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Review of "The Transformation of American Law, 1780—1860," by Morton J. Horwitz

Sheldon M. Novick
Vermont Law School

BOOK REVIEW

THE TRANSFORMATION OF AMERICAN LAW, 1780-1860.

By Morton J. Horwitz.

Cambridge, Massachusetts: Harvard University Press, 1977. Pp. xvii, 356. No price given.

This is a complex and absorbing book that should be of considerable importance to courts and lawyers as well as to historians. Professor Horwitz opens a realm of common law that few could enter without the assistance of his extraordinarily extensive research. He reviews the state and federal court decisions in which modern property, tort, contract, and commercial law were born; he assembles this great mass of law in lucid chapters that allow the reader to follow the development of case law in individual decisions. Much of this formative law is here available to the ordinary reader for the first time.

Horwitz sees a pattern in this law that was first described by Sir Henry Maine: "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[1] By "status" Maine means the place of an individual in the group—originally the family—that defines his rights and obligations. In primitive societies the family's interests are all, and there is no conception of individual freedom. The slow progress of morality has broken down the old rigid status relationships and created instead a system of voluntary agreements among free individuals.

The transition from status to contract occurred with considerable speed in the English-speaking world at the beginning of the nineteenth century. The elaborate social relationships of the eighteenth century were built on the land tenure systems of the Middle Ages; every person's rank was determined in descending order from the King. Dress, manner, and education were all determined by status:

> Appearances on the streets of London and Paris two centuries ago were manipulated so as to be more precise indicators of social stand-

1. H. MAINE, ANCIENT LAW 100 (Morgan ed. 1917) (1st ed. London 1861).

> ing. Servants were easily distinguishable from laborers. The kind of labor performed could be read from the peculiar clothes adopted by each trade, as could the status of a laborer in his craft by glancing at certain ribbons and buttons he wore. In the middle ranks of society, barristers, accountants, and merchants each wore distinctive decorations, wigs, or ribbons. The upper ranks of society appeared on the street in costumes which not merely set them apart from the lower orders but dominated the street.[2]

Legal relationships among persons were defined by their status. Property was not so much the possession of an individual as the underlying substance of the social order, the structure on which the pattern of social relations was stretched. Real property was a bounded domain in which one lived and ruled, not an instrumentality of economic purpose.[3]

In eighteenth-century London this feudal world was fast disappearing; modern commerce produced a large urban population outside the traditional status system.[4] The law preserved feudal status, however, to the satisfaction of the squires and gentry who continued to dominate political life. By 1832, the underpinnings of the system failed, and parliamentary reform opened government to bourgeois democracy. In the United States, the new state and federal constitutions enshrined individual liberties at the center of government; legislatures and courts quickly completed the transition to a system of laws regulating voluntary agreements among free individuals.

The transition was incomplete, of course, but by and large the United States and Britain moved from status to contract as Maine claimed, in a remarkably short period, from the times of the French and American Revolutions to that of parliamentary reform.

Horwitz agrees that this transition occurred, but he is not as comfortable with it as Maine. To Horwitz, the change reflected economic rather than moral progress. The courts decided to favor economic development and altered the law to suit their purpose—part of a general political decision taken in every state, Horwitz claims. Economic

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2. R. SENNETT, THE FALL OF PUBLIC MAN 65 (1977). This interesting book presents the argument that the public status relationships of the eighteenth century made life less isolated and more civilized.

3. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 31-63 (1977).

4. *See* R. SENNETT, *supra* note 2, at 47-49.

development was to be fostered and subsidized, but the legislatures refused to provide subsidies directly to economic enterprise. Instead, the courts were permitted to shift the burden of development onto the hapless bystanders injured by defective machinery and negligently operated railroads.[5]

The argument is a complex one. Horwitz begins by examining the role of precedent in American common law after the Revolution. At first, the colonies continued to follow British precedent, sharing the British view that the common law represented natural law, and was based upon a system of immutable principles embedded in the world and discovered slowly by judges. The fixity of common law was quickly questioned, however, as the separation from Britain and the divergence among the several states made it clear that there was not one common law, but several. This growing divergence among the courts called attention to the courts' role in making law as legislatures did, law not always found written in the book of nature.[6]

Horwitz argues persuasively that the collapse of fixed and universal common law led judges to examine the bases of their decisions, and to begin making rules based on considerations of what would be best for society in general. This legislative function encouraged judges to consult their views of social purpose as well as the merits of the cases before them.[7]

Horwitz then proceeds to show, in a series of brilliant chapters that cannot be briefly summarized, how the law changed in the early years of the nineteenth century. He shows first that the feudal view of real property as a private domain was quickly displaced by the new conception of property as a raw material, as a public good to be exploited. Tracing new doctrines of eminent domain, prescriptive rights, the Mill

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5. In this book, I seek to show that one of the crucial choices made during the antebellum period was to promote economic growth primarily through the legal, not the tax, system, a choice which had major consequences for the distribution of wealth and power in American society.

M. HORWITZ, *supra* note 3, at xv. Horwitz never says directly who he thinks made such decisions, but the overall tone gives one the impression of a cabal of lawyers determining the course of national affairs. Karl Polanyi argued that the whole system of free markets was an invention of lawyers and political theorists, imposed on a reluctant body politic, but it is not clear whether Horwitz goes this far. *See* K. POLANYI, THE GREAT TRANSFORMATION (Beacon ed. 1957).

6. *See* M. HORWITZ, *supra* note 3, at 1-31 ("Emergence of an Instrumental Conception of the Law").

7. *Id.*

Acts (which gave mill owners the right to flood others' property), the new doctrine of waste (that permitted exploitation of natural resources without much regard for posterity), and a variety of related themes, Horwitz shows how the nature of real property ownership changed to permit economic development.[8]

The law of nuisance also changed, and was slowly replaced by negligence law, with the result that entrepreneurs could build mills or operate railroads without much fear of liability for injuries caused to neighbors.[9]

The business corporation was born. In one of the most interesting passages in the book, Horwitz reminds us that corporations were at first customarily monopolies with extensive quasi-governmental powers, and that the development of business competition among corporations was one of the greatest innovations of the common law of the early 1800s.[10]

Commercial law, of course, underwent equally great changes. Horwitz gives an interesting account of the rapid absorption of the old law merchant into the general common law, a development he links to the disappearance of a distinct merchant class and the rise in power of lawyers, who slowly eradicated the competing merchants' courts and arbitrations.[11] The expansive construction of the federal courts' admiralty jurisdiction helped to absorb the old customary law of trade into the new common law.[12]

Finally, we have the "triumph of contract," a fundamental alteration of commercial law. The old system of rights and obligations defined by social relations governing mercantile exchanges was completely replaced by the law of voluntary agreements, a profound change that was clearly visible in the decisions permitting recovery against insurance companies even when the insured had been negligent. The insurance contract was permitted to override the duties owed by one person to another. Status and social relationships were finally subordinated to the marketplace.[13]

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8. *Id.* at 31-63.
9. *Id.* at 61-99.
10. *Id.* at 109-39.
11. *Id.* at 140-59.
12. *Id.* at 250-51. Horwitz notes that the expansion of the common law to encompass mercantile disputes was part of the flowering of natural law thinking in the eighteenth century, but he denies that this contradicts his general thesis that the courts abandoned natural law thinking early in the nineteenth century. To avoid the apparent contradiction, he argues that the apparent exponents of natural law in the nineteenth century were simply dishonest. *Id.*
13. *Id.* at 211-53.

In a concluding chapter, the weakest of the book, Horwitz argues that legal formalism appeared in the middle of the nineteenth century simply to mask the new economic motivation of the law, and to conceal its naked purpose.[14] Throughout the book he insists that this purpose was the "subsidization of economic growth."[15]

The landscape of changing law that Horwitz presents for our inspection can hardly be ignored. There can be no question that much of the private law shifted from an older status system to a new structure of relationships defined by voluntary exchanges in the marketplace. The shift from status to contract occurred, and was accompanied by a general agreement that the free market was the means of achieving the greatest material good for the greatest number. Displaying this transition in detail and breadth, as Horwitz does, is a major accomplishment, and one on which much further work will be based.

Why the change occurred is another matter. Horwitz is much less persuasive when he argues that courts intended the changes in the common law to subsidize economic growth. To begin with, he presents very little evidence that there was, in fact, a subsidy.[16] The clearest case for subsidy is the general practice of granting tracts of land to development companies, but this instance generally runs counter to Horwitz' thesis. It was the legislatures, not the courts, that were so generous with the public domain. The Mill Acts and direct legislative grants of land were indeed frank subsidies to mills and canals. To the extent that courts were involved at all, they held fast to older notions of land tenure. Courts did make it possible for the state to condemn privately held land without compensation, on the theory that all land

14. *Id.* at 253-68.

15. *See* note 5 *supra* and accompanying text. Chapter III is entitled "Subsidization of Economic Growth through the Legal System." M. HORWITZ, *supra* note 3, at 63.

16. Free-market economic theory, upon which the courts were presumably acting, holds that it makes no difference in economic efficiency which party to a dispute is saddled with liability. *See* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Horwitz acknowledges this in a footnote attached to his introduction, M. HORWITZ, *supra* note 3, at xvi n., but does not discuss the point at length. This is surprising in view of his main thesis that changes in rules of liability worked a considerable transfer of wealth. Horwitz merely argues in the footnote that Coase's theorem concerns a static society, but that there are "various allocationally efficient outcomes that relate to different wealth distributions." *Id.* Although it is true that distribution of wealth is an initial condition, rather than a result, of the kind of analysis made by Coase, it is still hard to see why a change in rules of liability should result in a redistribution of wealth. Rules of liability can be favorable to business enterprise without being at all necessary or even important in economic expansion.

was held at the sufferance of the state. Horwitz notes, however, the feudal view of land ownership, while it was used to subsidize new economic ventures, was hardly invented for that purpose.[17] The emerging free-market common law produced a different result: There was to be no taking without just compensation.[18] In short, the most significant subsidies to mills, canals, and railroad companies were made by the legislatures, and by courts acting on the traditional status-based common law. When courts modified these doctrines it was to end the pattern of subsidies.

In the other general areas of law considered by Horwitz, it is even less clear that the new law of property created any significant subsidy to private interests. Horwitz notes the changes in the law of nuisance that clothed private transportation companies with some of the protections of sovereign immunity, and the gradual appearance of negligence rules that exempted railroads from most liability for injuries to neighbors.[19] These changes were certainly sought and won by business enterprises in the courts, and in individual suits the business defendants saved some money. Horwitz does not estimate the magnitude of these savings, compared to the overall operations of the canals, mills, and railroads. Perhaps no such estimate can be made. The author fails to discuss the rules of liability to passengers and customers, which certainly were more significant economically but much less favorable to business enterprises. Common carriers were and are held to a high standard of care with regard to their passengers,[20] for instance, and intuitively one supposes this to have been a more important matter economically to the railroads and canal companies. Horwitz' thesis would suggest that courts were much more likely to shift accident losses onto the workingclass passengers of the railroads than onto the property owners along the tracks. Yet the contrary seems to have happened. Railroads were bound to a much higher standard of care with regard to passengers, but were generally able to escape liability for fires in neighboring hay stacks ignited by sparks.[21]

It is not difficult to imagine an economic interpretation of these developments. Wealth was not, after all, a guarantee of solidarity.

17. M. HORWITZ, *supra* note 3, at 63-65.

18. *Id.* at 66-70.

19. *Id.* at 70-108.

20. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 174-75 (4th ed. 1971) (citing cases).

21. M. HORWITZ, *supra* note 3, at 71-78.

Wealthy landowners of the South and wealthy industrialists of the North were on opposite sides of a Civil War. The merchants and shipbuilders of New England represented a set of interests quite different from either group, the small farmers of the North and West still another, and the urban mechanics and industrial workers still another. Many of the cases Horwitz discusses, as in the fires set by sparks from railroads, involve disputes between industrialists or merchants and landowners. We are not surprised to find Massachusetts and New York courts favoring merchants over landowners. What is surprising is Horwitz' notion that this sectional favoritism represents a decision to subsidize economic development at the expense of the poor, who are not represented in such disputes and are unaffected by that outcome. The book includes no discussion of the fellow-servant rule that one would think to be the clearest test of Horwitz' thesis. Owners were consistently favored over workers, and industry was evidently subsidized by the courts' refusal to award damages to injured workmen. The difficulty here is that, as Dean Pound showed some years ago,[22] the fellow-servant rule was not a novelty but a consistent application of prior principles to new situations; the rule was developed in cases that had nothing to do with industrial workers and that were decided by judges who had no obvious sympathy for the new entrepreneurial class.[23]

Here we meet one of the most serious objections to Horwitz' thesis. Judges were not all merchants or industrialists. A good many were planters, farmers, and even democrats. Roger B. Taney, Andrew Jackson's Attorney General, was the Chief Justice who did more than any other to undo the Federalist innovations of Marshall. Taney's state rights and pro-slavery decisions paved the way to Civil War; yet Horwitz would have us believe that Taney struck down the monopoly privileges at issue in the *Charles River Bridge* case to protect the rail-

22. Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 373-81 (1940).

23. The fellow-servant rule was first announced in Priestley v. Fowler, 150 Eng. Rep. 1003 (Ex. 1837), in which a butcher was held not liable for injuries to one employee caused by the collapse of a wagon overloaded by another. Pound points out that a majority of the court that decided *Priestley* were squires and landed gentry; "this was not a bench specially disposed to formulate as law the self-interest of manufacturers." Furthermore, "[i]t is a safe conjecture that in 1837 the butcher and the boy working for him . . . would be regarded by the court as of the same class." Pound, *supra* note 22, at 374. There was no reason to impose liability on the butcher rather than the boy, and no earlier cases had done so. The doctrine of vicarious liability was an exception rather than a general rule. *Id.*

roads from attacks by chartered turnpikes. Taney may have been moved by class bias, but it was certainly not a bias in favor of northern industry.[24]

By ignoring the possibility of divisions of interest among property owners, Horwitz avoids some difficult questions. Railroads appeared rather late in the period he is discussing. It was not until after the Civil War that the railroads became a significant economic force.[25] In the 1840s, when much of the legal development Horwitz discusses had already taken place, railroads were still very modest ventures. The courts would have needed extraordinary foresight to judge the railroads worthy of extensive subsidy. Except the textile mills of New England, there are no important industrial interests represented in the cases discussed by Horwitz. The clashes of the early nineteenth century tend to be between merchant and landowner, between landowners, or between debtor and creditor. The turnpikes and canals were owned by planters in many instances; George Washington was one of the great projectors of canal schemes.[26] Why are we to suppose that disputes among landowners and merchants were decided so as to foster industrial development? What class interest favored canals over the plantations they served?

Even if we suppose there was a subsidy to economic development, it is not clear why the courts felt obliged to make it. Horwitz argues that the legislatures declined to levy taxes for this purpose because the only source of revenue was taxes on property.[27] Refusing to tax the wealthy, legislatures left it to the courts to tax the poor by freeing developers from liability for the damages they caused.[28] The basis of this argument is that taxes would necessarily have fallen on property,[29] but Horwitz

24. *See* M. HORWITZ, *supra* note 3, at 135-37.

25. In the 1850's railroad investment accounted for only 2% of gross national product and railroads consumed only 15% of iron output; the "maximum direct impact of the innovation [railroads] did not come until after the Civil War." Cootner, *The Economic Impact of the Railroad Innovation*, in THE RAILROAD AND THE SPACE PROGRAM 107, 113-14 (B. Mazlish ed. 1965).

26. *See, e.g.*, M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 204-05 (1913).

27. "In every state after 1790 a political decision to avoid promoting economic growth primarily through the taxing system seems to have crystallized." M. HORWITZ, *supra* note 3, at 109. The author means that a decision was made to promote economic growth through a shift in legal rules of liability, *see* note 5 *supra* and accompanying text, but he does not explain who made such decisions or how they came to be enforced.

28. M. HORWITZ, *supra* note 3, at 109.

29. Until we know more about the potential redistributive effects of state tax

offers nothing in support of this view. The Federal Constitution gives evidence that direct taxes on property were not favored, but other sources of revenue were available. The taxes levied before and after the revolution were most commonly excise taxes. *Ad valorem* taxes on exchanges of goods—tariffs and stamp taxes, for instance—were the obvious sources of revenue early in the nineteenth century and their burden would have fallen on the consumer. In the great political struggles over tariffs, not mentioned by Horwitz, the new American industrial class favored protectionism and the merchants and landowners opposed it.[80] Tariffs would have financed industrial expansion by imposing higher prices on the general public, and industrialists favored such laws. Who then opposed taxes and favored legal subsidies? Certainly not the landowners who opposed tariffs but who also bore the brunt of the new rules of liability. There were large shifts in political opinion regarding tariffs and excises, of course, reflecting the changing relative positions of the contesting interests, but there is no reason at all to suppose that legislatures of every state were determined not to tax their constituents.

Even if we accept a narrow economic determinism, therefore, there is no reason to suppose that the courts assumed the task of transferring wealth from the powerless to the powerful. The courts did not always, or often, represent the emerging industrial class, nor were they always moved by economic considerations. The law adapted to economic considerations, but slowly and reluctantly. Judges may have favored

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> systems of this period, it would be dangerous to make any firm comparisons. Nevertheless, it does seem fairly clear that the tendency of subsidy through legal change during this period was dramatically to throw the burden of economic development on the weakest and least active elements in the population. By contrast, it seems plausible to suppose that in a period when the property tax provided the major share of potential state revenue, the burdens of subsidy through taxation would have fallen disproportionately on the wealthier segments of the population.

Id. at 101. The author offers no evidence for this surprising assertion. This factual uncertainty does not deter him from constructing an elaborate conspiracy theory: "the choice of subsidization through the legal system . . . entailed more conscious decisions about who would bear the burdens of economic growth." *Id.* The passive voice here masks Horowitz' assertion that some group of people made these decisions. Through much of the period Horwitz discusses, however, many state legislatures were Republican in the North and slave-holder in the South. A conspiracy powerful enough to impose decisions favoring merchants and industrialists on all the state legislatures and courts is hard to imagine. A Civil War was fought over similar issues.

30. *See, e.g.*, 1 C. BEARD & M. BEARD, THE RISE OF AMERICAN CIVILIZATION *passim* (1927).

one disputant over another, but the rules of decision were not easily altered.

> [T]he pressure of new interests has required that the taught tradition [of law] be made to serve new purposes as old doctrines were called on to solve new problems. There has been a gradual shaping of obstinate traditional precepts and traditional doctrines through the need of applying them to new economic conditions in the light of reshaping ideals of the legal order.[31]

The strength and importance of Horwitz' book lies not in his narrow determinist argument but in the wealth of law he presents, conscientiously arranged to show its development in the early years of this country. The work is so thorough that Horwitz produces ample materials from which contrary arguments can be constructed.

The judges of the early nineteenth century, as Horwitz shows, were unable to accept the strict adherence to precedent required of British courts.[32] Circumstances had altered, and it was clear the law would alter also. Courts quite reasonably responded by searching for the underlying principles of common law to apply to the new situation. In the eighteenth century, as Horwitz shows, the law was thought to be grounded in clear external principles governing human conduct: "That the Common Law, takes in the Law of Nature, the Law of Reason and the revealed Law of God; which are equally binding, at All Times, in All Places, and to All Persons."[33] While in summary this view may appear naive to modern eyes, it was not. The natural law philosophy imported into political economy and the common law from the Scottish Enlightenment was a highly sophisticated system of thought that forms the basis of modern social sciences.[34] Society, the Enlightenment believed, operated according to natural laws just as the physical world obeyed laws discovered by Newton. The laws of society were perceptible to reason and therefore were followed by reasonable persons. Judges had discovered and codified aspects of these laws, the overall

31. R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 83-84 (1938), *quoted in* Pound, *supra* note 22, at 367.

32. *See* note 6 *supra* and accompanying text.

33. Dulany, *The Right of the Inhabitants of Maryland to the Benefit of English Laws*, in THE ENGLISH STATUTES IN MARYLAND 82 (St. G. Sioussat 1903), *quoted in* M. HORWITZ, *supra* note 3, at 7.

34. Adam Smith's *Wealth of Nations*, published in 1776, is still, of course, the basic work of economics. Blackstone's codification of the common law was a part of this natural law tradition. *See generally* D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (1941); H. MAY, THE ENLIGHTENMENT IN AMERICA (1976).

framework of which was described by Blackstone, just as Newton had found the framework of physical laws.[35]

Horwitz argues that American judges abandoned this view of the law entirely, and developed an instrumental conception of jurisprudence that made the courts instruments of class purposes. The evidence he presents is not compelling. What he does show quite clearly is that the new nation rejected the conservative, high-church Tory view that the common law was an expression of divine will, immutable in all its details and not to be trifled with by Whig legislatures or democratic revolutionaries. The colonies rejected the religious view of natural law in large part, but they adopted its Enlightenment version, and searched for the general principles by which society operated.[36] They, like the British Whigs, believed that the customary behavior of people reflected natural laws, and that the laws followed by courts and legislatures should express these underlying natural principles. American judges, not surprisingly, began to feel that British judges had not correctly perceived the fundamental principles.

> Instead of entertaining a blind veneration for ancient rules, maxims and precedents, we should learn to distinguish between those which are founded on the principles of human nature in society, which are permanent and universal, and those which are dictated by the circumstances, policy, manners, morals and religions of the age.[37]

As Horwitz notes, "no judge of the period acknowledged himself to be free from the restraints of 'reason' and 'principle' in formulating legal doctrine."[38] Natural law had not been unseated, the courts had only adopted its Whig variety. In doing so, to be sure, the courts took a radical step, at least viewed from the perspective of Tory tradition. This is hardly the conscious instrumentalism that Horwitz claims, however. Thomas Jefferson, as Horwitz notes, was a leading exponent of the new rationalism, but it will hardly be believed that Jefferson intended to advance the interests of merchants against those of yeoman farmers and the landed proprietors of the south.

35. A contemporary praised Blackstone's *Commentaries* by saying, "Nor should it be considered panegyric to say, that this accomplished lawyer has done to the laws of England, what Newton did to the laws of nature, and Locke to those of human intelligence." THE LAWS RESPECTING WOMEN v (J. Johnson ed. 1777).

36. *See generally* C. CURTIS, LAW AS LARGE AS LIFE (1959) (reviewing the history of natural law philosophy in American jurisprudence).

37. N. CHIPMAN, DISSERTATION OF THE ACT ADOPTING THE COMMON AND STATUTE LAWS OF ENGLAND 41 (1793), *quoted in* M. HORWITZ, *supra* note 3, at 25.

38. M. HORWITZ, *supra* note 3, at 25.

The courts were examining custom for the evidence of underlying principles on which to rest the law, rather than simply advancing the interests of a particular class. This perspective makes it easier to see how the law adapted itself to new conditions. The origin of negligence is a good example.

In the early nineteenth century, as Horwitz perceptively says, "the story of the rise of negligence in America involves . . . the almost imperceptible changes in emphasis by which an older status-oriented conception of failure to perform a duty is gradually laid aside and the distinctively modern emphasis on careless performance begins to take its place."[39] In the older cases, the behavior expected of persons was clear and reasonable; any departure from custom was also a departure from duty, and liability would attach. The view of negligence as a departure from custom, firmly founded on natural law philosophy, persisted well into the nineteenth century. The modern utilitarian notion of carelessness—a failure to calculate the benefits and risks of an action—did not appear in negligence cases until the turn of the twentieth century.[40] Holmes, like others who tried to bring order to the new law of torts late in the nineteenth century, found no trace of utilitarian analysis in the cases; he rested the whole body of common law firmly on its old foundation. Liability was founded on fault, which in turn was a departure from custom and duty.[41]

Horwitz places the transition to a utilitarian view much earlier, in the "two decades before the Civil War,"[42] when railroads first began to flourish. He cites no cases from this period that show a utilitarian analysis. Horwitz is in good company when he asserts that a utilitarian standard was the basis of liability for negligence from its earliest appear-

39. *Id.* at 88.

40. The utilitarian standard was stated clearly for what appears to be the first time in Chicago, B. & Q.R.R. v. Krayenbuhl, 65 Neb. 889, 91 N.W. 880 (1902), in which the court held that a railroad would be required to take measures to prevent accidents to strangers, but only to the extent that the cost of such measures was outweighed by the harm they would prevent. *Id.* at 902-03, 91 N.W. at 882-83. The utilitarian standard now most widely used was first stated by Terry, *Negligence*, 29 HARV. L. REV. 40, 43 (1915), without any prior authority; Terry's statement formed the basis of the RESTATEMENT OF TORTS §§ 291-93 (1934) which in turn was widely adopted in decisions and pattern jury instructions. *See generally* Note, *Origin of the Modern Standard of Due Care in Negligence*, 1976 WASH. U.L.Q. 447, 465-67.

41. *See generally* O.W. HOLMES, THE COMMON LAW 128-29 (M. Howe ed. 1963) (the blameworthiness of an act is to be determined by experience which dictates "concrete rules" of behavior).

42. M. HORWITZ, *supra* note 3, at 98.

ance as a separate cause of action, but no authorities support this proposition before about 1900.[43] Until then the courts were, in fact, following the earlier standard of custom as duty. What perhaps is confusing to the commentators is that the defendants in negligence cases were generally business enterprises, often railroads, and the custom of the time was governed by free-market principles. Businesses calculated their profits, and presumably installed the safety devices that produced an economically efficient result, without any interference from government. Courts simply accepted custom as the rule of law. Adam Smith's theory was not elevated to the height of natural law, and embedded in the Constitution, until later.

The groundwork for this later development was laid in *Swift v. Tyson*,[44] decided in 1842. The Supreme Court held that a general federal common law governed commercial transactions. The opinion by Justice Story was clearly in the line of traditional natural law decisions that continued unbroken until 1937. Horwitz carefully notes this apparent contradiction of his thesis that the exponents of legal subsidy abandoned natural law, and goes to some length to explain *Swift v. Tyson* as a cynical exercise of judicial power.[45] This will not do. Whatever Story's own motives and opinions, *Swift v. Tyson* stood without serious challenge for almost a century. It was quite natural for Story to find a general federal common law, founded on laissez-faire principles. Horwitz' thesis that natural law had been abandoned, and the notion of a general common law with it, will not square with the cases. It was the survival of natural law thinking after the Civil War that permitted the changes in law Horwitz attributes to class interest decades earlier.[46]

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43. Holmes, for instance, does not suggest that potentially harmful conduct is ever justified by the good it may bring. *See* O.W. HOLMES, *supra* note 41, at 128-29. This balancing of costs and benefits, the heart of a utilitarian standard, does not appear in any nineteenth century authority; although Prosser insists the utilitarian standard was "fundamental" to negligence, he cites no case earlier than Terry's essay, *supra* note 40, for this proposition. W. PROSSER, *supra* note 20, § 31, at 149; Harper and James cite Terry and the *Krayenbuhl* case, Chicago, B. & Q.R.R. v. Krayenbuhl, 65 Neb. 889, 91 N.W. 880 (1902). 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.9 (1956). *See* Note, *supra* note 40, at 465-67.

44. 41 U.S. (16 Pet.) 1 (1842).

45. M. HORWITZ, *supra* note 3, at 245-52.

46. *See, e.g.*, Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 757 (1884) (Field, J., concurring) (among the "inalienable rights" guaranteed by the Constitution is the right to "pursue any lawful business," citing Adam Smith's *Wealth of Nations* as authority).

The Transformation of American Law shows the change, rapid in historical terms, from the older law of status and social cooperation, to the new law of individual freedom and competition. Horwitz shows that this change was not part of a steady progress of morality as Maine comfortably claimed,[47] but a costly and violent process that reflected the change in material conditions early in the nineteenth century. Horwitz goes wrong only in thinking that the transition was completed by 1860; that natural law, status, and custom were completely abandoned as foundations of the law, and replaced by the calculation of social purpose that we expect of modern legislatures. The law of nature did not disappear so quickly, however. The notion of natural law as a science capable of producing scientific common law persisted until quite recently. In the 1920s and 1930s it was still common to speak of the "science of jurisprudence,"[48] and of course the Supreme Court continued to hold that laissez-faire economics was a kind of natural law embedded in the Constitution until 1937.[49]

The complex status relationships and mutual obligations expected of people in the Enlightenment, however, were replaced by the simplistic principles of nineteenth century economics. Social Darwinism replaced the rationalism of Jefferson, and the law of the market place became the law of the jungle.[50] However unattractive the change now appears to be, the common law adapted itself to economic realities without abandoning its coherence and continuity as a system of natural principles.

The notions of natural law and status are still with us in many ways. The new right of privacy is a conscious revival of older notions of natural law; the legal position of families[51] and of women[52] is still largely determined by the status law of the eighteenth century. Even the

47. *See* H. MAINE, *supra* note 1, at 100.

48. *See, e.g.*, Kantorowicz & Patterson, *Legal Science—A Summary of Its Methodology*, 28 COLUM. L. REV. 679 (1928).

49. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (announcing the end of substantive-due process invalidations of restraints on freedom of contract).

50. *See* Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J., dissenting) (Court enacts Social Darwinism into constitutional law); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 757 (1884) (Field, J., concurring) (Constitution protects "sacred" property rights, quoting Adam Smith).

51. *See, e.g.*, Bove v. Pinciotti, 46 Pa. D. & C. 159, 161 (C.P. 1942) ("marriage is not only a contract but a status and a kind of fealty to the State as well").

52. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (state may restrict right of women to work as bartenders, and "may deny to all women opportunities for bartending," without denying equal protection of the laws).

commercial law still carries the marks of an earlier day; "merchant" is a status traceable to that in Lord Mansfield's time.[53] Competence,[54] sanity,[55] majority,[56] even race,[57] are statuses still recognized in law, and have not thrown off their eighteenth-century qualities. The newer natural law of economic competition is, of course, still greatly with us.

Roscoe Pound suggested that the older notions of hierachy and status might be preferable, in modern times, to the natural law of Social Darwinism.[58] Writing at a time when it appeared to many observers that the free market had ended its brief reign, and had been replaced by giant state and corporate monopoly enterprises, Pound suggested a new codification of mutual rights and obligations to replace the jungle laws of the market.

The transition from status to contract is not complete, and it is not likely to be final. We no longer share Sir Henry Maine's view that British parliamentary democracy is the pinnacle of human evolution; in large areas we are scrapping laissez-faire law for a different kind of regulation of economic activity. The new liberalism calls for federal chartering of corporations (a return to the sort of feudal tenure relationships that Pound suggested).[59]

The law moves slowly, however. As the natural law of free markets is being abandoned in the economic sphere, it is making its first advances against the still older status of women and families. The economic revolution of the nineteenth century has not yet brought women into

53. *See* U.C.C. § 2-104(1) (definition of "merchant"); § 2-104, Comment 2 ("The term 'merchant' as defined here roots in the 'law merchant' . . . ."). *See generally* Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 WASH. U.L.Q. 1.

54. *In re* Palestine's Estate, 151 Misc. 100, 270 N.Y.S. 844 (Sur. Ct. 1934) (alleged incompetent may not occupy "status" of administratrix).

55. This word is used with varying meanings, of course, but it can designate a legal status which determines criminal liability and it may be a type of competence. *See* W. LAFAVE & A. SCOTT, HANDBOOK OF CRIMINAL LAW 286-95 (1972).

56. The age of majority is another type of legal status, determined by statute. *See, e.g.*, N.Y. DOM. REL. LAW § 2 (McKinney Supp. 1976-77).

57. *See* Korematsu v. United States, 323 U.S. 214 (1944) (segregation of Japanese upheld); 25 U.S.C. § 479 (1970) (definition of "Indian" to include all persons "of one-half or more Indian blood"); 25 U.S.C. § 480 (1970) ("no individual of less than one-quarter degree of Indian blood shall be eligible for a loan"). An "Indian" woman, but not a man, can become a United States citizen by marriage. *See* 25 U.S.C. § 182 (1970).

58. Pound, *The New Feudalism*, 16 A.B.A.J. 553 (1930).

59. *See* R. NADER, M. GREEN, & J. SELIGMAN, TAMING THE GIANT CORPORATION (1976).

the marketplace, or freed them from the obligations attached to feudal status. The Equal Rights Amendment is clearly intended to work this change, and to treat women, like men, as persons whose individual rights and duties are determined in the abstract, without regard to social or family role. Sex, in short, is no longer to be a legal status.

Marriage, too, is being viewed for the first time as a contract and not as a status.[60] Families are now voluntary arrangements, and courts are free to disturb them in the best interests of the individual members.[61]

One may have reservations about the universal triumph of laissez-faire. Sex is not to be a status, but why should not marriage be one? It is difficult to view the marriage relationship as a contract. When marriage is no longer a means of imposing a separate status on women, it may again become possible to view the family as a status.

Horwitz has given us an important guide to the history of law in the United States. Like Moses, however, Horwitz seems to have been denied a clear view of the expanse he has opened to others. His achievement should not be denigrated on that account. The study of the continuing change from status to contract law promises to be very fruitful, and Horwitz has advanced this study considerably.

SHELDON NOVICK

60. "Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential. . . . A marriage may be contracted . . . ." UNIFORM MARRIAGE AND DIVORCE ACT § 201.

61. *See, e.g.*, UNIFORM JUVENILE COURT ACT §§ 30-32 (court may transfer custody of child from natural parents to other individuals or institutions if child is "deprived," "delinquent," or "unruly").