Holmes, for example, as Thomas Grey has pointed out, believed strongly in the grouping of doctrines under small numbers of highly abstract categories, as well as rule-formalism or formal realizability. He emphatically did not think that the categories expressed natural essences or that they could determine results in particular cases. Holmes was thus a formalist in some of Horwitz's senses but an anti-formalist in others.[60]

Horwitz's view of CLT in fact quite closely tracks the Progressive and Legal Realist accounts of "formalism"—which Horwitz announces from the start, he is trying to challenge.[61] He does challenge the Progressive caricature of CLT as the tool of big business: it was the Progressives who embraced big business, some along with a program to tame it, others happy to let it fulfill its unregulated evolutionary destiny. But Horwitz's description of formalism is basically the Progressive description, and it is, I think, exaggerated in similar ways. American jurists, including even the much-maligned and not very representative Harvard jurists C.C. Langdell and Joseph Beale, never went in for formalism on the High German model of *Pandektenwissenschaft* of the Windscheid variety: the common law is too case-bound for that mode and too dependent upon the individual judge and the concrete precedents. Though not as given to policy analysis and argument as post-Realist thought, even classical opinions and scholarship were suffused with the rhetoric of arguments from convenience and policy.[62] At the same time, I think Horwitz overstates the impact of the Progressive/Realist revolution in legal thought on the prevalence of formalist reasoning as he defines it. True, the impact of Realism on legal scholarship has been deep and pervasive; it

60. On "formalism" and its multiple meanings, Grey's essays on Langdell and Holmes are especially helpful. Grey, *supra* note 2; Thomas Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989). The entire subject could use considerably more analysis. For a valuable, skeptical treatment of the standard uses of "formalism", see Stephen Diamond, *Citizenship, Civilization and Coercion: Justice Holmes on the Tax Power*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 115 (Robert Gordon ed., 1992).

61. TRANSFORMATION II, *supra* note 1, at 7.

62. Some of these are cited in the book. *Id.* at 58. The long quotation from Francis Wharton is a lengthy policy argument against expanded entrepreneurial liability.

HeinOnline -- 6 Yale J.L. & Human. 156 1994

outlasted the Legal Process school's retreat to proceduralism in the 1950s, and will probably outlast the many neo-formalist revivals now under way. But judicial reasoning is still primarily doctrinal, categorical, and analogical: judges ask, "Is this a mortgage or a conveyance, a breach of contract or a tort, a gift or a trust?" as if they were matching up the legal category to some natural fact about the world. This is unavoidable, especially in routine practice where "functional" or "purposive" or "consequentialist" policy reasoning of the kind favored by Realists is rare.

I certainly do not mean there is no new law under the sun. Legal reasoning has changed, as one can tell immediately by picking up a law reporter or law review from 1900, or for that matter by reading English law reports or scholarship, which never went through a Realist phase and still largely resemble those from our formalist era. But I do not think any historian has yet found a description that really captures the subtleties of those changes.

5. *Political Implications of PLT: Was the Administrative State a Progressive Instrument for Controlling Corporate Power and Redistributing Wealth, or Was It a Captured and Coopted Instrument of Corporate Power?*

This question is, of course, one of the central controversies among modern political scientists, whether they be public choice, "republican," or neo-Marxist theorists, and among historians of the administrative state.[63] Horwitz is as understandably ambivalent about it as most progressive-liberals are. If I read correctly between his lines, he himself reads the history of PLT as a tragic failure of a view of law and regulation that had a chance to further a social-democratic vision, but was tamed and made conservative before that vision was realized. Horwitz also believes that the Realists articulated a potentially profound radical critique of liberal-capitalist legalism, but later retreated in fear of its implications. Sometimes he seems more optimistic, and his account reads as if the Progressive-redistributive vision had really triumphed after all in the New Deal, and only afterwards gone into retreat. Sometimes, however, he adopts the darker, instrumentalist view that the Progressive-New Deal initiatives (and the legal theory that supported them) served large corporate interests from their inception. For example, Horwitz informs us that the Progressive

63. For a small sample of the disputants, see PETER B. EVANS ET AL., BRINGING THE STATE BACK IN (1985); BARRY D. KARL, THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945 (1983); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1963); THEODORE LOWI, THE END OF LIBERALISM (1969); GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966); GEORGE STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975); CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION (1990); Thomas K. McCraw, *Regulation in America: A Review Article*, 49 BUS. HIST. REV. 162 (1975).

HeinOnline -- 6 Yale J.L. & Human. 157 1994

natural-entity conception of the corporation was designed to legitimate the giant firm and to insulate it from regulation.

Progressivism was, of course, all these different things simultaneously, but one wishes Horwitz could have been more explicit about his book's relation to these debates. For instance, he seems to adopt a very Progressive view of the New Deal's administrative agencies, that they really did contain business power. In this mood he is inclined to label critics of the agencies and proponents of heightened judicial scrutiny conservative legalists, reactionary throwbacks to CLT.[64] But almost immediately, he himself accepts the view that the agencies had become "captured" by the industries they regulated, and that at some point the good guys and bad guys had changed places and judicial review had come to favor liberal causes.[65] The one possibility he doesn't explore is, alas, the most likely one of all: many if not all of the administrative agencies, like the Progressive commissions that preceded them, were (and in some cases were designed to be) "captured" from the start, and as soon as they were created they settled into the familiar triangular alliances between narrow organized-industry interests, their friends in Congress, and the agency staffs. (There were always exceptions—agencies like the early Labor Board and early SEC that, for contingent reasons, were able to assert a relatively autonomous regulatory role.[66]) The industry-orientation of the New Deal agencies was widely noticed at the time[67]—and in some ways the wonder is that it took so long for administrative law writers, most of whom had themselves served in those agencies, to notice it too. (The registering of this phenomenon in the group-mind of the Harvard Law School, in the form of Louis Jaffe's articles and the 1960 Landis Report, seems like rather belated notice.[68]) Among political scientists these cozy deals were validated by standard pluralist theory as early as

64. *See* TRANSFORMATION II, *supra* note 1, at 225-40. His main example that signals the retreat to legalism is the adoption of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. In the Walter-Logan Act of 1940, conservative lawyers had attempted to hamstring the administrative agencies by forcing them to act through highly formal judicialized procedures. President Roosevelt, on the advice of New Deal administrators attached to the idea that administrative experts should be able to act informally and flexibly, free of internal procedural constraints and judicial review, vetoed Walter-Logan. The two sides compromised in the APA. Horwitz views the compromise as a victory for the conservative-legalist, Walter-Logan forces. *Id.* at 232. This seems exaggerated. The APA only required an agency to use formal procedures in adjudication if Congress specified these in the agency's organic statute. APA rulemaking was presumptively informal, requiring only notice and opportunity for comment.

65. *Id.* at 240-46.

66. Actually the problem with the Labor Board was that parts of it, such as the Appeals Division, were exactly like every other administrative agency, biased towards a single constituency. But since the constituency was labor rather than a business group, the bias led to a ferocious Congressional reaction, purge of the Division, and Taft-Hartley. *See* JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD (1981).

67. *See, e.g.*, PENDLETON HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST (1936).

68. *See* TRANSFORMATION II, *supra* note 1, at 238-41.

HeinOnline -- 6 Yale J.L. & Human. 158 1994

the 1940s and fifties. The understanding here was that administrative officers, like legislators, were just delegates of organized interest-group constituencies, and the resultant compromises were all likely to balance out to something approximating the public interest.[69]

Horwitz's arguments about the political contributions of PLT ultimately remain elusive because—apart from very general references to the legal system's potential to "redistribute property," "regulate" corporations, promote "social justice," and protect the civil liberties of dissenters—he does not spell out in any detail the Progressive legal thinkers' substantive views, the social agenda that (he believes) their backsliding and compromises in the post-New Deal period left unrealized. Did his Progressives ever mean more by "redistribution" (for example) than a mildly progressive income tax, compulsory unemployment and social insurance schemes, a more generous and efficient accident and workers' compensation system, a broadening of defenses to contract enforcement, recognition of labor unions' rights to organize and bargain collectively, and some enhanced regulatory supervision of corporate structures, public utility rates, and financial markets? If so, what was it? If not, what was left unrealized?[70]

6. *Political Implications of PLT: Progressive and Realist Social Science*

On another aspect of PLT, Horwitz is more openly ambivalent. Some of it, like Robert Hale's and Jerome Frank's work, he thinks was genuinely reformist. Other Realist work, however, he describes as having slipped into sterile technocratic positivism, into the program of trying to derive social-engineering solutions from "value-free" empiricism and of closing the gap between legal conceptions and social practices by readjusting the law to conform to customary practices—a program that was unable to locate values anywhere but in the status quo.[71] In these passages I think Horwitz occasionally confuses intellectual with political radicalism. The theoretical aspect of Realism he most admires is what (using Peter Novick's term[72]) he calls its "cognitive relativism," its "interpretive or hermeneutic" understanding of the "socially constructed character of frames of reference, categories of thought, and legitimating concepts."[73] The specific Realist project

69. *See* JAMES A. MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT 136 (1990).

70. I do not mean to suggest these were trivial ambitions; they were important reforms that required much struggle over a long period to get past the strenuous resistance, intellectual as well as political, of conservative elites. But *Transformation II* often implies that PLT at its height had a more radical agenda, without saying what it might have been.

71. TRANSFORMATION II, *supra* note 1, at 208-12.

72. PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY" QUESTION AND THE AMERICAN HISTORICAL PROFESSION 288-91 (1988).

73. TRANSFORMATION II, *supra* note 1, at 182.

HeinOnline -- 6 Yale J.L. & Human. 159 1994

he most admires, as I do, was the work demolishing the Classical categories, breaking the link between rights and remedies, disintegrating the concept of property, trashing the public-private distinction and the presumptions that state action was normally "coercive" and market relations normally "free," and above all, recognizing that the capitalist economy has a socially contingent constitution that is neither natural nor necessary, but alterable by deliberate collective action ("policy choices"). That set of Realist insights was politically reformist in context because it dug away the foundations of a mode of legal thought that had become—though in its egalitarian antimonopolist origins it had hardly started out that way—the bulwark of an apologetic ideology. But one can recognize that capitalist societies have a constructed and contingent legal constitution without actually wanting to change that constitution very much, or believing that it is politically feasible to change it more than a tiny bit—and few Realists went in for any very radical politics. Thurman Arnold (who curiously appears only once in Horwitz's gallery of Realists) produced some of the wittiest and most devastating critiques ever written of the rhetoric of laissez-faire capitalism.[74] But as chief trustbuster to the New Deal he pursued a cautious, efficiency-based policy, aggressive in the volume of cases brought, but in theory not much different from previous antitrust enforcement regimes.[75]

On the other hand, some of the Realists' "positivist" social science—to which I think Horwitz is anachronistically unsympathetic—was really illuminating and surprising in its findings, and reformist in its conclusions. It was anything but passively accepting of the status quo.[76] A series of court studies pioneered by Charles Clark made starkly clear to anyone who was willing to listen that trial courts were not tribunals that declared rights and obligations, but factories for routine processing of uncontested debt-collection claims on the civil side and plea-bargains on the criminal. This was all news at the time to the bar elites—indeed news so unwelcome that they refused to believe it.[77] Felix Frankfurter and Nathan Greene's study of labor injunctions revealed the astonishingly prevalent use and sweeping scope of this tactic of labor-capital warfare.[78] Friedrich Kessler's work on adhesion contracts and vertical franchising arrangements was the empirical prop to his theory that the modern capitalist economy was characterized by quasi-"feudal" hierarchies that required legal con-

74. THURMAN ARNOLD, THE FOLKLORE OF CAPITALISM (1938).

75. *See* Alan Brinkley, *The New Deal and the Idea of the State*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER 85, 89-92 (Steve Fraser & Gary Gerstle eds., 1989).

76. More sympathetic treatments are in the leading histories of Realist science. *See* KALMAN, *supra* note 2; Schlegel, *supra* note 2.

77. For the court studies and their reception, see Schlegel, *supra* note 2, at 495-519.

78. FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

HeinOnline -- 6 Yale J.L. & Human. 160 1994

trols on the overlords and a redistribution of rights in favor of the vassals.[79] And of course Berle and Means's famous work on changes in corporate structure was primarily an empirical study of shareholder diffusion and managerial concentration.[80]

These are just a few among many such studies of the period. Far from normativizing the grubby status quo that it uncovers, this work is often concerned to make the critical point that the law "in action" is not applied uniformly, but in ways that favor the wealthy and powerful. Other Realist empirical work assisted the critical project of undermining CLT, as some of Horwitz's own examples show: the descriptive sociology of Hale and Jaffe, whose examples of law-in-action—the exercise of law-making authority by private groups—helped make problematic the Classical public-private distinction.[81] In other words, despite its deplorably primitive theoretical bases, its naive functionalism and behaviorism, a good deal of Realist social science is, in context, both interesting and subversive. In this respect it is more a precursor of the modern critical law-and-society movement (which I am sad to see Horwitz leave out of his taxonomy of modern legal thought) than of law and economics. Realist social science in general is a useful reminder of how much science in the Progressive era was assumed not to be value-free in any strict sense, but—because of its ability to continually revise and unsettle complacently accepted and established truths—an instrument in the cause of democratic reform.[82]

There is an interesting parallel and contrast between Horwitz's treatments of CLT and PLT. Both are movements that claimed to be republican movements in the general public interest; both have been criticized as masks for corporate privilege—the first using common and constitutional law as its instrument, the second using legislation and administration. Horwitz by and large accepts the Progressive critique of the Classics, except on the matter of the contractarian theory of the firm. On the other hand, he takes the republican claims of Progressive/Realists at face value (except for their scientism) until the post-New Deal period. These judgments may be on balance fair, if one looks at the political uses actually made of the two legal theories. But the book could emphasize more than it does the bright side of

79. Friedrich Kessler, *Contracts of Adhesion: Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

80. ADOLF A. BERLE, JR. & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

81. Robert L. Hale, *Law-Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920); Louis Jaffe, *Law-Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

82. *See* JAMES KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920, at 319-20, 383-84, 406-07 (1986).

HeinOnline -- 6 Yale J.L. & Human. 161 1994

CLT (utopian, republican, and general public interest serving) and the dark side of Progressive/Realism.

III. Conclusion

The dialectic between Horwitz's grand Idea and the honesty of his historical detail results in a book of Protean elusiveness: just as you think you have the thesis pinned down, it twists away from you and turns into something else. But this very elusiveness turns out to be remarkably suggestive. Horwitz's subversive subthemes, by rendering his story much more complex than he wants it to be, succeed in making it almost as complex as it probably ought to be.[83]

I predict for this book the not unenviable fate of being received like its legendary predecessor, *Transformation I*. It will inspire many to praise and provoke others to furious attempts to refute everything it says. It will supply the questions that must be debated and prod another generation of scholars into evaluating its arguments. From now on anyone who wants to understand this period will have to start with Horwitz and come to grips with his thesis. It will be, as the last book was, seminal: both of new corn and dragon's teeth.

83. Horwitz's aversion to overt complexity—and his preference for the bold assertion and sweeping thesis—are, I suspect, the products of rebellion against his own formative intellectual context: the (very similar) 1950s schools of Legal Process in jurisprudence, "consensus" American historiography, and "end-of-ideology" political theory. These schools all promoted irony, complexity, ambiguity, and tragic resignation to the limits on human capacities to remake societies through deliberate collective action as the necessary antidotes to the sweeping "ideological" commitments that had led to "totalitarianism." This social vision—and the deep political complacency it often induced—is especially well described in Novick, *supra* note 72, at 281-360.

HeinOnline -- 6 Yale J.L. & Human. 162 1994