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Book Review [The Transformation of American Law, 1780-1860]

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THE TRANSFORMATION OF AMERICAN LAW, 1780-1860. By Morton J. Horwitz. Cambridge, Massachusetts, and London, England: Harvard University Press. 1977. Pp. xvii + 356. Hardbound. $16.50.

Reviewed by Paul J. Goda, S.J.*

This study is magisterial. It reflects the authoritative work of a craftsman in teaching who blends history, political science, and philosophy to explain the flux of social change. It is magisterial in another sense. I had the pleasure of being a student of Professor Horwitz in a fellowship in which many of the subjects of this book were treated. Reading the book brought back memories of discussion, argument, and friendship, all necessary parts of the learning process.

The general scheme of the book is simple. Professor Horwitz, of Harvard University Law School, traces the evolution of American law from its vision at the end of the Revolutionary War to a new vision just before the Civil War and the American Industrial Revolution. A legal system, which began with the goal of protecting the rights of individuals through case by case substantive justice, shifted its internal goals, developing rules that protected commercial interests. Professor Horwitz traces this change in the areas of property, contract, and commercial law.

There is a double strength in the development of the book. It does not become so technical that only lawyers versed in common law principles can read it. It is accessible not only to those who have studied *trespass de bonis asportatis* or trover or assumpsit, but also to non-lawyers who may wonder what we lawyers do. The other strength of the book is even more important. If history is philosophy teaching by example, then Professor Horwitz is the historian-philosopher who has made a paradigm for the problems of our own time from the litigation of long ago and far away.

In his introduction, Professor Horwitz reflects upon the New Deal historians who used the same history to buttress increased government intervention. He suggests that they did

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not ask "in whose interest these regulations were forged,"[1] but rather assumed that the interests of the expanding commercial class, for whom the regulations were initiated, were the same interests as those of the public. The regulations were not forged directly by a tax system but indirectly by a system of permission, franchise, and monopolies and were upheld by the courts. The first chapter is entitled "The Emergence of an Instrumental Conception of Law;" the last chapter is entitled "The Rise of Legal Formalism." Thus, Professor Horwitz uses philosophy to explain the vision of the courts.

The vision with which the American legal system began the period under study was a natural law foundation of common law rules. However, as Horwitz points out:

> By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier . . . . Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.[2]

This instrumental conception of law is the impersonalized utilitarianism with which we are more familiar. What is most interesting is Professor Horwitz' view that the court system was the primary mechanism involved in this change. The end result was what Professor Horwitz calls formalism, that is, the use of legal rules as norms, disassociated from the problems of the control of power. He stated:

> Legal relations that had once been conceived of as deriving from natural law or custom were increasingly subordinated to the disproportionate economic power of individuals or corporations that were allowed the right to "contract out" of many existing legal obligations. Law, once conceived of as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires and as simply reflective of the existing or-

1. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at xiv (1977).
2. *Id.* at 30.

> ganization of economic and political power. . . . The movement to merge Law and Equity begun by the Field Code of 1848 thus represents another instance of the subjection of an already internally eroded tradition of substantive justice to an increasingly formal set of legal rules, which were themselves now stridently justified as having nothing to do with morality.[3]

Professor Horwitz exemplifies this philosophy with many illustrations. They often have resonance with modern issues, such as his discussion of water rights and economic development in which he describes the "tension between the need for economic development and the fundamentally antidevelopmental premises of the common law. . . ."[4] The earlier rule based on natural flow gave way to a reasonable use or balancing test. This balancing test was intertwined with "the idea that the ownership of property implies above all the right to develop that property for business purposes."[5] Professor Horwitz describes the seventeen-year journey from *Tyler v. Wilkinson*[6] in 1827 that reasserted the old rules, although based on utilitarian premises, to *Cary v. Daniels*[7] in 1844 that frankly maximized economic development.

A second illustration involved franchises and implied monopolies. A statute which gave exclusive privileges was a monopoly by legislative grant. In *Croton Turnpike,*[8] Chancellor Kent allowed judicial enforcement of an implied exclusive monopoly even though the statute was silent about the grant of an exclusive privilege. The purpose was to protect investment.

A final example is taken from the chapter, "The Triumph of Contract." Professor Horwitz argues that there was an equitable conception of contract in the eighteenth century, based on an *objective* theory of value, stemming historically from natural law concepts. This assumption allowed courts to challenge the adequacy of consideration, since the fundamental notion of contract was sought in the fairness of exchange. If value were *subjective,* then the fundamental notion of contract would have been consensual and the courts would have become limited in their ability to inquire into the adequacy of consider-

3. *Id.* at 253.
4. *Id.* at 257.
5. *Id.* at 36.
6. 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312).
7. 49 Mass. (8 Met.) 466 (1844).
8. 1 Johns. Ch. 611 (N.Y. 1815).

ation. The growth of a large expansive market system in the American economy created the possibility of speculation and expectancy damages in contract. Horwitz explains: "In America, the application of expectation damages to commodities contracts correlated with the development of extensive internal commodities markets around 1815."[9] Because this chapter probes the theoretical assumptions behind formal rules, the analysis of the counterpoise of the growth of expectation damages with the decreasing significance of the doctrine of consideration is one of the more facinating aspects of the book.

In describing the shift from common law rules which were based on conceptions of natural law substantive justice to a formalized system of rules based on market needs, Professor Horwitz is not writing a paean of praise for natural law. However, he does not have the modern prejudices against natural law viewpoints. Rather, he is moved by a passion for justice that is at once his strength and his weakness.

Somewhat like Thucydides who condemned Athens by indirection in his history of the Peloponnesian war, Professor Horwitz does not directly bespeak his own philosophies. Those philosophies, voiced many times in seminar discussions, emphasize the need to solve the problems of the powerless and the poor by using the legal system to distribute the goods of society in such a fashion that human beings may live fruitful, dignified lives. In the last lines of his book, Horwitz adumbrates his guiding passion: "For the paramount social condition that is necessary for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitably political and redistributive functions of law."[10]

The strength of his passion for social justice lets Professor Horwitz cut through the surface of words and paragraphs of cases to see how the leaders of economic development triumphed in the years 1780-1860. But it is the strength of that passion that may also lead to the weakness of the chapter "Subsidization of Economic Growth through the Legal System." He maintains:

> There is reason to suppose, therefore, that the choice of subsidization through the legal system was not simply an abstract effort to avoid political contention but that it

9. M. HORWITZ, *supra* note 1, at 176.
10. *Id.* at 266.

> entailed more conscious decisions about who would bear the burdens of economic growth. It does seem likely, moreover, that regardless of the actual distributional effects of resorting to the existing tax system, a more general fear of the redistributional potential of taxation played an important role in determining the view that encouragement of economic growth should occur not through the tax system, but through the legal system.[11]

Although I do not mean to say this did not happen, I remain unconvinced by the author's espousal of such a conscious conspiracy. The fear that eminent domain, unrestrained by a principle of compensation, might lead to egalitarian redistributions of wealth, is stated but not explicated.[12] The burden of damage judgments for trespass or nuisance to land was shifted to the landowner by cutting down the scope of consequential damages and by shifting away from trial by jury. These examples do not buttress Horwitz' theory of a conscious conspiracy against egalitarian redistribution. He himself gives a rational basis for the problem of the early nineteenth century:

> Because of large damage judgments before 1830, for example, Pennsylvania was compelled to abandon various public works entirely before it finally took damage assessments away from juries. In short, there existed a major incentive for courts not only to change the theory of legal liability but also to reconsider the nature of legal injury. In an underdeveloped nation with little surplus capital, elimination or reduction of damage judgments created a new source of forced investment, as landowners whose property values were impaired without compensation in effect were compelled to underwrite a portion of economic development.[13]

Lurking behind these issues is a larger problem that Professor Horwitz did not intend to address: whether equality is the same as justice. A landowner should be compensated for his land but just compensation should not give him a windfall in a society with little capital. Lack of a windfall to a landowner should not be denominated subsidization. If jury judgments were really too large, then reducing them, by whatever method, was not a conspiracy to subsidize growth but a conscious political allocation for development. To that extent, I would agree with Professor Horwitz.

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11. *Id.* at 101.
12. *Id.* at 66.
13. *Id.* at 70.

Insofar as Professor Horwitz intimates but does not address the larger question of equality, he tantalizes, as well he should. The purpose of his book is not to solve philosophical problems but to help us look at our current problems with the same keen analysis he brings to the issues of the transformation of American law.

The world in which we live and the American society to which we belong is fighting out the same issues. I might call them a faith in freedom versus a need to control power within our society. I use the words in conscious analogy to the hopes and dreams of the religious order to which I belong. In its most recent General Congregation, it has stated "The mission of the Society of Jesus today is the service of faith, of which the promotion of justice is an absolute requirement." The relationship of religious faith and promotion of justice is the modern equivalent of the argument over faith and works which divided Western society in the sixteenth century. We have not finished the arguments and never will. But works like that of Professor Horwitz betoken the passion and the wisdom to plumb the depths.