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TRANSFORMING A FIELD: THE CRITICAL TRADITION IN AMERICAN LEGAL HISTORY

David S. Tanenhaus


In his 1977 review of The Transformation of American Law, 1780–1860, John Phillip Reid likened Morton Horwitz to a “mute hierophant,” who, along with his fellow “iconoclasts” Robert Cover and Jerold Auerbach, had “invaded the temple of legal history.” Reid called on “legal historians and lawyers” to drive them out. “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.” As Reid lamented, Horwitz’s brilliant first book marked the beginning of a new era for the field of American legal history. Analyzing antebellum judges’ instrumental use of private-law decisions to make economic policy benefitting merchant and entrepreneurial groups, Transformation offered a powerful rebuke to legal history’s orthodox high priests.

More than forty years later, the publication of Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz, the first of two volumes of a festschrift edited by law professors Daniel W. Hamilton and Alfred L. Brophy, demonstrates how much the field of legal history has changed since Horwitz invaded the temple. This festschrift is a loving testament to Horwitz’s impact as a scholar and teacher. The seventeen original essays by his students demonstrate that he has always cared deeply about history and historiography.

Charles Donahue, Jr.’s “Whither Legal History?” makes this point beautifully by placing Horwitz in the pedagogical context of his times. Donahue is the only author who is not a Horwitz student. He and Horwitz are colleagues at Harvard Law School, but in 1967 they were both on the law-school job market. Their generation sought to redefine the place of legal history in the law-school curriculum. They did not want to offer the standard required first-year course in legal history that “went from Aethelbert to Earl Warren,” told a Whiggish story, and universally alienated students (p. 329). Instead, they believed legal history should be offered as an advanced elective that focused

on a narrower period of time. This approach allowed them to demonstrate that “law is intimately connected with the economy of ideas, the politics, and the social structure of the society that produces it” (p. 329). This “externalist” approach allowed its practitioners to investigate the connections between law and society. Its proponents challenged the assumptions of traditional “lawyer’s legal history” that viewed law as an autonomous realm. In a 1973 review essay, “The Conservative Tradition in the Writing of American Legal History,” Horwitz critiqued this internal tradition and its leading American practitioner, Roscoe Pound.

Horwitz not only wanted to introduce law students to historical methods, he also actively sought to train legal historians. As Daniel W. Hamilton notes in his contribution to the volume,

Mort Horwitz is one of the few and certainly one of the best law professors to bring this PhD model into the law school. Students at Harvard, in the History department and in the History of American Civilization Program, often came to Harvard to work with him. This is itself rare. While law professors frequently serve on PhD committees, it is still exceptional for a student in a humanities program to go to a university in order to work with a law professor as a primary advisor. There are of course exceptions, but Mort is at the head of a short list. The question is, why did we seek him out, and why did he seek us out? (p. 392).

The quality of these essays answers the second question. The answer to the first is that Horwitz, much like J. Willard Hurst before him, convinced his readers that law mattered. To understand American history, one needed to understand legal history. But, as Reid’s review of Transformation suggests, scholars disagreed on what “legal history” was. Reid characterized Horwitz as a neo-Marxist who saw law as epiphenomenal. He accused Horwitz of substituting a wholly externalist approach in place of “the Poundian view of common law as an autonomous system producing changes by its own internal logic.” According to Reid: “There is no neutrality in the legal history of Horwitz. Economics determines all issues, conspiracy explains most events. There is no place for ideology; definitions of ‘law,’ ‘property,’ or ‘rights’ have no role to play.”

Fifteen years later, Horwitz’s second book, The Transformation of American Law, 1870 to 1960: The Crisis of Legal Orthodoxy, was a detailed intellectual and cultural history of legal ideology. As Horwitz explained, this book “can be regarded as taking up the story of the history of American law as I left it. But it is a very different book.” Law professor Eben Moglen described the change: “the once self-proclaimed ‘vulgar Marxist’ has gone postmodern.” He added, “But let no one sneer or gloat. If, to adopt Horwitz’s phrase, there has been a ‘dramatic turn,’ it has been good for both author and reader. The explanatory structure of The Crisis of Legal Orthodoxy is indeed richer, and Horwitz pursues
his fundamental interest in the intellectual history of law with what, at least
to me, reads as a sense of liberation. If this is the consequence of no longer
intoning pieties, then let piety perish forevermore.”

The editors of the festschrift picked the right introductory essay to familiarize their readers with a scholar who not only developed new methods of analysis, but whose scholarship ranges across much of American history. Daniel J. Hulsebosch’s “Debating the Transformation of American Law: James Kent, Joseph Story, and the Legacy of the Revolution” poses a fascinating hypothetical: how would the Horwitz of The Crisis of Legal Orthodoxy analyze antebellum jurists? Hulsebosch then applies Horwitz’s approach in Transformation II to “complicate and humanize a judiciary that, in Transformation I, appears largely unitary and nameless” (p. 1). He explores why Kent and Story, two of the most influential jurists in the nineteenth century, offered different answers to the legal issues embedded in their respective faiths in economic development and nation building.

Significantly, Hulsebosch moves beyond Horwitz’s more nationally focused approach to American law. Instead, he places this chapter of legal history in the context of the Atlantic World. As Hulsebosch argues:

For decades [American lawyers] wrestled with the meaning, for law, of the Revolution. Internally, the British Empire had left them with a fragmented and pluralist legal order; the reconstitution of authority on the basis of popular sovereignty restructured but did not eliminate that fragmentation. Externally, they still derived most of their legal learning from Europe, especially England. The American constitutions did not specify how the legal systems in the new Union would operate. Their structure, personnel, and doctrine were left primarily to the legal professionals themselves. They had to solve problems of institutional design such as, Which structures worked best? What were the appropriate sources of law? And what literary forms should be used to teach and communicate law? (p. 2).

These foundational questions about the place of law, especially its relationship to politics, animate the work of Horwitz and his students.

Essays by Mary Sarah Bilder on “Colonial Constitutionalism and Constitutional Law” and Alison LaCroix on “Drawing and Redrawing the Line: The Pre-Revolutionary Origins of Federal Ideas of Sovereignty” build on this theme of law’s place. They raise important questions about the significance of colonial history for understanding the ongoing struggle to define constitutionalism and sovereignty in what later became the United States of America.

The careful attention that Hulsebosch’s, Bilder’s, LaCroix’s, and Sally E. Hadden’s “DeSaussure and Ford: A Charleston Law Firm of the 1790s” all pay to the period before 1800 demonstrates how much the field of legal history has changed. For example, in his 1979 The Ages of American Law, Grant Gilmore had declared:
The law of the primitive agricultural settlements which were painfully hacked from the wilderness in the seventeenth century—indeed, the law of the westering frontier until the conquest of the continent had been completed—had no more relevance to the law of our own industrialized society than the law of the Sioux or the Cheyennes. It is true that, as the colonies prospered and their populations multiplied, courts were instituted and a professional class of lawyers and judges emerged. Even so, it is pointless to speak of an “American” law before the 1800s.

In addition to their shared interest in early American history, it is worth noting that Hulsebosch, Bilder, LaCroix, and Hadden were all trained as both lawyers and historians. The hybrid nature of the field of legal history, a central theme in Donahue’s essay and others, raises difficult questions about how best to prepare legal historians. In “Morton Horwitz: Legal Historian as Lawyer and Historian,” William Michael Treanor explains the dilemma. “The gifts of the historian and the gifts of the lawyer are rarely found in the same person. The term ‘legal historian’ is almost an oxymoron. The great historian has the ability to enter into the mind-set of those who lived before, to recover and analyze the details of the past, to synthesize what he or she finds and describe broad trends, to see cause and effect. The work of the great historian is marked by both a firm grasp of small things and by profound scope and ambition.” A lawyer’s gifts differ. “He or she must be able to understand and manipulate legal doctrine, to see connections between legal principles, to see where ambiguity lies and where the law is determinate, to be able to make the standard moves of legal argument, and to understand the limitations of those moves.” To do legal history well, Treanor argues that the scholar must occupy the middle ground between legal formalism and the critical legal-studies movement’s belief that law is simply a mask for politics. Horwitz succeeds, Treanor contends, because his work combines classic legal analysis with deconstruction “to recapture how previous generations thought about the law and to reveal the underlying preconceptions of which they were not always aware” (p. 321).

Christopher Schmidt’s “Hugo Black’s Civil Rights Movement” demonstrates how Horwitz trained his students to do both history and law. Schmidt describes his exhilarating experience as a graduate student in the History of American Civilization Program, preparing for his comprehensive examinations in United States legal and constitutional history with Horwitz. “Every now and then we would come across some technical aspect of law, which he would carefully explain as I scribbled on my notepad. He would then gently suggest that if I was really so interested in legal history, I really ought to consider law school (advice I would eventually follow)” (p. 259). Schmidt’s close reading of Hugo Black’s decisions in the sit-in cases demonstrate why legal training helped him, but his ability to compare Black to “James Otis, as portrayed in Bernard Bailyn’s Ideological Origins of the American Revolution, and John Adams,
as portrayed in Gordon Wood’s *Creation of the American Republic*—men who could not fully comprehend the revolutions of their time—suggests how his tutorial with Horwitz had shaped his historical sensibilities (p. 260).

Indeed, the delicate matter of striking the right balance between historical and legal analysis is addressed throughout the volume. Some essays, such as Stephen A. Siegel’s “The Death and Rebirth of the Clear and Present Danger Test” and Lewis A. Grossman’s “The Benefits and Evils of Competition: James Coolidge Carter’s Supreme Court Advocacy,” depend on a lawyer’s ability to see wrinkles in judicial reasoning, while revealing a masterful historian at work. Other essays emphasize law over history, such as Gregory Mark’s “On Limited Liability: A Speculative Essay on Evolution and Justification” and Polly J. Price’s “Stability and Change in Antebellum Property Law: Stare Decisis in Judicial Rhetoric.”

In their brief introduction, Hamilton and Brophy argue that legal history is becoming more than a field of inquiry. The essays in the *festschrift* “illustrate how broad legal history is as a field—and how it is, like law and economics, becoming itself a mode of analysis. For legal history is not just a field; it is a method” (p. xiii). Although the editors do not expand on this idea, Brophy demonstrates in his contribution, “Utility, History, and the Rule of Law: The Fugitive Slave Act of 1850 in Antebellum Jurisprudence,” that Horwitz’s method can be applied to a range of historical actors outside of the courts, including those who supported and opposed American slavery. In this regard, jurisprudence is part of American culture and is not the exclusive domain of the bar and bench. And, as Elizabeth Blackmar’s “Peregrinations of the Free Rider: The Changing Logics of Collective Obligation” reveals, Horwitz and his students care about the history of language, especially how conventional wisdom is created and used to justify legal and political decisions.

In “Two Horwitzian Journeys,” Israeli legal historian Assaf Likhovski provides an extended discussion of Horwitzian-inspired methodology. He reflects on more than ten years of attempting to answer the question, “What factors influence judicial decisions?” After describing his research projects, he concludes, “There is no way to discover why judges decide the way they do. Autonomous legal considerations; policy preferences; political ideology; jurisprudential notions; institutional constraints; strategic behavior; cultural biases; the influence of public opinion; the personality of judges, litigants, and lawyers; and countless other factors are all involved. Sorting them out and determining which of these factors influenced a specific decision or indeed a series of decisions is often an impossible task.” He adds:

Whether we use the broad-brush Horwitzian approach to the history of judicial decisions, such as the one applied in *Transformation I*; the more nuanced, complex, thicker, and culturally sensitive methodology used by Horwitz in his later work;
a biographical approach focusing on specific judges rather than on the development of specific doctrines; a micro-history of specific landmark cases; or even the ‘hard’ quantitative methodology so favored by political scientists engaged in the study of judicial behavior, we will never really solve the mystery and reach the promised land of certain answers to what is, ultimately, a literary, interpretative pursuit (pp. 315–16).

Perhaps legal history, like Horwitz, has become postmodern. Yet, in “Transformations: Pluralism, Individualism, and Democracy,” Dalia Tsuk Mitchell argues that we still await the final verdict on how to contextualize and characterize Horwitz. She recounts: “In 1998, in a review of Morton Horwitz’s The Warren Court and the Pursuit of Justice, Linda Greenhouse labeled Horwitz ‘an apologetic liberal for whom the Warren Court era remains a time when American idealism showed its most generous and hopeful face.’ For readers of Horwitz’s [The Crisis of Legal Orthodoxy], Greenhouse’s characterization must have seemed awkward. Transformation II, as we have all come to label it, was the work of a critical legal historian, not ‘an unapologetic liberal’” (p. 205).

In conclusion, this substantive festschrift introduces readers to a remarkable scholar and beloved teacher, many of his finest students, and a field that is flourishing because of their collective efforts. And this is only the first volume.

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