Michigan Law Review

Volume 91 | Issue 6

1993

Transforming History in the Postmodern Era

G. Edward White
University of Virginia

TRANSFORMING HISTORY IN THE POSTMODERN ERA

*G. Edward White**

THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY. By *Morton J. Horwitz.* New York: Oxford University Press. 1992. Pp. ix, 361. $30.

The appearance of Morton Horwitz' *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy*[1] is an instructive episode for students and practitioners of legal history. The book is a sequel to Horwitz' influential *The Transformation of American Law, 1780-1860,* which first appeared in 1977. Sequels are relatively common in the historical profession. Much rarer is a self-conscious change by the historian from one methodological framework to another in the process of writing a sequel. When the author associates that change with "the massive challenge to traditional ideas of historical explanation that ha[s] invaded both the worlds of theory and historical practice since *Transformation [I]* was written,"[2] an invitation is implicitly tendered to explore the relationship between the structure of Horwitz' historical narrative and contemporary historiographical culture.

In the course of my discussion of Horwitz, I will first contrast *Transformation II* with *Transformation I,* a book that appeared when the discipline of legal history, and the field of legal scholarship, were at a markedly different stage in their twentieth-century history. I will then turn to three central features of *Transformation II:* its methodology, the structure of Horwitz' historical narrative, and the metapolitical strategies driving the book. An exploration of those features, I believe, will lead us to confront the dilemmas historians currently face.

I. "A VERY DIFFERENT BOOK"

Horwitz begins *Transformation II* by noting what any reader of

* University Professor and John B. Minor Professor of Law and History, University of Virginia. My thanks to Kimberly Willoughby for research assistance.

Since this review was written, I have seen two other excellent reviews of this book, which arrived too late for me to take advantage of their insights. *See* Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History,* 102 YALE L.J. 1019 (1993); John H. Schlegel, *A Tasty Tidbit,* 41 BUFF. L. REV. (forthcoming 1993).

1. Morton J. Horwitz is Charles Warren Professor of American Legal History, Harvard University.

2. P. vii. I refer to the new book in the text as *Transformation II.*

the book and its predecessor will immediately grasp: while the sequel "tak[es] up the story of the history of American law as I left it in *[Transformation I], . . . [Transformation II]* is a very different book" (p. vii). This is not to say that the books are radically inconsistent. A dust jacket comment by Stanley Katz says that "Morton Horwitz has one subject — the relationship of law to politics in American history." One could refine that statement to say that Horwitz' subject in *Transformation I* and *Transformation II* is the continuing effort by members of the legal profession to effectuate a sharp separation between law and politics, so that law appears as a neutral, nonpolitical, transcendent entity, symbolized in the phrase *a government of laws rather than men.* In both books Horwitz is concerned with penetrating successive structures of legal thought that the legal community has enlisted in support of this effort to separate law from politics and with exposing the effort for the ideological enterprise that it has been.

One cannot read a Horwitzian narrative of historical events, then, without noticing the many examples of this effort to separate law from politics, in such "official" forms of legal discourse as common law cases, treatises, and other commentary. Nor can one miss the author's attitude toward the purported separation of law and politics, which ranges from skepticism through censure to outrage. The overwhelming message of Horwitzian historical narrative is that to deny the interrelationship between law and politics is to deny one of the essential features of American culture.

Thus, at one level, *Transformation II* "takes up the story" of *Transformation I* as Horwitz "left it" and tells it all over again. But, as we will see, the form of Horwitz' narrative is strikingly different in the second volume, and the differences — ranging from source materials to the theory of historiography practiced in the two books — are so patent and multifaceted that they distract the reader from any overriding similarities. Much of this review, in fact, will concentrate on differences before returning to the theme of Horwitz' unifying vision.

Well before *Transformation II* appeared there were hints, explicit and implicit, that it would be "a very different book" from *Transformation I.* A long time passed between publication of the two books, and during that interval significant changes occurred in the field of American legal history and in Horwitz' own career. *Transformation I* appeared at a time when American legal history, as a modern scholarly field, was in its relative infancy. Aside from the important works of Willard Hurst,[3] Mark DeWolfe Howe,[4] George

3. *E.g.*, JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950); JAMES W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); JAMES W. HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY (1960).

4. MARK D. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-

Haskins,[5] and a few others,[6] American legal history was a scholarly wasteland from the Second World War to the 1970s. *Transformation I* was one of several books appearing in the 1970s that helped give the field a scholarly identity and make it respectable among both legal scholars and what Horwitz called "general" historians.[7] By the time of *Transformation I*'s publication, a number of major law schools had hired faculty members whose primary scholarly interest was in legal history. Joint degree programs sponsored concurrently by law schools and history departments were also in place at several universities. The consequence was that *Transformation I* reached a scholarly community of sufficient size and stature to publicize it.

Indeed, the appearance of *Transformation I* at a time when modern American legal history was "coming of age" had some effects that Horwitz may not have anticipated. Given the chronology of legal-historian appointments to law school faculties and history departments, Horwitz' status as a tenured professor at Harvard, and the self-conscious formation of a legal-historian community of scholars in the 1970s, *Transformation I* would probably have received a significant amount of attention had it been a bland, cautious book. But it was far from that. It was one of the first "critical" scholarly efforts to seek to reach a large scholarly audience. In *Transformation I,* changes in the doctrinal superstructure of American private law were not portrayed as accidental or autonomous or even as simply reflective of changes in society at large. They appeared as the conscious efforts of powerful elites — including segments of the bar, the judiciary, and commercial interests — to shape legal doctrine so as to further their particularistic goals. That the elites were not identified with much precision — that Horwitz' analysis was not "sociological," but was conducted at the levels of theory or doctrine — seemed to make the narrative of *Transformation I* all the more sinister. It was as if Horwitz had seen through the obfuscating rhetoric of "neutral" doctrine to expose the fact that doctrinal change in the early nineteenth century invariably favored those in power.

The audience for *Transformation I* was particularly suited to receive its message. The 1970s had not only brought persons with a serious interest in legal history onto law faculties and history depart-

1870 (1957); MARK D. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882 (1963).

5. GEORGE C. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS (1960).

6. Notably LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

7. "It has been my ardent desire to reach the general historian," Horwitz wrote in the introduction to MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at xi (1977). I refer to this book in the text as *Transformation I.* In this effort he succeeded beyond expectations, winning the Bancroft Prize for 1978, an award for "general" books in American history given by a committee of professional historians.

ments; those years had also brought into tenured and tenure-track positions persons who had been undergraduates in the 1960s. A number of those persons regarded themselves as politically left, and in the mid-1970s some of them became involved in what came to be called the critical legal studies movement. Of the original "founders" of CLS, several regarded themselves as serious legal historians, and the early scholarship of other prominent "crits," such as Duncan Kennedy, was historically oriented.[8]

Horwitz was himself active in CLS, and between the early 1970s, when he first entered law teaching, and the publication of *Transformation I,* his historical scholarship took on a distinctly critical bite. Some of the chapters in *Transformation I* reflected work that Horwitz had begun much earlier. His original frame of reference had been more that of the social historian, examining legal doctrine in the context of changing social conditions.[9] In *Transformation I* those chapters were woven into the polemical superstructure of the work, which emphasized elite manipulation of doctrinal rules and categories.

The "critical" dimensions of *Transformation I* made it a source of excitement and inspiration for a number of legal historians who regarded historical scholarship as part of a larger critical project. Those dimensions also stimulated others in the field, who were unsympathetic either to "critical" politics or to Horwitz' methodology, to attack the book. The result was that reviews ranged from extremely praiseworthy to extremely unreceptive, and Horwitz became something of an academic celebrity.

With the exception of reviewers who attacked the entire vision of historical scholarship allegedly embodied in *Transformation I,*[10] negative reviews tended to focus on Horwitz' analysis of specific common law fields, arguing that he had misrepresented or distorted the cases that he had used as supporting evidence and that more careful or complete readings would reveal a doctrinal picture less consistent with his larger claims.[11] The collective assessment of these reviews was that the book was a provocative thesis in search of evidence, resting more

8. *See, e.g.,* Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFF. L. REV. 209 (1979). *See generally* John H. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies,* 36 STAN. L. REV. 391 (1984).

9. The first edition of Lawrence Friedman's *A History of American Law,* published in 1973, was firmly in this mode of "social history." In Friedman's model of the relationship between law and its social context, law simply "reflected," or was "a mirror of" society. "Nothing [about legal doctrine]," Friedman felt, was "autonomous." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 10 (1973).

10. *See, e.g.,* Peter R. Teachout, *Light in Ashes: The Problem of "Respect for the Rule of Law" in American Legal History,* 53 N.Y.U. L. REV. 241 (1978) (reviewing HORWITZ, *supra* note 7).

11. *See* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation,* 90 YALE L.J. 1717 (1981) (reviewing HORWITZ, *supra* note 7); A.W.B. Simp-

on rhetoric and passion than on fact. The reviews were in one sense guilty of faulting Horwitz for not doing something he had not sought to do. In *Transformation I,* Horwitz' analysis did not aspire to denseness, complexity, and comprehensiveness; rather, it operated at a level of inarticulate and unselfconscious rhetoric. His methods had been those of the intellectual historian, although his claims appeared to have sociological content.[12]

Still, the critical reviews must have given Horwitz pause about his methodological format. Was Horwitz' analysis truly "sociological" in the sense that he was claiming the existence of actual "alliances" or other relationships between "merchants," lawyers, and judges?[13] If so, he had provided precious little evidence on any such relationships. Or was it something else: a recognition of a consciousness in legal doctrine that reflexively identified "principled" rules as those that promoted security and predictability among persons whom those rules regularly affected? If the latter, this was the stuff of intellectual history, unencumbered by quantitative sociological analysis. Precisely how many lawyers and judges had formed actual "alliances" with "merchants" was of little consequence if those charged with the formulation of commercial law doctrine had an outlook on the world that was amenable to mercantile interests. Moreover, the fact that some cases did not reflect those interests did not mean that judges failed to consider them or deem them important.

Horwitz had not identified his perspective in *Transformation I* as that of the intellectual historian, primarily concerned with consciousness as distinguished from extralegal phenomena. The reasons for his failure to clarify this dimension of his methodology very probably had to do with the state of legal historiography and of "critical" thought at the time. In the modern infancy of legal history, its practitioners made a serious effort to distinguish themselves from an older discipline of "constitutional history." Their focus was on private law subjects, ordinary cases, and the relationship of private law to what Horwitz called "economic change."[14] Horwitz' assumption that "[c]onstitutional law . . . had been overstudied both in terms of its impact on the development of the American economy and in terms of its representative character" was widely shared by those who entered

son, *The Horwitz Thesis and the History of Contracts,* 46 U. CHI. L. REV. 533 (1979) (reviewing HORWITZ, *supra* note 7).

12. Alfred S. Konefsky, *Law and Culture in Antebellum Boston,* 40 STAN. L. REV. 1119 (1988), has an analysis that parallels mine here.

13. In one passage in *Transformation I* Horwitz had written:

> As political and economic power shifted to merchant and entrepreneurial groups in the postrevolutionary period, they began to forge an alliance with the legal profession to advance their own interests through a transformation of the legal system.

HORWITZ, *supra* note 7, at 253.

14. See Horwitz' discussion in HORWITZ, *supra* note 7, at xii.

the field of legal history along with him. "By . . . focusing on private law," he and his contemporaries believed, "we can study the more regular instances in which law, economy, and society interacted."[15]

Horwitz was consciously adopting the perspective of the social as distinguished from the intellectual historian by eschewing constitutional law and focusing on the relationship of private law to "economic change." That perspective as applied to Horwitz' own work, however, created some methodological anomalies. By avoiding "great" constitutional cases, Horwitz was seeking to bypass the "exceptional" rhetoric of heavily contested issues of high politics. He was looking for the unremarkable, uncontested rhetoric of private law in order to observe social and economic assumptions in an unselfconscious form. He may also have implicitly assumed that the rhetoric of law cases needed to be read skeptically, as generalized arguments masking more particular concerns, and that the "real" value of private law cases lay in their impact upon economic and political interests.

There was thus an anti-idealist dimension to Horwitz' decision to concentrate on the relationship of private law to economic development. But his analysis, throughout *Transformation I,* was conducted at the level of doctrine. He did not offer statistics on the uses of waterways or railroad ownership or commercial banking; he offered instead readings of cases involving water rights or torts or commercial transactions. The "transformations" he identified were doctrinal changes. While he persistently claimed that those changes paralleled changes in the economy, he did not spend much time documenting the latter set of changes. This is not to say that his claims about the relationship between doctrinal and economic change were inaccurate, but simply that his analytical energy was directed principally toward the exercise of reading and interpreting legal ideas, as expressed in the form of private law doctrine. In short, in *Transformation I* Horwitz functioned as an intellectual historian *manqué.*

There is another probable reason why Horwitz chose not to emphasize the intellectual history dimensions of his approach in *Transformation I.* Leftist thought in the American academy of the 1970s was still heavily influenced by neo-Marxist approaches to history; the work of the structuralists had not yet penetrated the consciousness of most practitioners. The neo-Marxist eschatology of the 1970s decidedly disfavored "idealist" perspectives, and "irrationalist" perspectives had not yet gained a foothold. Indeed, Horwitz' term *instrumentalism,* which he had borrowed from the social historians but had given a critical spin, was one that took the material world and its core themes — wealth, status, power — to be primary causative forces in history. Not only did Horwitz argue in *Transformation I* that legal doctrine was formulated for "instrumentalist" ends — that is, as an instrument

15. *Id.*

to further the goals of interests seeking to gain or hold on to power — his own approach to legal history was itself instrumentalist. He believed that the core themes of the material world drove the legal system. Doctrinal change represented a playing out of those themes in the distinctive language of legal rhetoric.

Thus, in *Transformation I,* Horwitz took pains to distinguish his form of doctrinal interpretation from the naive idealist versions of intellectual history. His form, he suggested, was deeply rooted in the "real" materialist world. But when one explored Horwitz' analyses of the successive private law fields in which doctrinal "transformations" had taken place, one found a great deal of attention to the concepts, tests, distinctions, and formulas of doctrine, and not much attention, except at a very general level, to the sociological context of the cases and treatises Horwitz examined. This created an anomalous relationship between Horwitz' "instrumentalist" vision and his exegesis. His vision suggested that doctrine should be read skeptically, with attention to which power-seeking interests gained and which lost with each doctrinal change; his exegesis assiduously "unpacked" the doctrine but declined to identify the interests in any detail. The result was a brilliant analysis of the intellectual dilemmas, contradictions, and mediating strategies that courts and commentators employed in successive private law fields, superimposed on which was a series of polemical claims about the transfer of wealth, status, and power in nineteenth-century legal and commercial America.

Another way to describe the methodological tension in *Transformation I* would be to focus on the relationship between Horwitz' analytical apparatus and his operative theory of historical causation.[16] Horwitz' "unpacking" of doctrine in the fields of property, commercial law, contracts, and torts repeatedly revealed historical "moments" when certain doctrinal principles, or the metatheoretical assumptions driving those principles, came to be perceived as awkward in their implications for specific situations. Examples were the principle of vicarious liability in torts, which seemed inconsistent with the theory that the contractual relationships between the parties should control the responsibility of employers for injuries suffered by employees; prescription in property law, which seemed inconsistent with the assumption in early nineteenth-century thought that property rights should yield to the developing needs of the community; or the "just price" theory of contract formation, which seemed inconsistent with the mid-nineteenth-century view that "value" in a contractual context should be a function of the marketplace and the "wills" of the contracting parties.

Horwitz' explanation for these "moments" was uniformly located outside the legal system. The attack on prescriptive rights was part of

16. See the discussion in Konefsky, *supra* note 12, at 1123-25.

"a movement to limit sharply the power of property owners to determine the scope of economic development."[17] The evisceration of respondeat superior in cases involving injuries to employees "arose in an economy which already had all but eradicated traces of an earlier model of normative relationships between master and servants," and thus reflected the fact that "the law had come simply to ratify those forms of inequality that the market system produced."[18] "The development of extensive markets at the turn of the [nineteenth] century contributed to a substantial erosion of belief in theories of objective value and just price."[19] "[A] regime of markets and speculation," Horwitz argued, "was simply incompatible with a socially imposed standard of value."[20]

In all these examples a "simple" model of causation was being employed: changes in the economy produced changes in legal doctrine. For all the prominence of "markets" in Horwitz' causal framework, however, his discussion of economic developments in *Transformation I* was strikingly sparse, especially when compared with his rich discussion of doctrine. Indeed, a characteristic pattern of Horwitz' analysis of private law subjects was to posit "external" changes in nineteenth-century American culture; then to detail, with considerable subtlety, changes in the *conceptions* of proprietary or contractual or commercial relationships that arguably paralleled those changes; and then to conclude with a "simple" causal explanation — the conceptions were a product of the external developments.

This "simple" model of causation not only contrasted with the complexity of Horwitz' "unpacking" of doctrine; it raised analytical problems in its own right. If conceptual change was simply a function of external economic developments, how did Horwitz account for what his own work had richly documented: the extraordinary *incapacity* of doctrinal writers and judges to modify existing doctrinal categories to alleviate the awkwardness of applying them in new contexts? Much of the "story" told in Horwitz' successive narratives of private law "transformations" involved the inability of existing categories to embrace new sets of social relationships, or at least to embrace them in a "satisfactory" fashion. In contract formation, for example, if the growth of markets had implications for the value of an item of exchange, making that value less objective, how could "just price" theory determine whether the price of an item was "just"? Yet just price theory persisted in the face of the expanded marketing of goods and services until the fundamental assumption of just price theory, that the value of a bargained-for item was objective rather than subjective, was

17. HORWITZ, *supra* note 7, at 45-46.

18. *Id.* at 210.

19. *Id.* at 180-81.

20. *Id.* at 181.

abandoned. This was a "transformation" in the prevailing conception of contract formation. But it did not occur "simply" because of the emergence of markets of exchange. Indeed, the assumptions of just price theory persisted because those who had a hand in the formulation of legal doctrine were unable to conceive of a subjective theory of value.

In short, Horwitz' own analysis significantly complicated his own theories of causation. But in *Transformation I* he not only retained those theories; he stated them in stark, polemical form. One thus wondered why, if the external forces "causing" doctrinal change were so strong, they were resisted, indeed not even grasped, for so long.[21] One wondered what were the sources of the numerous doctrinal anomalies, inconsistencies, and contradictions unearthed by Horwitz if law "simply" responded to economic change.

Nonetheless, Horwitz had powerful reasons to adopt the "simple" approach to causation that he employed in *Transformation I.* While his analysis may have focused largely on consciousness, he did not want to elevate ideas to a position of causal power. That would have smacked of idealism and broken ranks radically with a neo-Marxist perspective. Moreover, by retaining an uncomplicated polemical explanatory structure that emphasized "markets," the economy, and the core themes of social history, Horwitz avoided identification with any of the tendencies of intellectual history, which was pictured in neo-Marxist eschatology as evading the imperatives of the "real" material world. Finally, by emphasizing that his causal apparatus placed primary significance on the relationship between private law and economic development, Horwitz associated himself with the cutting edge of legal history scholarship in the 1970s. The enthusiasm for *Transformation I* in many quarters suggested that Horwitz' instincts had been sound.

Shortly after the publication of *Transformation I,* however, a remarkable and unanticipated series of developments took place in legal scholarship, affecting not only legal historians, but "critical" scholars of a variety of disciplinary persuasions. Another repository of "critical" methodologies began to influence the community of American legal scholars — methodologies whose starting place was internal rather than external, focusing on structures of thought shared by intel-

21. An earlier explanation for the phenomenon of "resistance," which managed to maintain the primacy of external (sociological) causation yet still accounted for the apparent inability of the legal system to respond quickly to external changes in the culture, was *cultural lag.* According to this explanation, the legal system was peculiarly slow to reflect changes in the larger culture, partly because of the specialized nature of the legal profession and partly because of the investment of professionals in the status quo. *See, e.g.,* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents,* 67 COLUM. L. REV. 50 (1967). This explanation gave no attention to the phenomenon of limits on the capacity of humans to embrace certain data within their consciousness — the "imprisoning" features of ideology. Changes in the larger culture may not be perceived by legal actors, given their consciousness, as "changes" at all.

lectual communities and not on developments in the larger culture in which those communities were situated. The methodologies emphasized the extent to which actors (even educated professional actors) situated at a given point in time were incapable of expanding their consciousnesses to contemplate certain intellectual options. The thought of such communities was "structured" by time, place, social status, and a host of other variables; the major effect of this structuring was an implicit set of cultural and ideological "boundaries" on the consciousness of actors within the communities.

The emergence of this strand of thought had two major implications for the culture of American academics. First, structuralist methodologies revived and recast intellectual history by treating the ideas of literate elites as one manifestation of the "sociology of knowledge." Instead of picturing intellectual history as an idealist escape from the "real" world, structuralists pictured it as another form, albeit a complicated one, of sociological data. The "thought" of literate elites from the past became as important for what it did not include as for what it did: the options implicitly not exercised by a particular generation of scholars, the tacit presuppositions that excluded certain subjects from the realm of stature or worth.

Second, structuralist methodologies were seen as having a powerful critical bite. As the "simple" causal explanations of a materialist explanatory perspective became increasingly troublesome, especially in their contemporary political implications, structuralist messages came to seem more congenial in the 1980s. One particular message of structuralism began to resonate: because consciousness is inevitably imprisoned by time and circumstance, collective ideological "solutions" are necessarily provisional and contingent. This gave enhanced meaning to the claim, which had distinct political implications in the 1980s, that "things could be otherwise." Structuralist history could reveal worlds in which positions were "unimaginable"; later worlds took those same positions to be commonplace. Such revelations undermined the status quo and invited relativism.

The methodologies of structuralism had two other important effects that directly bore on Horwitz' own scholarship. First, they significantly complicated questions of causation. "Simple" models of causal attribution not only assumed that priority could be assigned among competing "causal" phenomena in historical explanation; they assumed that causation was itself an objective, external phenomenon, separable from human consciousness. If market activity was the primary causal factor in shaping legal doctrine in the nineteenth century, that factor, according to such models, would be apparent to historians of a variety of persuasions, even those whose consciousnesses treated economic factors as incapable of having causal significance. Structuralism suggested that such an approach, at some level, was naive.

Humans could not attribute significance to certain causal explanations if those explanations were treated as sufficiently "foreign" to penetrate consciousness. While the structuralist argument may have proved too much, because some causal explanations have endured over time better than others, it nonetheless complicated the question of whether objective "causes" could ever be ascertained. Indeed, it suggested that the interplay between consciousness and data was sufficiently complicated to undermine any pretense of objectivity in historical explanations.

Second, structuralism suggested that a tacit preference for some historical subjects over others, such as private over constitutional law, was just that — a tacit preference, driven by the professional concerns of a community at a point in its history. There was nothing essentially rewarding in studying private law and economic development as opposed to constitutional law and the development of ideas. The choice to study one or the other was itself a function of consciousness. Thus, the limits *Transformation I* implicitly placed on itself were the limits of time and place, and not those of essentialist judgments. The ideology of actors in the legal system at a given point in its history could be gleaned from any source.

Horwitz was well aware of the emergence of structuralist methodologies in American academic life in the late 1970s and 1980s. One of the first scholarly groups to embrace structuralism was the CLS movement. Indeed, in the early 1980s a methodological split between "instrumentalists" and "irrationalists" developed within CLS, and Horwitz' work was cited as an example of "instrumentalist" scholarship. Horwitz himself participated in methodological debates within CLS, conceding that at the heart of the division between "instrumentalists" and "irrationalists" lay the question of the legitimacy of external or objective theories of causation.[22] In those debates Horwitz described himself as wanting to retain some "real world" materialist emphasis in scholarship, notwithstanding the difficulties in separating what was "real" from what one perceived reality to be.

The impact of these changes on the perspective Horwitz adopted in *Transformation I* was considerable, as certain passages in his preface to *Transformation II* demonstrate. After characterizing *Transformation II* as a "very different book" from its predecessor, Horwitz seeks to specify "the source of the change in emphasis" between *Transformation I* and *Transformation II.* That change derives, he says, "from the massive challenge to traditional ideas of historical explanation that have invaded both the worlds of theory and historical practice since *Transformation [I]* was written" (p. vii). He then identifies those changes as having involved "the disintegration of the nineteenth-cen-

22. *See* Morton J. Horwitz, *The Decline of Objective Causation, in* THE POLITICS OF LAW (David Kairys ed., 1982).

tury conception of explanation in the natural as well as the social and historical sciences." That conception of explanation placed emphasis on "general laws of history, change, and social progress," "predictive statements" derived from those laws, and "objective" theories of causation. In "explaining" historical events, then, one posited alternative general "covering laws" that "explained" historical phenomena, discovered the "facts" of a given historical episode, and then applied the covering laws to the facts so as to assert a "single-factor 'chain[ ] of causation.' " That process produced a historical explanation that was deemed "objective" (pp. vii-viii).

The nineteenth-century model of explanation, with its centerpiece of objective causation, has disintegrated, Horwitz believes, as "the separation between fact and value as the basis for value-free social science or history has been drawn into question," and "intense skepticism about the nineteenth-century working assumption that causation was objective" has "begun dramatically to undermine the claimed objectivity of explanation" (p. viii). The result has been a "new cult of complexity," emphasizing "highly specific 'thick description' in which narratives and stories purport to substitute for traditional general theories" of historical phenomena (pp. vii-viii).

Horwitz has accepted "multi-factored complexity" as a methodological baseline in *Transformation II.* But he retreats from an abandonment of objectivity as a scholarly ideal. "[T]he book constantly wavers," he notes, "between, on the one hand, conventional efforts at historical explanation that continue to derive from nineteenth-century models of objectivity, and, on the other hand, the recognition that modernism has challenged the objectivity of these forms in many different ways" (p. ix).

When one reflects on the implications of Horwitz' statement that *Transformation II* is a "very different book" from its predecessor, in light of the characterization of *Transformation I* previously advanced, three themes command further attention. First, the historiographical status of *Transformation I* as firmly in a genre of "social" history, private law, and "materialist" metatheory, taken together with Horwitz' statement, invites the reader to consider what features of that genre have been abandoned in *Transformation II.* Second, the unusual juxtaposition in Horwitz' preface between "cultural factors" and "social context," coupled with his discussion of the disintegration of traditional theories of historical explanation, suggests that he has associated "social history" with "single-factor" causation and seeks to prevent that association with respect to his own work. One wonders why. Finally, Horwitz' statement that he has not entirely abandoned traditional "objective" causation in *Transformation II,* despite his embrace of "multi-factor complexity," suggests that he is somewhat anxious about the implications of giving up the perspectives of social

history. Again, one wonders why. With these themes in place, I now turn to the methodological and narrative structure of *Transformation II.*

II. The Methodological Apparatus of *Transformation II*

I have suggested that, for reasons having to do with the state of legal history as a scholarly field in the 1970s, *Transformation I* was a work of intellectual history *manqué* — a work that, while directing its analytical energy principally toward the unpacking of doctrinal rhetoric and commentary, nonetheless implied at every point in the analysis that legal language was "instrumentalist" in character, masking the "real," sociologically driven motivations of legal actors. The sociological messages of *Transformation I* were taken seriously. In fact, most of the criticism of the book came from commentators who argued that Horwitz' treatment of cases had been distorted in order to make his evidence conform to his sociological readings. Most commentators appeared to accept Horwitz' "instrumentalist" approach to legal texts; they simply disagreed with him about whether the cases he had considered supported his particular sociological claims.

In *Transformation II,* Horwitz' approach toward his source material appears to be strikingly different. First, the material upon which he focuses is different in degree, and arguably in kind, from the material that formed the basis of *Transformation I.* In the first book, Horwitz focused heavily on cases as well as commentary and on many occasions appeared to be using cases as "representative" of doctrinal changes in the law. These changes were then given a sociological explanation. Consider the following paragraphs from the first volume:

> The nineteenth century departure from the equitable conception of contract is particularly obvious in the rapid adoption of the doctrine of caveat emptor. . . . It was only after Lord Mansfield declared in 1778 . . . that the only basis for an action for breach of warranty was an express contract, that the foundation was laid for reconsidering whether an action for breach of an implied warranty would lie. In 1802 the English courts finally considered the policies behind such an action, declaring that no suit on an implied warranty would be allowed. Two years later, in the leading American case of *Seixas v. Woods,* the New York Supreme Court, relying on a doubtfully reported seventeenth century English case, also held that there could be no recovery against a merchant who could not be proved knowingly to have sold defective goods. Other American jurisdictions quickly fell into line.
>
> . . . .
>
> The development of extensive markets at the turn of the century contributed to a substantial erosion of belief in theories of objective value and just price. Markets for future delivery of goods were difficult to explain within a theory of exchange based on giving and receiving equivalents in value. Futures contracts for fungible commodities could only be understood in terms of a fluctuating conception of expected

> value radically different from the static notion that lay behind contracts for specific goods; a regime of markets and speculation was simply incompatible with a socially imposed standard of value. The rise of a modern law of contract, then, was an outgrowth of an essentially procommercial attack on the theory of objective value which lay at the foundation of the eighteenth century's equitable idea of contract.[23]

The above passage is characteristic of the methodology of *Transformation I.* The existence of a historical doctrine is derived from a "leading case" and a summary statement that "[o]ther . . . jurisdictions . . . fell into line" in support of the position of that leading case; Horwitz then explains the doctrine's emergence by reference to extralegal phenomena, such as "the development of extensive markets." Extralegal phenomena affect legal "conceptions" and "ideas," such as the "equitable idea of contract." When such phenomena are "incompatible" with prevailing conceptions, the conceptions change. A "regime of markets and speculation" was "incompatible with a socially imposed standard of value." Hence, the standard changed and with it legal doctrine. Thus, Horwitz promotes "simple" understandings of the observed incompatibility — and therefore the doctrinal change — through his reliance on the single-factor model of "objective" causation.

Horwitz' source materials in *Transformation II* are arguably similar, but his approach to those materials differs noticeably. *Transformation I* made frequent use of legal commentary, but it had been interspersed with case analysis. The paragraphs quoted above typified Horwitz' treatment of cases, which he presented as embodying stages in the history of doctrine. In *Transformation II,* Horwitz expands his use of commentary and virtually abjures cases as "representative" documents. In their place is attention to legal doctrine, as there was in *Transformation I;* but doctrine occupies quite a different methodological "place" in *Transformation II.* To understand Horwitz' new use of doctrine, we must consider in some detail the conceptual apparatus that informs the book.

Horwitz began *Transformation I* with a chapter, "The Emergence of an Instrumental Conception of Law," that set the stage for many of that book's claims. Central to the chapter was Horwitz' assertion that "[i]n eighteenth century America, common law rules were not regarded as instruments of social change," but in the nineteenth century "judges came to play a central role in directing the course of social change."[24] That assertion was one of the most severely criticized features of the book, but it was consistent with Horwitz' interest in fashioning sociological explanations for doctrinal change — with the

23. HORWITZ, *supra* note 7, at 180-81.

24. *Id.* at 1.

mechanism for the explanation being an "objective" causal relationship between legal doctrine and extralegal phenomena.

In contrast, *Transformation II* begins with a chapter entitled "The Structure of Classical Legal Thought, 1870-1905." Included in the chapter are discussions of "Legal Architecture," "The Distinction between Public and Private Law," "The Creation of Increasingly Abstract and General Classifications," "The Structure of Legal Reasoning," and "The Categorical Mind." The chapter, in short, is an exercise in unpacking the metatheoretical assumptions driving legal analytics, as practiced by courts and commentators. As Horwitz puts it:

> Between 1870 and 1900, one sees everywhere [a] tendency to generalize and systematize fields of law that had previously been conceived of as a series of special cases and particular rules. This reorganization of legal architecture can be understood as an effort to create a systematic and autonomous system of private law derived from concepts such as will, fault (that is, the impairment of will), and property. It strove to erect an abstract set of legal categories that would subordinate particular legal relationships to a general system of classification. [p. 14]

Much of Horwitz' discussion in the chapter involves what he calls "internal changes in the structure of legal ideas" (p. 11). This emphasis takes him far afield from his methodological orientation in *Transformation I.* In that book he implicitly denied that changes in legal ideas were "internal" at all. They were "simply" and inevitably responses to extralegal phenomena. In *Transformation II,* the changes are not only "internal" in the sense of professionally self-contained and autonomous; they do not track sociological developments in a "simple" fashion. At bottom, Horwitz argues, the nineteenth-century drive to purify and "integrate" legal doctrine in ever more abstract categories was motivated by a desire to achieve a radical separation between the realms of law and politics, with "law" achieving a neutral, "scientific," nonpolitical status. This desire was, of course, politically derived in the sense that it was precipitated by longstanding concerns about the "tyranny of majority" that would result should the legal system become openly politicized (p. 9). But it was not precipitated by the particularistic, "instrumentalist" concerns that *Transformation I* had pictured as motivating legal actors. Indeed, the beliefs that drove nineteenth-century Americans to seek a radical separation of the realms of law and politics were so deeply and consensually held, Horwitz suggests, that they transcended "instrumentalist" concerns.

Thus, at the beginning of *Transformation II,* Horwitz outlines a methodological approach and a nascent view of causation in legal history that seem dramatically at odds with those employed in *Transformation I.* Yet the materials of the chapter are familiar ones: treatise literature, commentary, legal doctrine. However, when one sees how

Horwitz treats doctrine, the radical methodological contrast between *Transformation I* and *Transformation II* becomes apparent.

In *Transformation I,* I have noted, doctrine — while unpacked in the manner of the intellectual historian — was ultimately explained "instrumentally" and sociologically, as a response to extralegal phenomena. Doctrinal change provided documentation of the law's responsiveness to its social context. In *Transformation II,* doctrine is overwhelmed by the "architecture" of legal categorizing. Consider Horwitz' list of a number of familiar late nineteenth-century doctrines: "direct" versus "indirect" taxation or application of the commerce power; "business affected with a public interest"; "intervening" and "superseding" causes of injury and harm; eminent domain powers employed for, or not for, "public purposes" (pp. 17-18). His purpose in invoking and discussing these doctrines is not to show that in particular cases they were used "instrumentally" in order to conform the law to the demands of markets or other extralegal phenomena. His purpose is, rather, to show that their formulation presumed a bright-line, categorical approach to legal disputes in which the identification of relevant legal categories and the classification of disputes as governed by one category or another substituted for an approach in which competing "interests" were "balanced." Doctrine thus serves not social forces but "architecture."

Even more striking is the implicit theory of causal explanation that underlies Horwitz' treatment of doctrine. The use of bright-line doctrinal categories is not to serve any short-run "political" end. Rather, it fosters the image of law as a realm above and distinct from politics, in which categorical distinctions are made because they are "neutral, natural, and necessary" — in other words, because "everyone" accepts and consents to them (p. 270). The image of nineteenth-century legal architecture fostered by Horwitz' analysis is one of a self-contained, autonomous, professional subculture, largely insulated from the world around it. Indeed, Horwitz suggests that the drive for categorization as an end in itself became so strong that "the process of integration gradually eliminated a series of built-in 'mediation' devices that had allowed various contradictory principles and doctrines to coexist without totally consuming each other" (p. 15). Property, for example, which had originally been given a physicalist definition, was abstracted and expanded to become a category that included future expectations as well as uses, so that any governmental activity absurdly "was rendered capable of being regarded as a taking" (p. 15). In such instances doctrinal development was not only not responsive to its social context, it even came to operate in the face of that context.

Horwitz' views of the relationship among theory, doctrine, and social change in *Transformation II* thus appear to deviate radically from the views he expressed in *Transformation I.* But his views are not

consistent throughout the second book. Consider Horwitz' treatment of the case of *Santa Clara v. Southern Pacific Railroad Co.*,[25] in which the Supreme Court declared for the first time, without even hearing argument on the point, that corporations were "persons" within the meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses. Commentators have regularly treated the *Santa Clara* case as a prominent example of the responsiveness of law to changes in the economy. The Court's holding that corporations were entitled to Fourteenth Amendment protection has been seen as a recognition of the increased significance of the corporate form in the late nineteenth-century American economy, and even as a signal that the Court wanted to promote the interests of "big business."[26]

Horwitz rejects this explanation. That fact alone might not be surprising, but the manner of his rejection, in light of *Transformation I,* surely is. Horwitz first claims that the treatment of corporations as "persons" harmonized with an older conception of the corporate form as being on the one hand an "artificial entity," created by the state and subject to state regulatory powers, and on the other an aggregate of the "vested rights" of individual shareholders. It was those rights, and those "persons," that were being recognized in the *Santa Clara* decision. *Santa Clara* was another way of saying that the Fourteenth Amendment codified the principle of protection for "vested rights" against state interference.

The first step in Horwitz' argument assumes that the increased prominence of the corporate form in the American economy made no difference to the decision in *Santa Clara.* Indeed the "artificial entity" theory of the corporation presupposed that the state could control a number of corporate activities, such as mergers, dissolutions, the creation of joint stock holding companies, and the like. Treating the corporation as a "person" within the Fourteenth Amendment did not, theoretically, affect the proposition that corporations were creatures of state sufferance.

Horwitz then goes on to consider the appearance, in late nineteenth-century jurisprudence, of the theory that the corporation was a "natural" rather than an "artificial" entity that should be seen as a working group of individuals — most prominently the directors — rather than as a creature of the state. This theory eventually became dominant in the early twentieth century and served to justify concentrations of corporate power, such as mergers, which were seen as comparable to arrangements between individuals. It replaced an earlier

25. 118 U.S. 394 (1886).

26. Horwitz cites an early statement of that view, CHARLES BEARD, CONTEMPORARY AMERICAN HISTORY, 1877-1913 (1914). *See* p. 66 n.4. He also cites Howard Jay Graham's well-known articles, Howard J. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,* 47 YALE L.J. 371 (1938), and Howard J. Graham, *Justice Field and the Fourteenth Amendment,* 52 YALE L.J. 851 (1943). *See* p. 67 nn.4 & 7.

conception of the corporation as an aggregate of individuals, which had informed the decision in *Santa Clara* (pp. 100-06).

The point of Horwitz' discussion of the rise of the "natural entity" theory is to show that only that theory was consistent with a permissive attitude toward concentrated corporate power; the "artificial entity" theory of the corporation presupposed that corporations required oversight by the state. *Santa Clara,* then, was not a decision solicitous of corporate power in the form it came to take in the late years of the nineteenth century, when general incorporation laws and mergers produced large-scale corporate enterprises that operated virtually free from governmental regulation.

In his conclusion to the *Santa Clara* chapter, Horwitz summarizes his argument:

> In *Santa Clara* a natural entity theory was unnecessary for the immediate task of constitutionalizing corporate property rights. An aggregate or partnership or contractual vision of the corporation — with well-established roots in the *Dartmouth College Case* — was sufficient to focus the conceptual emphasis on the property rights of shareholders. Either a partnership or a natural entity view could equally successfully have subverted the dominant artificial entity view of the corporation as a creature of the state.
>
> If the choice between a natural entity and a partnership theory was a toss-up when *Santa Clara* was decided, other nonconstitutional considerations soon pushed American legal theory toward the entity conception.
>
> First, by 1900 it was no longer easy to conceive of shareholders as constituting the corporation. Changes in the conception of shareholder from active owner to passive investor weakened the evocative power of partnership theory. Moreover, the entity theory was better able to justify the weakened position of the shareholders in internal corporate governance. Second, the partnership theory represented a threat to the legitimacy of limited liability of shareholders. The entity theory, by contrast, emphasized the distinction between corporations and partnerships. Third, while the partnership theory pushed in the direction of requiring shareholder unanimity for corporate mergers, the entity theory made the justification of majority rule possible. [p. 106; footnote omitted]

This passage takes a markedly ambivalent approach toward the relationship between legal theory and its social context. First Horwitz appears to reject an "instrumentalist" approach — as exemplified by earlier treatments of the *Santa Clara* decision as solicitous of big business — for one that emphasizes the autonomy of established legal categories, such as vested rights independent of state control. From that perspective, the statement in *Santa Clara* that corporations were persons within the meaning of the Fourteenth Amendment was a kind of aside, simply indicating that the vested rights principle had been incorporated into the amendment.

The next portions of the passage appear to modify the initial approach. While the Court in *Santa Clara* was "actively suspicious of

corporate power and the emergence of concentrated enterprise," those developments became facts of economic life in late nineteenth-century America (p. 105). Indeed those developments, Horwitz claims, "pushed American legal theory" toward the natural entity theory of corporate form (p. 106). He suggests that the natural entity theory was superior to other possible conceptual alternatives that likened the corporation to a group of individuals because it better explained and justified internal changes in corporations themselves, such as the increased power of directors and the correspondingly weakened position of shareholders, the growth of majority rather than unanimity requirements for corporate mergers, and the importance of providing shareholders with limited liability. That the natural entity theory came to be regarded as the principal theoretical justification for unregulated corporate activity was no accident, then. That theory was responsive to the conditions of late nineteenth-century corporate life.

This portion of the passage offers a view of historical causation apparently at odds with the view offered in the earlier portion. In *Santa Clara,* the announced constitutional protection for corporations is a reflexive affirmation of an older principle of protection for the vested property rights of individuals. It not only bears no connection to the internal structure of late nineteenth-century corporations, in which directors rather than shareholders possessed decisionmaking power, it also embodies a consciousness that Horwitz suggests would have been hostile to increased growth and concentration in corporate enterprises. Doctrine, in short, is a product of the autonomous conceptual structure of the legal profession.

Yet once changes in the direction of concentration and majoritarian director-based power occur within the corporate form, those changes "push" legal doctrine to assume some forms rather than others. Here doctrine appears more in the form it assumed in *Transformation I,* as a response to or a reflection of developments in the economy and society as a whole. Indeed, Horwitz suggests that some doctrines whose claims to legitimacy were more deeply rooted in legal consciousness, such as the conceptions of corporations as partnerships or as contracts among individuals, lost stature because the natural entity theory "was superior" in legitimating the structural developments in corporate governance that had actually taken place. Thus, one is not sure how to take the final sentence of Horwitz' chapter on *Santa Clara:* "[I]n . . . specific settings, one finds that legal theory does powerfully influence the direction of legal understanding" (p. 107). The causal relationship among theory, doctrine, and social context remains elusive.

III. The Narrative Structure of *Transformation II*

The *Santa Clara* chapter appears as something of an interlude in

the narrative of *Transformation II.* As noted, the book opens with a chapter on the "Structure of Classical Legal Thought," followed by one entitled "The Progressive Attack on Freedom of Contract and Objective Causation." Those two chapters establish the narrative structure of the book, which traces a conflict between "classical" and "progressive" systems of legal thought.[27] While Chapter Two introduces "progressive" critics of the "classical" system, it principally concerns the central roles of freedom of contract and objective causation in the architecture of classical thought. The chapter attempts to show how deeply rooted "objective" and "contractual" conceptions of legal relationships helped further the classical ideal of law as a neutral, nonpolitical entity and how "progressives" eventually came to point out that such conceptions ignored basic standards of social and economic justice. By the end of the chapter, one develops a sense of an emerging "progressive" critique of the established "classical" regime, but one has only a dim sense of the architecture of "progressive" thought.

In light of the first two chapters, the *Santa Clara* chapter appears as a somewhat isolated episode. After giving almost no attention to social and economic developments in the first two chapters, Horwitz begins the *Santa Clara* chapter by reciting some late nineteenth-century developments, such as "three deep economic downturns," the growth of organized labor, "a series of major strikes," and the "strong showing of the Populists in the elections of 1892" (pp. 65-66). He then appears to endorse a causal connection between those developments and the emergence of a critique of "classical legal thought":

> If increasing inequality challenged the premise than an impersonal and self-executing market system could produce . . . a just distribution of wealth, the emergence of large, concentrated economic enterprises drew into question the very naturalness and necessity of decentralized economic institutions. The project of redefining the market system to recognize a legitimate role for the new corporate giants represented a central theme in American social thought at the turn of the century. It expressed no less than a crisis of legitimacy, testing the intimate relationship between classical economic and social theories, on the one hand, and decentralized political institutions, on the other. [p. 66]

The model of causation in this paragraph smacks of the model Horwitz employed in *Transformation I.* Extralegal phenomena, such

27. The terms *classical* and *progressive* are not defined and are obviously used by Horwitz as ideal types. The term *classical,* borrowed from Duncan Kennedy's "The Rise and Fall of Classical Legal Thought" (a portion of which was published in Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940,* 3 RES. L. & SOC. 3 (1980)), approximates what Horwitz called *legal formalism* in *Transformation I. Compare* HORWITZ, *supra* note 7, at 252-53 *with* pp. 3-5. The term *progressive,* while loosely identified with the progressive movement in national politics that surfaced in the early twentieth century, is primarily used to signify any strand of legal thought fundamentally critical of the assumptions of classical thought. *See* pp. 4-5.

as "increasing inequality" and "the emergence of large, concentrated economic enterprises" affect legal thought. They "challenge" premises; they "draw into question" assumptions about the "naturalness and necessity" of political and economic arrangements. Their presence forces a redefinition of "the market system" to accommodate them and to secure their legitimacy. Indeed, the "crisis of legitimacy" that Horwitz identifies as "a central theme" in late nineteenth- and early twentieth-century social thought is one precipitated by the imperfect fit between "classical economic and social theories" and "political and economic institutions." The passage strongly suggests that when such dissonance occurs, the theories have to adjust. As previously noted, his ambivalently presented analysis in the *Santa Clara* chapter is not inconsistent with that suggestion.

When one encounters the next several chapters of *Transformation II,* however, one wonders how they square with the model of causation advanced in the *Santa Clara* chapter. The next four chapters — on Justice Oliver Wendell Holmes, "The Progressive Transformation in the Conception of Property," and the elements and legacy of legal realism — center overwhelmingly on intellectual developments and give almost no attention to extralegal phenomena. In the Holmes chapter, Horwitz dwells "at great length on intellectual history" (p. 142), arguing — quite persuasively — that Holmes' "intellectual journey from *The Common Law* in 1881 to 'The Path of the Law' in 1897 parallels a major change in American social, economic, and legal thought and in the structures of legitimacy in the two periods" (p. 110). He makes no effort to explain why any "major change" occurred. In the chapter on property, Horwitz takes up Wesley Hohfeld, Walter Wheeler Cook, Arthur Corbin, Morris Cohen, Robert Hale, and the "institutional economists" of the early twentieth century in the course of an argument that property — previously characterized as a "private" entity whose existence was prior to society — came to be seen as socially created and therefore a creature of "public law." In the two chapters on legal realism, Horwitz seeks to redefine that movement as "the culmination of the early-twentieth-century attack on the claims of the late-nineteenth-century Classical Legal Thought to have produced an autonomous and self-executing system of legal discourse" (p. 193). Those chapters focus exclusively on the contributions of various "realist" thinkers, with emphasis on the degree to which those thinkers were "progressive" in their political orientation and "critical" in their methodology.

The overwhelming emphasis in the chapters on intellectual contributions makes Horwitz' cryptic statements about causation, which appear at scattered places in the chapters, seem all the more puzzling. In the chapter on Holmes, Horwitz notes that he has previously focused on "the vast institutional and ideological changes . . . that triggered the crisis of legitimacy at the turn of the century" and will now

"demonstrate how these changes affected the legal thought" of Holmes (p. 109). In the property chapter, he states that "[t]he basic problem of legal thinkers after the Civil War was how to articulate a conception of property that could accommodate the tremendous expansion in the variety of forms of ownership spawned by a dynamic industrial society" (p. 145). In one of the realist chapters, he asserts that the realists "were . . . much more self-conscious than their Progressive predecessors in attempting to legitimate social reform and social engineering in the emerging regulatory state" (p. 170). In another chapter, he states that, "[a]s American society grew more unequal and as the spectacular increase in corporate concentration undermined the belief in the naturalness of a decentralized, competitive market economy, social critics focused their attack on the assumptions behind an entirely process-oriented view of social justice" (p. 195).

These statements approximate the views of historical causation and doctrinal change in the law advanced in *Transformation I,* yet they are accompanied by statements that seem to advance a different calculus toward those issues. Consider these passages from the opening of Chapter Seven, "The Legacy of Legal Realism":

> The late-nineteenth-century system of Classical Legal Thought that Progressive jurisprudence after *Lochner* sought to dismantle was the culmination of a set of ideas that had gradually crystallized over the course of a century. By the time *Lochner* was decided, these ideas had produced conceptions of law and legal reasoning that were designed to create a sharp separation between law and politics, and between legal reasoning on the one hand and moral and political reasoning on the other.
>
> . . . .
>
> A conception of a self-executing, decentralized, competitive market economy was central to ideas of legitimacy in all areas of late-nineteenth-century American thought.
>
> . . . .
>
> This vision of a self-executing, competitive market constituted the foundation of all efforts to create a sharp separation in legal thought between processes and outcomes, between means and ends, and between law and politics. Just as result-oriented economic policy was regarded as a non-neutral interference with the natural operations of the market, so too was orthodox legal thought stridently committed to avoiding political scrutiny of outcomes. The law of contracts, the legal paradigm of voluntary market relations, was, as we have seen, especially resistant to any attempts to judge the fairness of contracts by their results. [pp. 193-94; footnotes omitted]

It is very difficult to square the view of the relationship between ideas and "legal thought" offered in these passages with Horwitz' earlier comments on the causal connection between extralegal phenomena and legal doctrine. The passages characterize the "system" of "classical legal thought" described by Horwitz in the early chapters of *Trans-*

formation II as "the culmination of a set of ideas" that are said to "produce[ ] . . . conceptions of law and legal reasoning." The conceptions, or "visions," constitute the "foundations" of legal doctrines, such as the set of contract doctrines that elevated voluntariness and resisted scrutinies about the "fairness" of bargained-for transactions. In short, legal doctrine in these passages appears to be "caused" by "the culmination of a set of ideas." Moreover, those ideas do not seem to "come from" any extralegal forces in American society. The only force Horwitz identifies as driving the creation of "a system of legal thought that could separate law and politics" is the desire to prevent "tyranny of the majority," a desire Horwitz identifies with American thought "since the Revolution" (p. 193).

By Chapter Seven of his narrative, then, Horwitz has identified himself with two views of causation, and two theories of the evolution of legal doctrine, that seem radically incompatible. One view, a holdover from *Transformation I,* treats legal doctrine as derivative of "legal thought" but legal thought as responsive to extralegal phenomena. The other view treats legal doctrine as the end product of "conceptions" and "ideas" that have been embedded in the system of American legal thought virtually since its inception. While those conceptions and ideas are loosely tied to extralegal forces, they make their principal impact as intellectual constructs. A "tyranny of the majority" may or may not have been actually possible, given the political structure of nineteenth-century America; Horwitz' point seems to be that thinkers of that time nonetheless persistently feared that such a "tyranny" would come to pass. In making that point, Horwitz seems to be elevating an idea — persistent fear over time — to the level of causal agent. One may note that such an idea has nothing to do with markets, economic concentration, "inequalities" in the fabric of late nineteenth- and early twentieth-century American life, or other extralegal phenomena. What, then, is one to make of Horwitz' earlier statements attributing causal power to those forces?

If one examines the narrative structure of *Transformation II* with Horwitz' two models of causation in mind, one finds a suggestive pattern unfolding. The last chapter to advance a "sociological" model of causation is Chapter Five — on the "progressive" transformation of the conception of property — and the passage in which Horwitz employs that model recapitulates earlier coverage.[28] Beginning with Chapter Six, on legal realism, Horwitz not only abandons all pretense

28. The basic problem of legal thinkers after the Civil War was how to articulate a conception of property that could accommodate the tremendous expansion in the variety of forms of ownership spawned by a dynamic industrial society. At a time when legal conceptions were still overwhelmingly derived from ideas about landed property, new forms of property developed and expanded that were increasingly difficult to fit into the conventional categories.

P. 145.

Note that even this passage is ambivalent: while legal conceptions "accommodate" extralegal

of surveying extralegal phenomena, but he largely abandons even the cryptic statements of "sociological" causation he had made in earlier chapters.

The effect of this changed emphasis is that *Transformation II* becomes, overwhelmingly, a book about "legal thought," a history of legal ideas and the persons who promulgated them. From Chapter Six on, Horwitz not only presents analyses of several of the leading figures of twentieth-century legal education, but he includes biographical information about them. Increasingly, persons such as Karl Llewellyn, Roscoe Pound, Jerome Frank, Lon Fuller, Benjamin Cardozo, Robert Hale, Louis Brandeis, James Landis, Felix Frankfurter, Louis Jaffe, Learned Hand, and Herbert Wechsler occupy the forefront of the narrative. Increasingly, Horwitz not only dissects the ideas of these figures, but comments on their personal characteristics and discusses tensions and clashes between them. At some parts in the narrative, *Transformation II* begins to resemble a "history of intellectuals."

Moreover, the analytical energy of *Transformation II* appears to be redirected in its later chapters. In Horwitz' nineteenth-century chapters, his emphasis was on demonstrating the architectonic integrity of "systems of thought": their premises, ideas, conceptions, and doctrinal formulas. Tensions were related to the collision between this architectonic structure and extralegal developments that did not "fit" within it — developments that prompted doctrinal modification, abandonment and, finally, by the early twentieth century, the collapse of the entire structure.

In the twentieth-century chapters, the "progressive" critique of this "classical" system is in place, but Horwitz does not present a comparable synthesis of the architecture of progressive thought. Indeed, his analysis suggests that from almost the moment of its inception, "progressive" thought has confronted internal tensions and dilemmas that have never been fully "solved." The insight of the "progressives" that legal categories and doctrines are socially created and thus contingent leads to philosophical relativism and the possibility of epistemological nihilism. The "progressives' " concern with social inequalities and injustices has led to an attack on judicial lawmaking, which doubles back on itself when "democratic" branches of government produce "undemocratic" social policies, as in the area of race relations.[29] The "progressives' " confidence in "scientific expertise" runs into two difficulties — the elitist, undemocratic status of "experts," such as administrative agencies, and the alleged "value-free" nature of

developments, they are nonetheless "derived from ideas." It is not clear where the original ideas "come from."

29. The paradigm example is the racial segregation laws invalidated in Brown v. Board of Educ., 347 U.S. 483 (1954).

"scientific" inquiry, which runs counter to modernist assumptions about the necessarily value-laden character of all forms of knowledge.

Thus, while the history of late nineteenth-century legal thought in *Transformation II* is a history depicting the gradual abstraction and refinement of an all-encompassing "system" of interlocking legal ideas, conceptions, and doctrines, the history of twentieth-century legal thought is a series of episodes in which a "progressive" system seeks to find a common architecture in the face of opposition from its own adherents. For every "triumph" of "progressive" thought, from the critique on "classical" thought launched by the early twentieth-century sociological jurists to the emergence of realism as the dominant mid-century American jurisprudential perspective, there are temporary "defeats" — such as the retreat of leading realists from cognitive relativism around the time of World War II, the emergence of internal opposition to realist-sponsored lawmaking by administrative agencies, and the rise of the "legal process" school of jurisprudence, which sought to domesticate realist insights and establish a new proceduralist ethic in law, uncannily like earlier nineteenth-century efforts to equate substantive and procedural fairness.

One wonders why Horwitz' history turned out this way. One explanation, of course, might be that an architectonic picture of a system of legal thought is not possible without a fair amount of distance between the historian and her subject, and that Horwitz and the rest of us are simply "too close" to "progressive" legal thought to be able to see it as a "system" capable of being decisively located in time. I would, however, offer a different explanation, one located in what I take to be Horwitz' ideological strategy in structuring the narrative he presents in *Transformation II.*

IV. The Strategy of *Transformation II*

Recall the close connection between the methodology Horwitz employed in *Transformation I* and the metapolitical view of history with which he came to be associated after the publication of that book. The crucial term establishing that connection was the term *instrumentalism.* As Horwitz originally used the term in *Transformation I,* it appeared to refer to a point of view adopted by judges: a creative, policy-oriented approach to legal doctrine that viewed law as an "instrument" for facilitating social change and responding to the interests of various elites. Of course none of the judges whose decisions Horwitz examined in *Transformation I* called themselves "instrumentalists" or, for that matter, openly revealed that their decisionmaking calculus was "instrumentalist." The term itself was borrowed from twentieth-century social history.

In fact, the term *instrumentalist* signified a view of the world that was itself a product of the "progressive" critique Horwitz describes in

Transformation II. It was a view that assumed that the content of law bears a direct relationship to the demands of elites, that elites seek to shape law for their own purposes, that elites themselves respond to changes in the materialist structure of society, and that law, inevitably, will reflect those changes. When Horwitz asserted that early nineteenth-century American legal history was marked by the emergence of an "instrumentalist conception of law," that was another way of saying that the grounds for such a reading of early nineteenth-century American legal history were in place. Early nineteenth-century legal actors, in other words, were acting the way elites in American society act. They were molding doctrine to suit their purposes.

Some of the criticism directed at Horwitz' analysis in *Transformation I* was concerned with an overreaching of his "instrumentalist" perspective. Some commentators suggested that, in characterizing late eighteenth-century legal actors as unconcerned with, or even unaware of, the law's capacities to respond to social change and the demands of elites, Horwitz was engaging in a thematic mischaracterization to highlight the "novelty" he claimed for the early nineteenth century.[30] Other commentators felt that Horwitz' readings of cases were skewed in favor of an "instrumentalist" reading and argued that interpretations were possible that did not conform to Horwitz' hypothesis.[31] Still other critics focused on Horwitz' most generalized claims, which stressed the close relationship between legal and commercial elites in nineteenth-century America, and argued that Horwitz had produced no real evidence that such a relationship existed beyond the mere supposition that those seeking or holding economic power would enlist the support of those with authority in the legal system.[32]

Taken as a whole, these critiques of *Transformation I* appeared to claim that Horwitz had engaged in a kind of reification. *He* was the "instrumentalist," insofar as he believed that, in the worlds of political economy and the law, elites functioned in a certain fashion. Being such, he "saw" evidence of that tendency in the early nineteenth century. Because undoubted evidence of both social and doctrinal change existed in that century — one could construct parallels between changes in extralegal phenomena and changes in doctrine — all that was necessary was to advance a *metaexplanation* for those changes. Metaexplanations cannot fully be proved or disproved; at some level they rest on whether others in an interpretive community find them intuitively sound. Horwitz' "instrumentalism" ultimately served as

30. *See, e.g.*, R. Randall Bridwell, *Theme v. Reality in American Legal History: A Commentary on Horwitz,* The Transformation of American Law, 1780-1860 *and on the Common Law in America,* 53 IND. L.J. 449, 456-57 (1978).

31. *See, e.g.*, John P. Reid, *A Plot Too Doctrinaire,* 55 TEXAS L. REV. 1307, 1309-10 (1977).

32. *See, e.g.*, Grant Gilmore, *From Tort to Contract: Industrialization and the Law,* 86 YALE L.J. 788, 794-95 (1977); Harry N. Scheiber, *Back to "the Legal Mind"? Doctrinal Analysis and the History of Law,* 5 REVS. AM. HIST. 458, 463-64 (1977).

the metaexplanation of *Transformation I.* The success of the book suggests that Horwitz was not the only instrumentalist around.

At one level, then, *Transformation I* contained an analytical strategy; it "set up" instrumentalism as the "best possible" explanatory theory to make sense of early nineteenth-century legal history.[33] Can Horwitz be said to have a comparable strategic plan in *Transformation II?* What is being "set up" in his narrative?

Here the narrative structure of *Transformation II* can provide some clues. We have previously noted that Horwitz' attention in the first portion of his narrative is principally directed toward the "system" of "classical" legal thought, which he describes as becoming increasingly more abstract and category-ridden in the nineteenth century. By the *Santa Clara* chapter and the chapter on Holmes, the "classical" system is pictured as having sown the seeds of its own destruction, and the assault on the system comes from two directions: "outside," as new forms of economic enterprise conflict with classical assumptions about the naturalness of a decentralized economy, and "inside," as perceptive commentators such as Holmes unearth the system's doctrinal fictions and contradictions. These chapters pave the way for the emergence of an alternative system — that of "progressive" thought — which is introduced in Chapter Five and developed in Chapters Six, Seven, and Eight, and whose uneasy future is the subject of Chapter Nine.

I also noted, however, that Horwitz does not present the "progressive" system of thought in the same fashion as he did the "classical" system. From the outset, Horwitz depicts the "progressive" system's struggle to reconcile its own contradictory tendencies, such as the conflict between "cognitive relativism" and scientific "objectivity." "Progressive" legal thought, in Horwitz' narrative, never acquires the architectonic integrity of "classical" legal thought. Instead of emphasizing its adherents' shared premises, Horwitz emphasizes their differences.

Nonetheless, Horwitz' narrative does invest "progressive" thought with its own kind of integrity. This integrity is linear rather than architectonic; it comes from asserted connections between various twentieth-century manifestations of a "progressive" jurisprudential sensibility. In the end, "progressive" thought becomes a recurrent feature of twentieth-century American jurisprudence, one side in a perpetual debate between those who continue to seek a radical separation of law from politics and those who insist that no separation is possible. The result is to elevate the successive "progressive" attacks on ortho-

33. In the preface to *Transformation II,* Horwitz says that "I still aspire to give the best possible explanation," even though "[a]s one sees both theories and causes as more contingent, one's belief in one's own objectivity is drawn into question." P. viii.

dox jurisprudence from isolated episodes to examples of the presence of an alternative intellectual "system."

Horwitz employs three narrative devices in his effort to elevate the place of "progressive" thought. The first is to emphasize the connections, rather than the differences, between the first wave of "progressive" challenges to the "classical" system — the contributions of Roscoe Pound and other "sociological jurists" in the years around World War I — and the realist movement of the late 1920s and 1930s. As Horwitz puts it, "[f]or many purposes, it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism. Too much has been made of the distinction between Legal Realism and what Roscoe Pound called 'sociological jurisprudence' before World War I" (p. 169). His point is that, whatever differences existed between the sociological jurists and the realists, both groups firmly rejected the premise of "classical" thought that law could serve as a neutral, nonpolitical force. The effect of the coupling of sociological jurisprudence and realism in Horwitz' narrative is that a "progressive" version of legal thought occupies a continuous chronological existence from the years before World War I to at least the years after the Second World War, when realism was significantly modified by process theory.[34]

Horwitz' second narrative device is to emphasize the "cognitive relativism" of "progressive" thought and to insist that this dimension of "progressive" legal ideology, particularly as it related to realism, has been widely misunderstood. In order to emphasize the "cognitive" aspects of realism, Horwitz reexamines the pivotal role of Karl Llewellyn in identifying the realist movement as an intellectual entity and concludes that Llewellyn's own preoccupations — with making a "list" of realists and with emphasizing the connections between realism and value-free social science — have been appropriated by historians. The consequence has been a distortion of the thrust of realism. At one point Horwitz summarizes his claims about Llewellyn and his effect on subsequent perceptions of the realists:

Llewellyn's effort to define Realism in terms of a relatively coherent and

34. Because some of my earlier work is cited as an example of scholarship making "too much" of the distinction between sociological jurisprudence and realism, I should note that in *Tort Law in America* I offered a reading of the relationship between sociological jurisprudence and realism much closer to Horwitz'. The following paragraph captures that reading:

> Indeed, when one considers Realism in the context of broad intellectual developments in the early twentieth century, and contrasts those developments with prevailing late nineteenth-century intellectual trends, it is possible to formulate a definition of Realism that incorporates sociological jurisprudence. The Realist movement, in its successive stages, was an extended critique of the conceptualist orientation of late nineteenth-century jurisprudence, with the sociological jurisprudes primarily criticizing the social and political consequences of that orientation, and the self-styled "Realists" primarily criticizing conceptualism's underlying philosophical assumptions.

G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 70-71 (1980) (footnotes omitted).

> systematic methodology has resulted both in a de-emphasis of the substantive political commitments of the Realists — their connection to the movement for political reform — and in a substantial over-emphasis on a now largely discredited strand of positivist and behavioralistic social science that has deprived us of the true richness of the intellectual and political heritage of Realism. [p. 172]

In calling for a recognition of the realists as political reformers and "cognitive relativists," Horwitz prepares the way for his third narrative device, which he employs to describe the "legacy" of realism. By identifying the realists as in the "progressive" tradition of political reform, Horwitz associates them with a point of view hostile to the "classical" system's effort to separate law and politics. He can thus show that mid-twentieth-century efforts to subvert or absorb realism, such as the work of what he calls the legal process school,[35] amount to efforts to reassert the law-politics dichotomy. At the same time, by identifying the tension in realism between cognitive relativism and value-free social science, Horwitz is able to show that the realists themselves were searching for some version of methodological "neutrality" that could function as a barrier against the nihilist implications of perspectivalism. The realists' own ambivalence toward the values of objectivity and neutrality made them more vulnerable to neo-"classical" critics in the years of the Second World War, when relativism of all kinds seemed close to treason.

When one focuses on this last narrative device of Horwitz', and considers the connections among the three devices, the outlines of an interpretive strategy begin to appear. By presenting "progressive" thought as a continuous, but conflicted, twentieth-century alternative to "classical" thought, Horwitz both legitimizes the "progressive" tradition and demonstrates its vulnerability to "classical" counterattack. By identifying the principal conflict within "progressive" thought as that between epistemological ("cognitive") relativism and a search for methodological objectivity or neutrality, Horwitz locates the source of "progressive" thought's vulnerability to "classical" opposition. That source is the very fascination with neutrality and objectivity that drives "classical" thought to attempt a separation between law and politics. The purpose of that attempted separation, Horwitz regularly reminds us, was to establish law as a neutral force, above the passions of humans and the tyranny of the majority. In a sense, value-free methodologies played the same role for "progressives." They served as a brake on the assumed tendency of humans to make over legal institutions and concepts in accordance with their own predilections.

The effect of this portrait of the interaction of "classical" and "pro-

35. Horwitz does not actually use the term *legal process school* until very late in his narrative, several pages after he has introduced and discussed the contributions of process theorists. *Compare* p. 269 *with* pp. 253-55.

gressive" thought is to invest both systems with a certain normative baggage. Twentieth-century jurisprudential "schools" seeking to subvert or to modify "progressive" movements such as realism come to be seen as neo-"classical" in their orientation, and thus come to take on the full panoply of Horwitz' earlier characterizations of "classical" thought. They appear as category-ridden, fixated on the goals of neutrality, and unresponsive to social injustice. Such is the characterization Horwitz advances of the "legal process school."

"Progressive schools," viewed through Horwitz' lens, benefit from the added stature of an alternative jurisprudential "tradition" — extending for the entire balance of the twentieth century — and also demonstrate a recurrent fixation with methodological objectivity and neutrality that has been a source of weakness for them. Because Horwitz announces that value-free social science is "now largely discredited," continued efforts on the part of "progressive" thinkers to search for neutral methodological principles are in vain (p. 172). The implicit message, for such thinkers, is that they should proudly reaffirm the "cognitive relativism" of their heritage, drop all pretenses of achieving neutrality or objectivity, and join battle with the neoclassicists.

At this point in the book, Horwitz is talking about the present, as he has, in a sense, been doing all along. His final chapter makes more explicit the lessons readers are to draw from his narrative. The first is that yet another effort to separate law from politics, the legal process school, encountered a "swift decline of its influence" — and ultimately its "demise" — after the mid-1960s (p. 269). Given the structure of Horwitz' narrative, the causes for the decline of process theory are not hard to find. Process theory made an investment in the search for "neutral principles," sought to equate proceduralism with substantive justice, and adopted the "sharp distinction between facts and values characteristic of ethical positivism" (p. 270). These characteristics of the movement relegated it to the status of "formalistic" jurisprudential schools that, in one form or another, sought to reassert or to revive the separation of law from politics (p. 271). Horwitz' narrative suggests that such efforts are foredoomed because they start from a misguided premise.

As a result of the collapse of the legal process school, "[t]hree different intellectual movements have struggled for ascendancy" in contemporary American jurisprudence (p. 269). The next lesson of Horwitz' narrative determines which of those movements bears the greatest promise.

Here Horwitz' strategy is twofold. After identifying the three movements competing for influence — "rights theories," law and economics, and CLS — he seeks to delegitimate the first two movements, but at the same time to avoid identifying himself too openly as a partisan of the third. By avoiding an open declaration of his affinity for

CLS, Horwitz remains faithful to his statement in the first paragraph of his conclusion that "for the historian, a degree of perspective and distance remains essential if history is not to become simply an extension of current controversies about law" (p. 269). Nonetheless, one could argue that his entire narrative has been "set up" to make the connection of CLS with the "progressive" tradition of twentieth-century American jurisprudence appear "natural" and "necessary."

Horwitz' first tactic, in his discussion of the competing intellectual movements, is to dismiss the claims to prominence of "rights theory." He does this in an oblique manner, by devoting little space to those claims. He notes that "rights theory" is not a new phenomenon; it surfaced during the Second World War, "in reaction to the horrors of totalitarianism," and again during the Warren Court years. He also notes that a "property-centered version" of rights theory has been revived recently by proponents of a "right-wing libertarian legal philosophy" (p. 269). This history suggests that rights theory has a protean character and can support any philosophical point of view. "[I]n American history," he notes, "natural rights has equally served both abolitionists and the defenders of the rights of ownership in human and non-human property" (p. 271). In short, rights theory appears to be too "malleab[le]" to be of much use (p. 269).

Horwitz' efforts at discrediting law and economics are more extensive. Here he has a formidable opponent, not only because of the symbiotic relationship between welfare economics and the neoconservatism of the 1980s, but also because of the claims of members of the law-and-economics movement to be "the rightful heirs to Legal Realism" (p. 270). The realists, those claims suggest, were essentially seeking to get beyond legal doctrine to the truths of social science; by revealing the truths of the social science most relevant for legal transactions, law and economics has completed that search.

Here the groundwork Horwitz lays in his narrative of realism proves particularly helpful. He points out again that Llewellyn's characterization of realism as a " 'methodology' or 'technology' " was incomplete and misleading, reminds us that "there was an entire body of Legal Realist work that explicitly rejected both ethical positivism and the alliance between Legal Realism and value-free social science," and repeats that "the greatest and most enduring contribution of Realism was its early recognition of the implications of cultural modernism and, in particular, of cognitive relativism for legal thought" (p. 270). The last claim about realism, in particular, makes any connection with law and economics "ironic." The realists devoted their energy to demonstrating the contingent nature of social phenomena; law and economics seeks to "reestablish[ ] . . . Classical Legal Thought's reified picture of the market as neutral, natural, and necessary" (p. 270).

Law and economics is thus, if anything, the heir to the legal pro-

cess school, another "effort to separate law and politics in American culture, one more expression of the persistent yearning to find an olympian position from which to objectively cushion the terrors of social choice" (p. 271). That the "neutrality" dimension of law and economics resides in "the market" rather than in formal principles of legal doctrine makes no difference.

Thus, if any contemporary movement can claim descent from realism and other movements in the "progressive" tradition, it would appear to be CLS. Horwitz is notably cryptic on this point, limiting his discussion to the statement that "the strand of cognitive relativism" he has prominently associated with realism has been "revived and extended" by the CLS movement (pp. 270-71). That is all he says, but in his final paragraph in *Transformation II,* when he speaks of "transcend[ing] the American fixation with sharply separating law from politics," his choice to use the word *transcend,* a common one in the discourse of CLS, is no accident (p. 272).

V. Conclusion: Transforming American History

If the term that formed the core of the narrative of *Transformation I* was *instrumentalist,* the term that forms the core of the narrative of *Transformation II* is *reify.* "Nowhere," Horwitz writes in his conclusion, "has the process of reification been more pronounced than in American legal theory" (p. 271). By *reify* Horwitz means "make real," in the sense that one makes a "self-fulfilling prophecy" come true: one reads the experience of the past as confirming propositions that one already takes to be self-evident. "Classical" legal thought was a system based on reification; its abstract legal categories created an "architecture" that ensured that legal doctrines would confirm the primacy of value judgments already made. The bright lines drawn, for example, between property "affected by a public interest" and other kinds of property were possible for two reasons — because "property" itself was taken as an entity preceding the organization of society and because distinctions between the "private" and "public" spheres of life were assumed to be "natural" and settled.

When Horwitz turns from "classical" to "progressive" thought, a different sort of reification occurs. Instead of identifying common premises and demonstrating how the entire structure of a body of thought functioned to reify those premises, Horwitz identifies distinctive features of "progressive" thought — he calls them *strands* — but does not attempt to synthesize them. On the contrary, he presents the strands as not easily reconcilable and the "progressive" tradition as being characterized by a simultaneous pursuit of apparently contradictory themes.

We have seen that three strands of "progressive" thought receive prominence in Horwitz' account. The first is a fundamental dissatis-

faction with "classical" thought, with respect to both its methodological assumptions and its political agenda. "Progressives" were those who found the legal outcomes produced by "classical" doctrines substantively unjust and the doctrinal system that produced them epistemologically misguided. One theme uniting "progressives" was the belief that legal orthodoxy was simply wrongheaded.

A second strand of "progressive" thought is what Horwitz calls *cognitive relativism.* He associates this posture with the numerous works by "progressive" scholars suggesting that legal categories, thought by classicists to be natural and necessary, were socially created and contingent. The "discoveries" by "progressives" that causation was multiple rather than monocausal, or policy-driven rather than objective, or that property was the creation of social arrangements rather than antecedent to them all followed from an altered view of the process by which humans react to experience. The "classical" view of that process had emphasized the inevitability of certain universal truths — the primacy of property, the competitive instincts of humans — that formed the "realities" of experience. In contrast, the "progressive" view took those "truths" as socially created, and thus adopted a more complex posture toward the relationship between perception and experience.

The strand of "cognitive relativism" in "progressive" thought harmonized well with the "critical" strand in that progressives' substantive attacks on orthodox legal doctrines were reinforced by their insight that those doctrines were not inevitable and universal. But the third strand of "progressive" thought emphasized in Horwitz' narrative fits less well with the other two. It is enthusiasm for behavioralist social science. While Horwitz identifies several "progressive" thinkers as explicitly or implicitly subscribing to Holmes' dictum that "the man of the future is the man of statistics and the master of economics,"[36] he does not spend much time suggesting why twentieth-century "progressive" theorists should have been attracted to the social sciences. A fair amount of other scholarly literature has done so, however, and Horwitz cites some of that literature, so we may take him as having incorporated its arguments by reference. Briefly, the social sciences have been attractive to twentieth-century scholars because they seem to provide general "covering" laws — based on observable human behavior — as explanations for social change, and are at the same time not grounded on theological or religious assumptions. They thus retain the nineteenth-century fixation with "scientific" explanations of the universe without retaining the theological dimensions of nineteenth-century "science."[37] Horwitz points out the number of "pro-

36. OLIVER W. HOLMES, *The Path of the Law, in* COLLECTED LEGAL PAPERS 187 (1920).

37. Among the relevant literature cited by Horwitz on the collapse of religious-based "scientific" explanations and the growth of modern social science are MARY O. FURNER, ADVOCACY

gressive" theorists who began with the assumption that social science methodology could be used to reform the law to meet "progressive" political and moral goals, but ultimately concluded that it should be "value-free" (pp. 209-10).

In Horwitz' narrative, this strand of "progressive" thought does not reinforce the other two. Indeed, it is the source of some of the deepest contradictions in the "progressive" epistemological system. In the hands of Llewellyn and other "constructive" progressives, the canons of objectivity and neutrality — originally identified with social science — become devices for "subordinat[ing] political and moral passion to social science expertise" and for "push[ing] the behavioral social sciences in directions that ultimately dulled the critical edge of Realism itself" (pp. 209-10; footnotes omitted). In this effort the "progressive" enthusiasts for social science were exhibiting what Horwitz calls a "preoccup[ation in twentieth-century American thought] with finding a method that can either determine values objectively or avoid the value question entirely" (p. 210). The turn to social science in the twentieth century, he believes, was "part of this general effort to find alternative forms of legitimation amid the decline of religious belief and the disintegration of an orthodox Darwinian paradigm" (p. 210).

The "progressive" alternative tradition of twentieth-century jurisprudence thus emerges as deeply conflicted. Alongside its critical and relativistic strands rests its social science strand; alongside the reformist energy of sociological jurisprudence and "cognitive" realism rest "scientific" realism, positivism, and the legal process school. Instead of pressing its critical and relativistic insights to their full potential, the tradition has vacillated between periods of great creative energy and periods where it has struggled to make the claim that a jurisprudence was objective or value-free.

Now consider the contemporary jurisprudential universe, as Horwitz describes it in his concluding chapter. Three competing schools struggle for "ascendancy." Of those, one, the "rights" school, appears to rest on the proposition that "natural rights" has some determinate content, even though "rights" arguments, Horwitz suggests, have been advanced by theorists at all points on the political continuum in support of a great variety of conflicting claims. Rights theory appears to be an effort to "determine values objectively," an effort which Horwitz' history suggests is doomed to failure.

Law and economics, on the other hand, appears to be adopting

AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865-1905 (1975); THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE (1977); DAVID A. HOLLINGER, MORRIS R. COHEN AND THE SCIENTIFIC IDEAL (1975); EDWARD A. PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1973); and DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991).

both of the strategies employed by past twentieth-century jurisprudential movements. On the one hand, law and economics posits the existence of an objective methodology by which human relationships can be studied, because all humans, at bottom, are utility-maximizers. Having determined the calculus of utility maximization to be the baseline for human decisionmaking, law and economics argues for a kind of neutrality — or at least an indifference — to the consequences of aggregate maximization. Thus, the process by which one observes utility maximization is objective, but the "value" that individuals place on the choices they make in the process is subjective. One is therefore precluded from intervening in the process: first, because such intervention would be inconsistent with the objectivity canon; second, because there is no objective way of evaluating outcomes other than to say outcomes are what individual utility-maximizers "want."

Law and economics thus appears to stand squarely in the twentieth-century positivist tradition of retreat to a constructed objectivity, the very tradition that in Horwitz' narrative has produced continual moral abdication. What of the remaining intellectual movement? Horwitz may be cryptic, but the lessons of his narrative are clear. The most powerful features of the "progressive" alternative tradition — the features Horwitz has labored hardest to unearth — are its "critical" attitude toward orthodoxy, its cognitive relativism, and its persistent resistance to efforts to establish legal doctrine as neutral, natural, or necessary, as distinguished from socially constructed, contingent, and time-bound. In the "progressive" caricatures of "mechanical jurisprudence" and in the realist attacks on "conceptualism," one sees the same impulses that produced critical "trashings" of centrist "liberal" doctrine. In the "cultural modernism" of the early "progressives," one sees something like the "irrationalist" critical attacks on process theory. In short, one has a sense that another "progressive" wave has swelled. If only this wave can avoid the shoals of positivism; if only critical thought can abandon the practice of "hid[ing] behind unhistorical and abstract universalisms in order to deny, even to itself, its own political and moral choices" (p. 272).

If . . . . One is struck by Horwitz' comments, at the beginning of his *Santa Clara* chapter, that one of the precursors of "progressive" theory was "[t]he gradual acceptance of the reality of multiple causation" (p. 65) and by his statement in the preface to *Transformation II* that he inhabits "[a] complex, multi-factored interdependent world," a "world of complex multiple causation" (p. viii). One wonders whether the "reality of multiple causation" is any more capable of being objectified than any other "fact" of history. One wonders, in general, just what is being "reified" in the narrative of *Transformation II.* There is a sense of a narrator alternatively horrified and fascinated at the capacity of "classical" thought to achieve architectonic integrity. At the same time, one cannot escape noticing the self-denial of that same nar-

rator, alternatively energized and deflated by the critical brilliance of the "progressive" theorists' insights and the recurrent lapses of American jurisprudence, whether "progressive" or orthodox, into episodes of neoclassicism. In a sense, Horwitz appears to believe that if his efforts to reveal the critical and cognitive dimensions of "progressive" thought are appreciated, others will be inspired, and if his efforts to warn against the dangers of naive faith in social science or some other positivist escape mechanism are heeded, others may avoid them in the future. At the same time there is a sense of the inexorable pattern of retreat to objectivity — or avoidance once a critical project is pushed too far or appears too relativistic in its sweep — a sense that, for all the illuminating efforts of "progressive" theorists, American jurisprudence will continue to bury its head in the sand.

Horwitz has now made two efforts at "transforming" American legal history. It is a commentary on his stature and on his self-awareness that his second effort implicitly abandons the "instrumentalist" motif of his first despite that motif's capacity to energize many of his contemporaries. His second effort is more self-conscious, but no less bold. Nuance and detail are sacrificed, and new linear relationships developed, in the service of a highly purposive narrative. Sociological jurists and realists are made to look more like critical theorists than they ever really were, and the system of orthodoxy becomes almost pristine in its self-containment.

Despite Horwitz' occasional retreats to the stance of the professional historian, reification is the motif of *Transformation II* in ways that involve its author as well as its subject. Not only the "classical" theorists build their doctrinal world according to their own assumptions; Horwitz builds his narrative according to his. This comment is not meant wholly as a criticism; there is no escaping subjectivity and time-boundedness, in historians as in other humans. The structure of *Transformation II* "sets up" progressives to "win" our approval, and by doing so establishes CLS as the most promising of the contemporary legal intellectual movements; Horwitz could hardly have written the book differently. Because of its inherent structural limitations, one can hardly say his narrative is definitive — but definitiveness presupposes an objectivity to historical analysis and a universality to historical interpretation that, as cultural moderns, we seem fated not to accept.

Still, Horwitz' evolving posture in the *Transformation* sequence appears to have left him, and the rest of us, in an awkward predicament. The unifying feature of *Transformation I* was its relentless instrumentalism, its relatively simple view of historical causation. In *Transformation II,* Horwitz has come to recognize that history resists monocausal explanations and that the choice of a causal motif on the part of a historian is to an important extent personal and subjective.

Put another way, by *Transformation II* Horwitz has come to recognize that a good deal of authorial reification was going on in *Transformation I.*

What follows from this recognition? In his preface Horwitz confronts the possibility that, in a world in which historical explanations, and theoretical statements of all kinds, are socially constructed and contingent, historical scholarship could become "just my story, with all the connotations of skepticism and subjectivity that the word 'story' implies" (p. viii). He believes, however, that this predicament is not inevitable so long as historians "aspire to give the best possible explanation" of their subjects (p. viii).

But where does this explanation come from? And how does one know it is the "best possible" one? *Transformation II* is distressingly cryptic on both those questions. While rejecting monocausal causation, Horwitz returns in the early chapters of *Transformation II* to the model of causation he employed in *Transformation I,* reciting extralegal phenomena and suggesting that those phenomena "pushed" or "pulled" legal doctrine in various directions. After the introduction to Chapter Five, however, he abandons attention to extralegal developments, so that one gets the impression that if anything is "causing" the various twists and turns of "progressive" thought in the 1920s, 1930s, 1940s, and 1950s, it is the inherent contradictions within that body of thought itself. Such an impression would comport with quite a different theory of the causal relationship among theory, doctrine, and context in the law. That theory might emphasize the degree to which given intellectual "movements" or "schools" are fated, because of their culturally determined governing assumptions, to slide over philosophical difficulties and to assert "solutions" to contested social or legal issues that subsequent generations, having abandoned the governing assumptions, find problematic. Under such a theory, changes in legal doctrine over time emerge as the "inevitable" product of distinctive generational mixes of cultural experiences and epistemological premises. Horwitz, however, never advances any such theory. He simply stops talking explicitly about causation.

Lacking any explicit explanatory theory of the developments surveyed in *Transformation II,* one has no answer to the question whether Horwitz has given the "best possible explanation" of those developments. What one has instead is a sense of the metaexplanatory structure of Horwitz' narrative. One feels that he presents his subjects in order to forge connections between CLS and other twentieth-century "progressive" jurisprudential movements, and in order to discredit the claims of other contemporary schools, especially law and economics, to stand as the "heirs" to those movements.

In short, one feels strongly that Horwitz *would like* the history of twentieth-century legal America to be read in a certain way. After

reading *Transformation II,* however, one has no basis for determining whether it *should* be read in that way. This makes all the more puzzling Horwitz' decision to "end[ ] the story around 1960" and thus not to include "the breathtaking changes in postwar academic legal thought" that came with the collapse of process jurisprudence (p. 269). Horwitz identifies that decision with his desire to act as a "historian," for whom "a degree of perspective and distance remains essential if history is not to become simply an extension of current controversies" (p. 269). That statement is puzzling because the overwhelming "message" of Horwitz' history of twentieth-century legal thought is that history *is* an extension of current controversy; history helps to explain and even provisionally to resolve that controversy.

So the historian ends up in a considerable predicament after *Transformation II.* He has no "objective" theory, whether based on historical causation or something else, with which to explain the past. Yet he needs to eschew subjectivity and preserve "distance" from his subjects. It is not clear how subjectivity can be resisted, and distance preserved, without some criteria for evaluating which of a myriad possible explanations for past developments to prefer. It seems that the only way to establish such criteria is for historians to make clear to their readers which explanations they have chosen to emphasize and why those explanations are superior to others. In so doing, historians return themselves and their readers to the basic problems of the relationships among text, context, and interpretation that form the heart of the scholarly enterprise. One may find this suggestion distressingly prosaic. But it at least does not seek to evade the problems of distinguishing historical scholarship from storytelling, problems that "transformative" methodologies appear designed to avoid.