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BOOK REVIEW

THE TRANSFORMATION OF AMERICAN LAW, 1780-1860.

BY MORTON J. HORWITZ. Cambridge: Harvard University Press, 1977. Pp. xvii, 356. Price \$16.50.

Morris S. Arnold †

Professor Horwitz's title is descriptive: his book traces and interprets the changes in American law, roughly between 1780 and 1860, that occurred in response to the emerging developmental and entrepreneurial ethic of the nineteenth century. Other legal historians before him have seen the nineteenth century as a "Golden Age,"¹ or have spoken of the "release of energy"² that occurred during the era; but until now, no one has described in anything like the detail present here the transformations in private-law doctrines that characterized the times. More important than this detailed description, however, is the framework provided in Horwitz's sustained analysis of the causes and effects of those changes. No single book can hope to be entirely successful at surveying in an interpretive way the whole of American law during so long and important a time span, part of which is not illuminated by sufficient source material to make conclusions very easy or entirely trustworthy. But in many important aspects, the book is convincing, and gives American legal historians what they have not had before—a systemic way into their subject, an example to imitate. It is among the most interesting and intriguing books on American legal history ever produced. But a model to aspire to is often also a target to shoot at, and much future energy will likely be expended

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I had the advantage of using Professor Horwitz's excellent teaching materials in my American Legal History class in the Spring of 1977 at the University of Pennsylvania Law School. The students in that class contributed very substantially to my understanding of nineteenth-century legal history, and, without limiting the generality of the foregoing, Mr. Curtis E. A. Karnow and Ms. Virginia Kerr were especially helpful in that they asked questions to which I did not always have very good answers to hand. My students were truly my teachers.

¹ Haar, *Preface* to *THE GOLDEN AGE OF AMERICAN LAW* at v (C. Haar, ed. 1965).

² W. HURST, *LAW AND THE CONDITIONS OF FREEDOM* 3-32 (1956).

trying to catch Horwitz out. This Review will, among other things, attempt in a small way to demonstrate how this might be done with respect to a few particular points and to some general themes of the work.

I.

Horwitz begins by demonstrating that early nineteenth-century judges, unlike their eighteenth-century counterparts, self-consciously took it upon themselves to mold the law in order to promote policies that they believed the public welfare required. This creative, activist model of judicial behavior, a manifestation of the belief that the common law ought to be responsive to changing social forces, has a curiously twentieth-century aura, but was the invention, roughly speaking, of the first quarter of the nineteenth century. By contrast, eighteenth-century judges had viewed the common law as basically fixed and changeless, the product of reason and custom. This earlier natural law theory of adjudication gave way to the innovative one, Horwitz believes, as a result of a change in the general conception of law brought about partly by the revolution and its concomitant political theories.³ Briefly put, his theory is that the notion of popular sovereignty gave rise to the belief that all law (even common law) was the creature of will and not simply the product of reason; law was to be manipulated to serve the sovereign's sense of necessity. So law began to be viewed in "instrumental" terms, as something to be used to accomplish a policy instead of simply discovered to settle a dispute in accordance with a preexisting justice. And, the book's argument runs, an eighteenth-century doctrine of strict adherence to precedent was replaced by the fast and loose judicial style of the nineteenth.⁴

Now Horwitz is quite clearly correct, as he admirably demonstrates, that America's view of adjudication did change, roughly, from one of discovery to one of policy vindication. But it is not easy to see how the notion of sovereignty got translated into judicial activism. One would rather expect that the view of law as will would result in judicial timidity, as it eventually did in England; however, it is right that in England parliamentary, not popular, sovereignty was the nineteenth-century constitutional rule. Horwitz says that post-revolutionary thought sought to explain the innovative power of judges by describing them as "trustees" or

³ This is the theme of the book's first chapter. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* at 1-30 (1977).

⁴ *Id.* 26.

“agents” of the sovereign; but no examples are given, and this is surely a rather peculiar way to describe what judges do. But perhaps it is simply my own after-mindedness (or, worse, political inclination) that sees popular sovereignty and judicial creativity as inevitably inimical.

The question of the changing role of precedent is even more troubling. The notion that law is discoverable by observation and deduction, the natural law theory of adjudication, tends rather away from the rigid *stare decisis* principle ascribed by Horwitz to eighteenth-century courts⁵ than toward it. The previous “discovery” may well have been erroneous, and a judge’s (or jury’s) job is to do justice according to right and not according to precedent. Reason should govern, not example. Moreover, even if by some peculiar twist of logic colonial judges did feel the need to conform to previous case law, it is not easy to know where they might turn. There were no American reports at all, and English reports, with a few distinguished exceptions, were intermittent and frequently untrustworthy. Indeed, it is not easy to locate the idea of *stare decisis* in English jurisprudence before the nineteenth century.⁶

II.

For whatever reasons, however, and whether as a result of or despite post-revolutionary notions regarding the nature and source of law, nineteenth-century judges did set out to transform the common law in many of its most important aspects. Not every anti-developmental rule fell, of course, for as Horwitz says the judges sometimes “regarded the weight of the received legal tradition as just too overwhelming to allow for innovation.”⁷ But the law of property was certainly harnessed to the task of economic development: the “natural flow” rule of riparian rights was relaxed to

⁵ *Id.* 8.

⁶ J. DAWSON, *THE ORACLES OF THE LAW* 83-90 (1968). This is a very complicated matter and deserves serious investigation, but a brief outline of the difficulty as I see it can be given here. As Horwitz shows, very little control over the jury was exerted by eighteenth-century judges. Now jury control devices are necessary for generating legal opinions by judges whether written or not; and opinions are necessary for a system of *stare decisis* in the usual sense. Of course a system of precedent could be based on custom. But if jury control techniques were rare before the revolution, juries, not judges, would be responsible for keeping the custom pure. A proper analysis of this difficulty will require separate treatment of procedural and substantive law, and, within the substantive division, distinct consideration of criminal and civil law. Moreover, separate consideration of the law of real property would seem to be necessary because special verdicts were common in that area of the law and uncommon elsewhere.

⁷ M. HORWITZ, *supra* note 3, at 83.

allow for competitive use of water; the doctrine of prescription was partially overthrown to allow land development that produced externalities; the law of waste was relaxed to allow life tenants and other temporary occupants of land to alter their estates to make them more productive; and, perhaps most important, the law of nuisance was allowed more and more to drift away from its organizing maxim *sic utere tuo ut alienum non laedas* toward a new balancing test that measured the relative utility of competing land uses.⁸ Horwitz marshals impressive evidence to document these changes and he is in this respect very convincing. Furthermore, he correctly points out that in these and other ways certain injuries became noncompensable; and so it often fell out that those "landowners whose property values were impaired without compensation in effect were compelled to underwrite a portion of economic development."⁹ More and more, courts resorted to the idea of *damnum absque injuria* to deny a plaintiff's claim. By accomplishing subsidization through the legal system rather than through taxation, Horwitz maintains, the ultimate political choices were hidden from view and insulated from debate.¹⁰ The developmental urge had captured the courts, and it was by this allegedly apolitical agency of government that the subsidy was levied.

All this, as I say, is convincingly argued. There may have been some rather extensive redistribution going on, and if so, the developmentally minded were, partly at least, the benefited parties. Not all developers would win, for some would be inefficient even with a subsidy; but still, in general, developers as a class, or, as Horwitz has it, the "dynamic and growing forces in American society,"¹¹ the "active and powerful elements"¹² would have been the chief beneficiaries of the transformation. Yet the losers are more difficult to identify. Horwitz calls them "the weak and relatively powerless"¹³ and "the weakest and least active elements in the population."¹⁴ There is a tautological sense in which a person who is victimized this way is necessarily "weak" and "powerless": if he were otherwise he would have acted to prevent it. But there is another tautological sense in which victims are neither weak nor powerless:

⁸ *Id.* 32-34; *see id.* 56-58, 74-78.

⁹ *Id.* 70.

¹⁰ *Id.* 101.

¹¹ *Id.* 99.

¹² *Id.* 108.

¹³ *Id.* 99.

¹⁴ *Id.* 101.

in order to be victimized, one needs to be propertied. A substantial landowner who finds himself powerless to enjoin an injurious activity because of a transformation in nuisance doctrine may be very considerably damaged, but it seems somewhat curious to describe him, before the fact, as "weak" or "powerless." Indeed, the "weakest" and most "powerless" of the society are the dispossessed; and they, by definition, having nothing, have nothing to lose. Still, it is true that the non-propertied classes might have lost something during this transforming period, for, as Horwitz shows, the general compensation principle of the eighteenth century gave way to a predominantly negligence-oriented tort law in the nineteenth.¹⁵ To the extent that the right to be free from even non-negligently caused injury is a property right, everyone, even the dispossessed, may have lost something to the active elements of American society. Whether liability rules might be property became much debated, of course, during the heyday of substantive due process.

Still there is a larger point to be made here, and that is that while the proproductive law of the nineteenth century may have robbed some of their property in the more usual sense, and everyone of their common-law liability rules, economic development may have so benefited society in general that the result to even the unpropertied was a net increase in utilitarian terms. We are not dealing here with a zero-sum game, and the subsidy may possibly have amounted merely to compensation to the entrepreneurial class for benefits conferred and otherwise uncollectable. In other words, the transformation in liability rules can be seen as a kind of hidden, general unjust enrichment remedy, and the resulting social structure, even with the "subsidy," may have been very nearly pareto superior. It was almost certainly Kaldor-Hicks efficient. The conclusion that nineteenth-century legal changes actively promoted a "legal redistribution of wealth"¹⁶ is probably correct to some degree; but it is a real question whether the redistribution was large and who the losers were. Take the concrete case of an ordinary nonpropertied working person, say, a railroad employee. He may be benefited by lower costs of goods because of lower transportation costs. Moreover, the loss to him represented by a changed liability rule may have been more particularly compensated for by higher wages than would otherwise be forthcoming.

I am not suggesting that Horwitz's thesis is necessarily erroneous, only that this proposed analysis is at least a not altogether im-

¹⁵ *Id.* 85-99.

¹⁶ *Id.* 254.

plausible alternative. Economics is, after all, an empirical science, and research by economic historians with respect to what does happen (and what did happen) would greatly enhance our chances of correctly interpreting the causes and effects of nineteenth-century legal development.

III.

One of the most striking theses of the book is that eighteenth and nineteenth-century contract law were fundamentally different, the one being based on flexible regulatory notions of substantive justice and just price, the other on hard-line and literal enforcement of bargains precisely as made.¹⁷ Horwitz argues, for instance, that in the eighteenth century there was at law and equity a substantive theory of consideration, that is, that adequacy would be examined into, and necessary adjustments made by juries, if the agreed price seemed in some manner unfair.¹⁸ That this was the rule in equity has been for some time recognized; but the existence of an identical rule at law, for which Horwitz produces much evidence, is very surprising indeed. But Horwitz's theory is not free from difficulty.

In the first place, his general description of the "substantive justice" characteristic of eighteenth-century American contract law as a survival of "the medieval tradition"¹⁹ seems off the mark. It is true that it is always hazardous to speak of medieval substantive rules since jurors were conceded so much control over results and hardly ever explained themselves. Still, there is good evidence that a basic tenet of medieval law was that promises, once made, ought to be kept.²⁰ The writ of covenant contemplated specific performance—no apparent room here even for Holmes' supposed "right" to break a contract and pay damages.²¹ Moreover, there is no evidence in medieval law for the existence of a doctrine of consideration at all; and, for all we know, even gift promises were specifically enforceable. It is not until the sixteenth century that the doctrine of consideration becomes anything like a general feature of the law of contracts. Secondly, the widespread use of the penal bond in the middle ages to secure the performance of promises makes it even clearer that the chief object of medieval contract law was performance. Even a bond defeasible upon performing an impossible act

¹⁷ See generally, *id.* 160-210.

¹⁸ *Id.* 164-73.

¹⁹ *Id.* 160.

²⁰ See generally Arnold, *Fourteenth-Century Promises*, 35 *CAMB. L.J.* 321 (1975).

²¹ O. W. HOLMES, JR., *THE COMMON LAW* 235-36 (Belknap Press ed. 1963).

was regarded as good. Obviously, then, the "unfairness" of the obligation to pay could be no defense. Indeed, the whole point of the bond was to make nonperformance so costly as not to be lightly contemplated. Still, developments in the seventeenth century do point to a softening of the rigor of common-law contract principles: penalties and forfeitures of all types came to be avoidable in equity.²² Such rearrangements may have made popular a general interventionist ethic, or may indeed simply be specific adoptions of an already paternalistic community attitude. A similar community feeling might have come to be vindicated by eighteenth-century American jurors.

A more telling difficulty with the Horwitz theory, however, surfaces in his treatment of implied warranties of quality in the sale of chattels.²³ He shows that there was much reliance in the eighteenth century on the maxim that "a sound price warrants a sound commodity"; and from this, and other evidence, he concludes that there was a warranty implied by law in the sale of goods. But the cited cases do not always bear out the conclusion. The buyer's common-law action for defective goods alleged both fraud (knowledge of the defect, *scienter*) and an express warranty. In *Wadill v. Chamberlayne*,²⁴ a 1735 case, there was no express warranty alleged, only fraud, so the writ was not in common form; but the court held the action good. However, this is evidence only that an express warranty was unnecessary if fraud could be proven; it says nothing about implied warranties. Indeed, if there was a doctrine of implied warranty, it would seem that the plaintiff would have pursued that theory instead, since *scienter* is so difficult to prove. Moreover, two other eighteenth century cases relied on by Horwitz, *Baker v. Frobisher*²⁵ and *Toris v. Long*,²⁶ seem to proceed on the premise that there is an implied warranty only against *latent* defects; apparently if the defect were patent, at least if it were actually discovered by the buyer, the contract would be enforced as made. Of course, if this is the extent of the implied warranty, then the alleged principle of equality of exchange, the substantive theory of consideration, is impossible to maintain. It is, however, just possible

²² See Yale, *Introduction to 2 LORD NOTTINGHAM'S CHANCERY CASES* 8-15 (D. Yale ed. 1961).

²³ M. HORWITZ, *supra* note 3, at 167, 180.

²⁴ 2 Va. Colonial Decisions B45 (Gen. Ct. 1735) (cited M. HORWITZ, *supra* note 3, at 167 n.40).

²⁵ Quincy 4 (Super. Ct. of Judic. Mass. Bay 1762) (cited M. HORWITZ, *supra* note 3 at 167 n.40).

²⁶ 1 N.C. Tayl. 17 (Super. Ct. 1799) (cited M. HORWITZ, *supra* note 3 at 167 n.40).

that the principle existed but could be vindicated only in a suit by the seller for the purchase price; and that when the buyer sued on an executed contract adequacy would not be inquired into. The distinction seems somewhat gratuitous, but some chancery courts have been known to adopt it.

A final obstacle to the Horwitz thesis is Professor Nelson's conclusion that, although eighteenth-century law did not actively encourage assumptions of promissory liability, a buyer, if he made a specific promise, "became liable in special assumpsit to the extent of the promise."²⁷ At least if the promise were in writing, Nelson concludes, a buyer was "barred from claiming in defense 'that the consideration which he rec'd . . . was not of half the value' of his promise or otherwise represented only a partial consideration."²⁸ Horwitz maintains that the law treated notes "as an exception to the general rule governing contracts."²⁹ But if so, it would be interesting to know how frequently notes were employed; for if they were common the "general rule" may have been very generally avoided.

IV.

So complicated a work as this deserves more space than can conscientiously be given over to a book review. An excellent chapter³⁰ on the relationships between the bar and commercial interests, for instance, has not been touched on; nor has a similarly intriguing chapter³¹ on the rise of legal formalism. The contents of both of these, however, can be briefly stated: they deal with the institutions and judicial techniques by which commercial needs came to work their will on the common law. Horwitz demonstrates again and again that this happened. But in a sense it would be surprising if it had not, so committed was the age, or at least its most powerful people, to the ideal of commercial development. Moreover, not every episode is as convincingly related as others. For instance, the rule of negotiability, certainly a pro-commercial doctrine, was resisted sedulously in many of the state courts; and so, Horwitz maintains, Joseph Story in *Swift v. Tyson*³² created a national and, more important, a pro-commercial rule of negotiability in the federal

²⁷ W. NELSON, *AMERICANIZATION OF THE COMMON LAW* 60 (1975).

²⁸ *Id.*

²⁹ M. HORWITZ, *supra* note 3, at 166 n.33.

³⁰ *Id.* 140-159.

³¹ *Id.* 253-266.

³² 41 U.S. (16 Pet.) 1 (1842).

courts.³³ But it is a question, if commercial convenience was such a favorite object of nineteenth-century judges, why in this instance most, or many, seemed so backward. Furthermore, the federal rule would be available only to those whose cases possessed the requirements for invoking that jurisdiction. Of course, it is possible that many suits on written instruments might easily meet these requirements: if the paper had been extensively circulated, perhaps a large number of remote endorsers would have been potential defendants, and that might have made a diversity case easy to make out.

There is one further point. It may be that Horwitz has been too quick to see distributional effects in nineteenth-century legal changes. Take, for instance, the assertion that the change to the rule of *caveat emptor*, if it occurred, had distributional consequences to the detriment of buyers.³⁴ It may simply be instead that the price of goods declined to compensate for the lack of a warranty, so that what a buyer lost was regained in the purchase price. It is true that if buyers in general did not know of the rule, the market would probably not so operate; but many must surely have known, and this would have produced a corresponding reduction in price. Unequal knowledge of the existence of defects might at first seem to result in enrichment of the seller, but, technically, the law was that the seller had a duty to disclose such defects if he knew of them. It is true that *scienter* is notoriously difficult to prove, but nevertheless the *scienter* action does survive a *caveat emptor* regime. Similar criticism can be made of distributions allegedly occurring as a result of allowing persons to "contract out" of a legal liability.³⁵ If the risk of loss is shifted by contract, say, to a shipping customer of a railroad, it is difficult to know that this will not be reflected in lower shipping costs in the amount, as it were, of an insurance premium sufficient to cover the risk. Of course, it must have often happened that transportation companies would be in a monopoly position; but even so they may well have been unable to impose an exculpatory clause without giving up something in return.³⁶ Whatever may be the reality, the book has the virtue of being mainly nondidactic and laudably free of Marxian moralizing, although we

³³ M. HORWITZ, *supra* note 3, at 245-252.

³⁴ *Id.* 61.

³⁵ *See id.* 203-10. Moreover, "contracting out" may well have been a feature of the law of torts since the middle ages. Perhaps however, I have misunderstood Horwitz when I charge him with claiming a redistributional consequence in "contracting out" situations.

³⁶ *See* Schwartz, *Nonsubstantive Aspects of Unconscionability*, 63 VA. L. REV. — (1977).

do hear (once each) of oppression,³⁷ class bias,³⁸ and class legislation.³⁹ The "oppression" referred to has to do with the rise of the subjective theory of value and the subsequent refusal of courts to inquire into adequacy of consideration. This could be endlessly commented on, but perhaps it is enough for present purposes to note that many people feel oppressed when promises, freely made, are broken. The "class bias" is discovered in the rule that labor contracts were "entire," that is, that no *quantum meruit* recovery could be had on a partially completed contract of service, while, on the other hand, building contractors who failed to complete their work were normally allowed a recovery "off the contract." Horwitz may well be correct on this one, although it would be interesting to know what the result would have been in the builder's case if a defendant should claim a willful and deliberate breach.

But enough cavilling. This book deserves to be read by anyone interested in the history of eighteenth and nineteenth-century America, as it for the most part succeeds in its aim "to make the history of technical and obscure areas of American law accessible to professional historians and to other nonlegally trained scholars."⁴⁰ There is much that is disputable; but that makes it all the more worthy of attention.

³⁷ *Id.* 184.

³⁸ *Id.* 188.

³⁹ *Id.* 192.

⁴⁰ *Id.* xi.