

From Tort to Contract: Industrialization and the Law

The Transformation of American Law, 1780-1860. By Morton J. Horwitz. Cambridge: Harvard University Press, 1977. Pp. xvii, 356. \$16.50.

Reviewed by Grant Gilmore†

I

Caveat: A complex argument developed in 350 pages of text and footnotes cannot be fairly summarized in a few pages.

Professor Horwitz's theses appear to be:

1. The common law, in the state of development which it had reached in England in the 18th century, reflected a preindustrial, pre-commercial society in which land values, technology, and population had remained relatively stable over an extended period of time. The most notable feature of the common law in its then state was the virtually absolute protection which was afforded to existing interests in property (particularly land). Such interests were jealously guarded against invasion and competition: the mill owner and the ferryman were entitled, under the prevailing theories of monopoly by franchise, grant, or custom, to prevent the establishment of new mills or ferries within the territorial limits of their operations. The legal maxim which best summed up the common law approach was: *Sic utere tuo ut alienum non laedas*. Liability was based almost entirely on what we have come to think of as tort—the actions of trespass and case, whose common characteristic, according to Professor Horwitz, was that, in their 18th-century versions, both actions contemplated (to use current terminology) strict liability, not liability based on fault or negligence.¹ Contract had not yet arisen as a major field of law and, in particular, the bilateral executory (or future) contract, which we have come to think of as the paradigmatic contractual transaction, had hardly made its appearance. The several branches of the action of assumpsit which had become established during the 17th century still

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1. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 89-94 (1977) (rejecting the "conventional wisdom," according to which "[trespass] was based on strict liability while [case] required an allegation of negligence") [hereinafter cited by page number only].

retained their close ties to the tort actions from which they had, historically, been derived.

2. The property-based law of 1750 was, during the following century, both in England and in this country, transformed.² Property interests lost their sacrosanct status as the ideas of economic growth and competition came to have a more compelling charm for the 19th-century mind than the older ideas of stability and monopoly. For strict liability and the wide protection afforded existing interests in property, there was substituted the much narrower concept of liability based on carelessness, fault, or negligence—a concept which was further narrowed with the rise of the idea of contributory negligence as a bar to any recovery by a despoiled plaintiff. Contract theories of liability were for the first time clearly separated from tort theories of liability. In Professor Horwitz's analysis the key to the emerging "contractarian" theories was that they purported to base liability on will, consent, or "meeting of the minds," rather than on status or vested property rights. With the "triumph of contract" the way was open for the process of "contracting out" of the liabilities imposed by the earlier tort and property theories. As illustrations of the "contracting out" process Professor Horwitz offers the employment contracts imposed on factory workers, the shipment contracts under which the railroads and other carriers sought to immunize themselves from the consequences of their own negligence, and the rise of the principle of caveat emptor both in land transfers and in the rapidly developing law of the sale of goods.

3. The erosion of property rights and the rewriting of liability law were determined by the needs (or at least the wants) of the entrepreneurs who became the masters of our industrialized society. The lawyers became the enthusiastic allies—or perhaps the willing servants—of the new masters; Kent and Story, both as judges and as treatise-writers, were the leading apologists for the new order.

Furthermore, the rewriting of liability law was mostly accomplished on the judicial, not the legislative, level. The restrictions on legislative power, state and federal, which were written into the constitutional settlement of the 1820s, left the power to innovate in the hands of a nonrepresentative judicial elite. Indeed, the federalization of the common law under the doctrine of *Swift v. Tyson*³ may be taken as a device

2. Professor Horwitz does not discuss the English experience except for a few passages on the growth of "commercial law" during Lord Mansfield's tenure as Chief Justice (1765-1788).

3. 41 U.S. (16 Pet.) 1 (1842), discussed at pp. 245-52.

for controlling the unpredictable vagaries of state judges who might not be as sensitively in tune with the needs of industry and commerce as the centrally recruited and more easily manageable corps of federal judges.

The reformulation of substantive law by the judges went hand in hand with a systematic reduction of the role of the civil jury. At the beginning of the 19th century there seems to have been widespread acceptance of the idea that the jury, without instructions from the court, was entitled to determine both the law and the facts applicable to the decision of a case. In the course of time not only was the jury subjected to judicial control as to the applicable principles of law but the province of law (for decision by the court) constantly expanded at the expense of the province of fact (left to the jury). The restatement of questions of fact as questions of law also served to increase the power of appellate courts to review and control decision at the trial level both in jury and nonjury cases. Another way of circumventing the popular control inherent in the institution of the jury was the vast expansion of admiralty jurisdiction on the federal level and equity jurisdiction on both federal and state levels.

4. After any successful revolution, it becomes essential for the victors to legitimize the gains—or at all events the changes—accomplished during the revolutionary period. The open-endedness of debate, the irreverence for the past, the passionate advocacy of fundamental change—tactics appropriate for the period of struggle—must be suppressed in the name of the new consensus. Hence, in Professor Horwitz's analysis, the rise to dominance in American legal thought shortly before the Civil War of what it has become customary to call legal formalism. Professor Horwitz discusses the rise of formalism in a brief concluding chapter and does not carry his story into the post-Civil War period. The elements of formalism, in the Horwitz version, appear to include the reestablishment of the *stare decisis* idea, the insistence on the "scientific" nature of law, and the elaboration of increasingly general unifying theories of liability (which, of course, as "scientific" statements were no longer subject to further change).

One of Professor Horwitz's most striking suggestions is that the tools of formalism had been forged in the area of public law in the course of the struggle to insure that the private-law revolution could be carried out by the judges without interference from the legislatures.⁴ The revolution having been accomplished, it became appro-

4. Pp. 255-56. Compare R. COVER, *JUSTICE ACCUSED* 197-259 (1975), in which Professor Cover suggested that formalistic judicial techniques may have made their first appearance

priate to expand the limits of the domain of formalism so that the area of private law was also encompassed. That required a certain amount of readjustment in theories which had once proved useful but had now served their time—notably the substitution of “objective,” general rules of contract for the subjective or “meeting-of-the-minds” theory which had been of great help in reducing the precapitalist rules of 18th-century law to jurisprudential rubble. But, so reformulated, the 19th-century construct could, it was thought, be guaranteed as a law for all seasons and all centuries.

II

According to the jacket-blurb which accompanies the book: “This searching interpretation, which connects law and the courts to the real world, will engage historians in a new debate. For to view the law as an engine of vast economic transformation is to challenge in a stunning way previous interpretations of the eras of revolution and reform.” I do not mean to suggest that law book writers are to be held responsible for the indiscretions of law book publishers. But the essentials of the argument—Professor Horwitz would, I am sure, agree—are not all that novel; they have been current for 30 or 40 years.

The idea that the orthodox or classical statements of American law which date from the late 19th-century and early 20th-century period of formalism masked a serious distortion of historical fact was, to say the least, implicit in Arthur Corbin’s lifelong work on contracts. Corbin, who was not a generalist, was content to leave the theoretical formulations of his predecessors (notably Williston) in ruins without proceeding to a new reconstruction of his own. In a casebook and a series of articles on sales law which were published during the 1930s Karl Llewellyn traced the early 19th-century development of that field of law, which had been born with the Industrial Revolution, and its subsequent reduction to a meretricious order at the hands of the formalists. In articles and casebooks published during the 1930s and 1940s such scholars as John Dawson,⁵ Lon Fuller, and Friedrich Kessler pointed out the radical restructuring of 18th-century theories of liability during the first half of the 19th century as well as the intimate relationship between the later formalistic reductions of liability theory

in American law in cases decided by judges such as Story and Shaw who were known to have been antislavery men in their personal lives but who felt themselves constrained in cases arising under the Fugitive Slave Acts to give judgment for the slaveowners or their agents.

5. Professor Horwitz at pp. 262-63 quotes from Dawson’s seminal article, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

and laissez-faire economic theory. In *The Common Law Tradition: Deciding Appeals* (1960), Llewellyn, attempting a final theoretical formulation of his earlier work, proposed the terms Grand Style and Formal Style to describe the pre-Civil War and post-Civil War periods. During the 1960s the idea that a half-century of radical innovation in American law had been succeeded by a half-century or more of formalism during which it was hoped or believed that further change had been abolished, became a commonplace. It appears to be common ground among a great many legal historians that the successive transformations in American law were attributable to the emergence and triumph of the 19th-century version of free enterprise capitalism following the scientific and industrial revolutions of the 18th century.

The bulk of current and recent writing of the type I have been describing has been devoted to the apparent breakdown of the formalistic approach to law in this country—beginning with the Legal Realist movement of the 1930s. The great merit of Professor Horwitz's book is that it focuses on the process by which the precapitalist law of the 18th century was, as it had to be, metamorphosed.⁶ He has read widely in many fields of law—property, torts, contracts, procedure—with the result that many of his illustrations of the process of change will surprise those of us (most of us, no doubt) who are (lamentably) more specialized than he is.

There is, for example, an altogether fascinating account of the unexpected uses to which the 18th-century mill acts were put.⁷ These were statutes—the earliest one was enacted in Massachusetts in 1713—which immunized the owners of mills from damage actions brought by the owners of upstream and downstream lands flooded by the storage and discharge of water incident to the milling operation; subject to compliance with a statutory compensation scheme (which seems to have been less than adequate), the mill owners were privileged to flood the adjacent land at their own convenience. The mills which the colonial legislatures had in mind when the statutes were enacted were small local operations—saw mills and grist mills which provided essential services to all the inhabitants of the early settlements. Thus the public interest was preferred to a certain amount of private inconvenience. However, by the early 19th century the enterprises which claimed the statutory protection were apt to be large textile mills which (a) did a great deal more damage by flooding than the saw mills

6. Another recent book which focuses on the post-Revolutionary period of transition is W. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975), to which Professor Horwitz frequently cites.

7. Pp. 47-53.

and grist mills ever had and (b) were in the "public interest" only in the sense that their operation contributed to the economic growth of the country. Nevertheless, the 19th-century courts, proceeding perhaps on the theory that a mill is a mill is a mill, professed to see no difference between the individual miller who sawed the logs as his neighbors cleared their lands and the partners or (later) shareholders in a large manufacturing enterprise run for private profit. The legislatures saw no reason to protect landowners against the expansive judicial construction of the old mill acts, so that there appears to have been a consensus that cotton mills were good things which merited a subsidy at the expense of the unfortunate owners of adjacent land.

I have singled out Professor Horwitz's discussion of the mill acts principally because I, for one, had never, until I read his Chapter II, heard of these statutes and their curious history. There are a great many other excellent discussions of such matters as the valuation of a widow's dower right in land owned by her husband (the widow came off badly), the growth of the eminent domain idea, the rise of the modern corporation, the spread of insurance coverage—all of these (and many other) developments being taken as instances of the process by which old rules were put to modern uses (when that could be done) or scrapped in favor of new rules which better corresponded to the felt necessities of the time. Professor Horwitz has gathered a rich harvest for any reader who is interested in the process by which a system of law is transformed in response to fundamental changes in the society which the law reflects.

III

Agreeing, as I do, with much of what Professor Horwitz has written there are some aspects of the book which I find disturbing.

At the outset of his concluding chapter on "The Rise of Legal Formalism," Professor Horwitz writes:

For seventy or eighty years after the American Revolution the major direction of common law policy reflected the overthrow of eighteenth century precommercial and antidevelopmental common law values. 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.

By around 1850 that transformation was largely complete. . . . Law, once conceived of as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the com-

munity, had come to be thought of as facilitative of individual desires and as simply reflective of the existing organization of economic and political power.

This transformation in American law both aided and ratified a major shift in power in an increasingly market-oriented society. By the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society.⁸

I have no quarrel with Professor Horwitz if he means only that pre-industrial society was, in many ways, better than postindustrial society. But, not only in the passage quoted but throughout the book, there seems to be more to the argument than that. We are apparently being told that the law of the preindustrial society was (or was "conceived of" as being), among other things, "a paramount expression of the moral sense of the community," while the law of the postindustrial society came to be "simply reflective of the existing organization of economic and political power." Surely, Professor Horwitz cannot seriously mean that the law of England, France, or wherever in the early 18th century was designed to protect the poor and the weak against the rich and the powerful or that it was only with the emergence of 19th-century capitalism that law came to reflect "the existing organization of economic and political power."

If we assume that in 1750 land was the principal repository of wealth and that "landowners" were consequently more powerful than "merchants," we should expect to find that the law of 1750 was more favorable to the landowning interest than to the mercantile interest. If we assume that by 1850 railroads and manufacturing enterprises had become the principal repositories of wealth and that "merchants" had consequently become more powerful than "landowners," we should expect to find that the law of 1850 was more favorable to the mercantile interest than to the landowning interest. It is true that, to the extent the two interests are in conflict, the preservation in 1850 of the law of 1750 without change would, as of 1850, operate to the advantage of a "less powerful" group against a "more powerful" group. But it is certainly not true that the law of 1750 was, as of its own time, any more (or any less) "moral" than the law of 1850 as of its time. And the preservation of a state of law after the social and economic conditions which called it into being have themselves disappeared (or been "transformed") is as unlikely as it would be undesirable.

8. Pp. 253-54.

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Nevertheless, there seems to be a recurrent insistence in Professor Horwitz's discussion that what happened to the law between 1750 and 1850 was, in some sense, a "bad" thing, that the "transformation" is to be explained, at least to some degree, as the result of a conspiracy between the lawyers and the capitalists⁹ and, finally, that, with more luck or a clearer vision of what was going on, the precapitalist state of law could have been preserved to the advantage of "farmers, workers, consumers and other less powerful groups."

I quote from the introduction to Chapter VII, "The Development of Commercial Law":

The triumph of a contractarian ideology by the middle of the nineteenth century enabled mercantile and entrepreneurial groups to broadly advance their own interests through a transformed system of private law. . . .

But there remained throughout the first half of the nineteenth century strong elements in American society opposed to the expanding values of a market economy. . . .

The history of commercial law in both England and America has often been written as if it had nothing to do with such political and economic struggle. . . . In the historiography of commercial law, for example, there is a still generally shared assumption that "modernization" is an unqualified good and that the development of legal doctrines to reflect the triumph of a market system was both inevitable and desirable.¹⁰

Professor Horwitz is less than generous to his predecessors (notably Karl Llewellyn) in suggesting that they quite failed to see that the development of "commercial law" reflected the "political and economic struggle" of the period of industrialization. If indeed the "market system" triumphed, it was inevitable that the law would be "modernized" to reflect the values of the new system. If the modernization was inevitable, the question whether what happened was also "desirable" becomes a sort of romantic irrelevance.

Nor is it possible, without gross oversimplification, to reduce the emerging rules in such commercial specialties as sales and negotiable instruments to the simple paradigm of capitalists exploiting consumers. Thus the replacement of caveat emptor by the complex system of implied warranties was, in its origins, a mercantile inspiration: the

9. See the first paragraph of the passage quoted, p. 793 *supra*.

10. Pp. 211-12.

implied warranties got their start in actions by mercantile buyers against mercantile sellers. And there was a great deal more to the triumph of the good-faith purchase idea, which was a notable feature in both sales law and negotiable instruments law during the first half of the 19th century, than the discovery or invention of a device which enabled wealthy capitalists to prey on the people who bought goods or borrowed money from them.

I think that there was also a good deal more to the elaboration of formalist theory after 1850 (in Professor Horwitz's version) or after the Civil War (in most other versions) than the freezing into place of the liability rules which had, by that time, triumphed. Professor Horwitz does acknowledge that a certain amount of theoretical reformulation went on during the formalist period—as in the substitution of objective for subjective theory—but his basic thought seems to be that what happened after 1850 was mostly a matter of consolidating the gains (looking at the problem from the point of view of the entrepreneurs and their lawyers) achieved before 1850. So far as my own reading takes me, I think that the private law (particularly the area of the law relating to liability in tort and contract) changed quite as dramatically between 1850 and 1900 as it had between 1800 and 1850.

For example, it has for a long time been a truism that the rules of sales law which emerged during the early period were, to a remarkable degree, favorable to sellers¹¹—in throwing the risks of the transaction on buyers at the earliest possible time, in requiring buyers to accept and pay for defective goods (with a price allowance for the defects), in rules of discharge which operated in favor of sellers but not of buyers and so on. Professor Horwitz does not carry the story beyond 1850. If he had, he would have had to deal with the fact that by 1900 most if not all the original “proseller” rules had been, at least in mercantile (as distinguished from “consumer”) transactions, transformed into “probuyer” rules.

For another example, on a somewhat higher level of generality, I think it is fair to say that the pre-1850 judges and treatise-writers entertained what might be called expansive ideas of liability in contract as well as of the availability of remedies for breach of contract and of the recovery of “consequential” or “special” damages. During

11. Professor Horwitz seems to accept this “truism,” referring, for example, to “[t]he clearly proseller contract doctrines developed early in the nineteenth century for the law of sales.” P. 264. He goes on to suggest that these “proseller” doctrines “seem to reflect the fact that this branch of law reached maturity in a period when economic relations between economically sophisticated ‘seller-insiders’ and relatively unsophisticated ‘buyer-outsiders’ were becoming dominant.” *Id.* I do not find his explanation convincing. .

the second half of the century a reaction set in against these expansive ideas: liability was cut back under a reformulated theory of consideration, remedies for breach were restricted to actions for money damages, and the amounts recoverable in the damage actions steadily became less and less "compensatory."

My point is that the process of change continued unabated during the formalist period, despite the anguished efforts of the formalist theorists to make it appear that the law had, at long last, reached a point of stable equilibrium. In using such terms as "19th-century capitalism" or "free-enterprise capitalism" we oversimplify to the point of absurdity if we assume that the economic system of, say, 1820 endured without change down into our own century. Postindustrial capitalism, despite some economists, was never a static model; nor was the law which reflected it.

The rise of legal formalism in this country after the Civil War was, as I have tried to suggest, an altogether more complex phenomenon than Professor Horwitz's reconstruction makes it out to be. The apparent decline of formalism during the first half of our century was equally complex. It may be that we are currently witnessing a revival of formalistic thinking and writing. The techniques of formalism can be employed in support of liberal or radical ideologies as well as of conservative or reactionary ideologies (although in this country, historically, the technicians of formalism have mostly been spokesmen for positions perceived as conservative or right-wing). Formalist theory is both reductionist (in its quest for broad, general, unifying principles) and activist (in its assumption that the law can be, and should be, used as an engine for the accomplishment of the social or economic goals which the architect of the theory espouses). What principally disturbs me in Professor Horwitz's excellent book is that he seems to be proposing a formalism of the left which I find quite as distasteful as the more familiar formalism of the right. Perhaps I have misread him. If I have, then I have nothing but praise for a remarkable accomplishment.