Transformations

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Whenever I am in the UCLA Law Library, I make a pilgrimage to the desk where it happened. As if it were yesterday, I am transported back to the fall of 1976. I am a third-year law student taking my first legal history course, and I am reading the two articles that became Chapters I and VIII of Transformation,1 “The Emergence of an Instrumental Conception of Law” and “The Rise of Legal Formalism,” for the first time.2 My blood ran cold. Horwitz did not expressly say that “until we are able to transcend the American fixation with . . . separating law from politics,” each generation was doomed “frantically to hide behind unhistorical and abstract universalisms in order to deny . . . its own political and moral choices” until Transformation II.3 Nevertheless, that was clearly the subtext of the articles. As one who had studied history in college and who had spent the previous two years wondering why my law professors were so insistent on separating law from politics, context, morality, and plain old idiosyncrasy, I found his message extraordinarily refreshing. Then and there, I decided to become a legal historian.

So naïve was I that I assumed the Harvard History Department and the Harvard Law School must be intertwined, and that if one wanted to study with the Charles Warren Professor of American Legal History, the Harvard History Department was the logical place. (As Sally Gordon reminds me, delusion typically lies at the heart of conversion narratives.) I actually ran out of the library to telephone for an application to Harvard’s Ph.D. program in History. Harvard was the only department to which I applied that year, submitting an essay about how Morton Horwitz had changed my career plans. I was rejected. Certain there had been some mistake, I applied to Harvard again the following year. Fortunately, this time, I applied to some other schools as well, for once again, a

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slim envelope came from Cambridge. Bowing to the inevitable, I went to Yale, where I met Bill Nelson, John Blum, and my husband. So Morty Horwitz transformed not only my career, but also my entire life.

The distance between Harvard’s History Department and its law school in the 1970s mirrored that between the disciplines of history and law. The singular achievement of Transformation was to bridge the two. As someone starting out in academic life, I innocently assumed that such an achievement would win the book not just canonical status, but garlands as well. So as a graduate student, I was stunned by the intensity of the reaction against the book. I have read many a nasty review since then, but when I recently reread the reviews of Transformation, I still found many singularly snotty. How do we explain them?

It is usually said that historians loved Transformation, so much so that they gave it the Bancroft Prize in 1978. That is not quite right. American historians who did not write legal history did greatly admire the book. And why not? It made law intelligible for them: As Steve Presser said, Horwitz managed to discuss the “holder in due course doctrine,” without once calling it by name. It was the one work of legal history American historians felt obligated to open.

But save for raves in the American Historical Review and the Journal of American History by Kent Newmyer and Kitty Preyer, and a few less prominently placed plaudits, American legal historians in history departments and law schools, while grudgingly acknowledging the book’s brilliance, often nevertheless joined law professors in the chorus against Transformation. Recall that John Reid contented “legal historians and lawyers must be alarmed” and concluded that “[t]he iconoclasts have invaded the temples of legal history. They have smashed the fetishes, blotted out the frescoes, and desecrated the tombs. If we do not force them to the evidence, they will even desacralize Clio.”

Here was one refrain that sounded constantly: “show me the money.” Even though Transformation had 79 pages of endnotes, critics regularly demanded more proof of its thesis. Their call ensured that over 25,000 copies of Transformation would be sold and that the book would set the agenda for the next generation. Consider the spate of articles that followed the book testing “the Horwitz thesis” on contracts, torts, attractive nuisance, etc. What Dan Ernst said in 1993

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4. Years later, I was offered a job in the Harvard History Department, and when I telephoned my parents to tell them, my father said gleefully, “I saved your rejection letters!”
5. For an excellent overview of the reviews, see Wythe Holt, Morton Horwitz and the Transformation of American Legal History, 23 Wm. & Mary L. Rev. 663 (1982).
12. Gary Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation,
remains no less true today: "[f]ifteen years after Transformation was published, some legal scholars and historians still compulsively frame[d] their research to refute Horwitz'[s] claims." In this sense, Transformation was very much like my other favorite work of American history, Richard Hofstadter's Age of Reform. It fired imaginations.

To my mind, that qualifies a book for greatness. Indeed, one of the many virtues of Transformation is that it makes us think about the definition of a disciplinary classic. To me, such a book is controversial and provocative in the best sense of those words. Like the Hofstadter thesis, the book may be proven wrong, but it is proven wrong because it has often spurred readers to collect new evidence and always to interpret the evidence in new ways. A classic moves a discipline forward by inspiring—sometimes even angering—readers sufficiently to make them want to contribute to it.

Perhaps this definition of a classic is quirky. I once told a colleague of Horwitz's, who was not a legal historian that it did not matter if every word of Transformation were proven wrong. The book would still be the greatest work of legal history to be published in his and my lifetimes. He reacted much as H. R. Haldeman did when I told him that my favorite President was Lyndon Johnson: "You can't be serious!"

Some legal historians responded the same way to claims of classic status for Transformation. In part, that was understandable. Like a bad houseguest, the book had something to offend everyone. Some were irritated by Horwitz's point that historians had "overstudied" constitutional law. They seemed to believe that he claimed he was the first to concentrate on private law. And they charged that he had ignored his forebears in the consensus school, who had also focused on the interplay between pressure groups and economic development in the formation of private law.

I disagree with those critics. As Wythe Holt suggested, Horwitz's failure to cite Willard Hurst and others was "a way of underscoring that he ha[d] radically gone beyond and broken" with the work of consensus historians.

For as Eben Moglen observed, in much the same way that the New Left had torn up "consensus" political history in the 1960s, Horwitz challenged the "consensus" legal history popularized by the other "H's:" the Handlins, Hartz, and

16. Horwitz, supra n. 1, at xii.
These liberals had provided a pedigree for the New Deal when they pointed to the tradition of legal activity to promote economic growth for the benefit of all. Hurst praised *Transformation* as "a first-rate monograph," while gently pointing out that like conflict, consensus also played a part in American legal history. But other consensus historians stood aghast at Horwitz's allegation that activity represented a "Machiavellian" conspiracy between merchant and entrepreneurial groups and the legal profession "to serve the interests of the wealthy and powerful" by actively promoting "a legal redistribution of wealth against the weakest groups in society."

Consensus historians saw a more "benign" explanation for what had happened than Horwitz. They thought the changes he documented did not reflect a conspiracy, but "the legal order's responsiveness to changed social conditions and its ability to evolve in the direction of greater flexibility, greater maturity, and . . . common sense." And besides questioning whether Horwitz had correctly identified an intent to redistribute, they wondered whether he had gotten the redistributive effects right and correctly identified the winners and losers.

Historians on the left piled on, with Mark Tushnet also impugning Horwitz's inferences about redistributive effects. Additionally, Tushnet wondered whether Horwitz had paid sufficient attention to the relative autonomy of law. Eugene Genovese found Horwitz guilty of a "tendency towards mechanistic materialism" that had led Horwitz into "the reductionist trap that caught Charles Beard."

Though John Reid had little in common with the Genovese of the 1970s, that was a critique that resonated for Reid and others who had rebelled against the consensus school by emphasizing the importance of constitutional principles in shaping American history. "Constitutional historians" believed Horwitz was guilty of letting economics explain everything, and according to Reid, leaving "no place for ideology." In this, I think they were mistaken. As Max Bloomfield and Harry Scheiber noted at the time, and Bob Gordon and Ted White would observe later, *Transformation* was much more of a work of intellectual history than most recognized. Despite Horwitz's protestations to the contrary, I think *Transformation II* is not "a very different book" from *Transformation.*
Critics of *Transformation* sometimes gave Horwitz credit for killing the "taught tradition" of Roscoe Pound as dead as a doornail. But to them, that seemed a minor achievement. In the words of Steve Presser: "[f]ew, if any legal historians would seriously advance Pound's perspective today, and 'Pound-pounding' had been a favorite indoor sport for legal historiographers for almost forty years."\(^{30}\)

In fact, the reaction to *Transformation* demonstrated that Pound's common law judges who made their decisions on the basis of tradition and reason without concern for economics or politics remained very much alive among legal historians and law professors. It is difficult to understand the shrillness of the criticism of *Transformation* otherwise. As Bob Gordon said, it was one thing for the realists to indict late nineteenth century formalist judges with class-biased rulemaking. It was another to carry "the charges back to the early nineteenth century, the period that common lawyers had previously celebrated as their heroically 'formative' era."\(^{31}\)

Thus as Dan Ernst saw, *Transformation* could be read as Horwitz's cry of rage not just against Pound, but against Harvard and the legal process tradition it symbolized.\(^{32}\) Horwitz suggested judges were just as "antimajoritarian" as the process theorists feared. But where the process theorists counted on craft to discipline judges, Horwitz alleged craft was a smoke screen for conning the masses. His was a shout against an institution that would be all the more vulnerable to Critical Legal Studies because it had proven so impervious to legal realism. The reaction to *Transformation* demonstrated that just as Pound's ghost still hovered, so too did process jurisprudence, even among the heirs to the realist tradition who comprised the consensus school of legal historians.

Horwitz's rage was important. As Eric Foner said, he wrote "with passion."\(^{33}\) By making his own politics clear, he reminded us that scholarship is a political act and that objectivity is impossible. "One strength of the book [was] its implicit point . . . that behind the bland and seemingly neutral phrases" historians had traditionally used—phrases such as "the release of energy"—lay "fundamental changes in political values and human relations."\(^{34}\) Horwitz reminded us that like law, scholarship is not neutral.\(^{35}\) That was a reminder that

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32. Ernst, *supra* n. 15, at 1024-27.
34. *Id.*
35. As a twentieth-century American historian, who writes about the period since Watergate, I was disappointed when Horwitz chose 1960 as the endpoint of *Transformation II*, contending, "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." Horwitz, *supra* n. 3, at 269. In my view, history is always an extension of current controversies. That is why each generation must write their own history. And as Michal Belknap said, that argument "rests on assumptions concerning the possibility..."
those who clung to their faith in "objective" history did not welcome, particularly since the idea of objectivity in history was already under attack.

The book's message was as important as its tone. Horwitz did not simply say that law was not neutral and that the powerful realized that "[c]hange brought through technical legal doctrine" could "more easily disguise underlying political choices" than change brought through legislation. The same year that Transformation was published he also questioned what he described as the "excessively reverential and apologetic attitude" of American legal historians and law professors towards the rule of law. They were guilty, he said, of "pervert[ing] the real function of history by reducing it to the pathetic role of justifying the world as it is." They did not realize that, as Herbert Gutman and Richard Rorty have said, historical inquiry "transforms historical givens into historical contingencies" and liberates us to make our "own contingencies." Horwitz challenged the belief that legal historians should serve as handmaidens to the profession and the assumption that the rule of law had been "an unqualified human good." The rule of law, he acknowledged, did create "formal equality—a not inconsiderable virtue." But the rule of law also "promote[d] substantive inequality by creating a consciousness that radically separate[d] law from politics, means from ends, [procedural from substantive justice]...." The rule of law enabled the rich and "the shrewd" to manipulate its forms to their own advantage.

That rankled. Of course, as Bob Gordon once remarked in exasperation, "For God's sake, at any bar dinner," one could hear the most conservative lawyers bemoaning the same thing. And certainly, Horwitz's despair did not make him immune to the charms of procedural justice, as his later work on the Warren Court would demonstrate. Nevertheless, this articulation of the Critical Legal Studies critique of rights annoyed those Polyannas who believed one could not recognize how bad things were and work to improve them. They saw Horwitz's demolition of process jurisprudence and the rule of law, I believe, as an attack on their own legal liberalism, and their faith that federal courts could achieve positive social change. Peter Teachout was one who read Transformation in light of Horwitz's critique of the rule of law. And to Teachout, Horwitz's work stood out


36. Horwitz, supra n. 1, at 100-01.
41. Horwitz, supra n. 35, at 366.
42. Id.
43. Id.
44. Id.
45. Gordon, supra n. 29, at 96 n. 96.
for "its radical antilegalism: its central preoccupation with law as a force for the destruction of those human values we hold most sacred in a civilization—of individual dignity, equality, and community."

Here we come to the heart of it. *Transformation* came out at a time when all of its readers had recently seen the power of law to do evil. It also appeared at a time when its liberal audience was losing hope that the Burger Court would follow in the Warren Court's footsteps. If *Transformation* were right, neither Watergate nor the Burger Court was an aberration. If it were right, perhaps readers who had gone to law school to learn to do good, even to become legal historians, had chosen the wrong careers. The reaction to *Transformation* was so intense among lawyers and legal historians, I believe, because it reinforced our darkest suspicions and fears. And the reaction tells us more about ourselves than it does about the book.

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47. Peter Teachout, *Light in Ashes: The Problem of "Respect for the Rule of Law" in American Legal History*, 53 N.Y.U. L. Rev. 241, 244 (1978). John Reid also explicitly acknowledged reading *Transformation* in conjunction with Horwitz's critique of the rule of law, see Reid, *supra* n. 10, at 1312 n. 15, and I believe others did as well.