Review Essay

The Critical Tradition in the Writing of American Legal History

The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy. By Morton J. Horwitz.* New York: Oxford University Press, 1992. Pp. xii, 361. \$30.00.

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In early 1914 John Henry Wigmore, dean of the Northwestern University Law School, was invited to join the American Academy of Jurisprudence, founded by a group of elite lawyers to reform the law by settling the “small” number of doctrinal issues left confused and uncertain by conflicting judicial opinions.¹ Wigmore responded with a long circular to the charter members attacking the project. In part, Wigmore opposed the Academy because he wanted to reserve “the scientific statement of the law” for that “specialist in legal

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1. Letter from John Henry Wigmore to William Howard Taft, enclosed in letter from John Henry Wigmore to Elihu Root (Jan. 28, 1914) (Box 117, Elihu Root Papers, Library of Congress); Letter from James D. Andrews to William Howard Taft (Oct. 7, 1914) enclosed in letter from James D. Andrews to Elihu Root (Oct. 17, 1914) (Box 117, Elihu Root Papers, Library of Congress).

science," the full-time law professor.² He also objected to the Academy's mission. "The present decade (or even generation) is precisely the time when a formal statement of the law is inappropriate," Wigmore wrote. "The law is so obviously in a seething change that one might as well expect to analyze a chemical reaction while the test tube is over the flame."³ "Take any branch of law you like," Wigmore continued. Torts? "The old-time doctrines of liability are changing so fast that it is difficult to keep up with them." Criminal Law? "All along the line a radical re-casting is going on." Evidence? "Nobody knows how many rules are on the point of crumbling away in the next twenty years." Constitutional law? "A prophet would be needed to tell us what its complexion will be as soon as the present unrest has subsided; certainly many existing books may be sold for old paper."⁴

Wigmore stood at the midpoint of the ninety years chronicled by Morton Horwitz in his new book, *The Transformation of American Law, 1870-1960: The Crisis of the Legal Orthodoxy* ("Crisis").⁵ Many American historians, looking no further than great constitutional cases, have treated the early twentieth century as a relatively static period in American legal thought, a long dark age in which most jurists embraced outdated notions of natural rights and Lockean political philosophy. Often the whole period passes under the label "the *Lochner* era," in honor of the 1905 decision of the United States Supreme Court that most notably defended "liberty of contract" from the intrusions of social legislation.⁶ In contrast, Horwitz ranges across American law and discovers sweeping change in legal doctrine, legal thought, and social vision. He has produced the most intellectually ambitious, closely argued, comprehensive, and engaging study of American legal history from Reconstruction through the New Deal that has yet appeared.

Horwitz' grand theme is the inherently political nature of law. Following Duncan Kennedy and his "history-of-doctrinal-contradictions-and-their-mediation school,"⁷ Horwitz views American legal history in terms of the rise and fall of dominant structures of legal thought. He begins with late-Victorian jurists and their system of abstract, general principles, "Classical Legal Thought." Classical legal theorists claimed they could deduce from fundamental legal principles certain outcomes in concrete cases. In fact, classical legal thought was rife with

2. Letter from John Henry Wigmore to William Howard Taft, *supra* note 1; see John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 315 (1985).

3. Letter from John Henry Wigmore to William Howard Taft, *supra* note 1.

4. *Id.*; see WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 226 (1977). See generally N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, LAW & HIST. REV. 55, 57 (1990).

5. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) [hereinafter cited by page number only].

6. *Lochner v. New York*, 198 U.S. 45 (1905).

7. See Robert W. Gordon, *An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 139, 142 (1988). See *infra* notes 59-64 and accompanying text.

internal contradictions, which the great industrial and social changes of *fin de siècle* America made increasingly apparent. In studies of contracts, torts, corporate law, property, and the figure of Oliver Wendell Holmes, Jr., Horwitz charts the growing perception of contradictions within classical legal thought, the collapse of the structure, and the evolution of law in the following generation to a consequentialist, policy-oriented alternative, "Progressive Legal Thought."

Some members of the new generation of legal thinkers attempted to reconstruct a neutral rule of law on the basis of social science. Others—in particular the "critical realists" who are Horwitz' heroes—rejected this new form of legal positivism and insisted that law was inescapably moral and political. The work of "critical realists" would be revived by the Critical Legal Studies (CLS) movement after 1960,⁸ but it had little influence in the intervening years, to judge from *Crisis*' overview of post-realist legal thought. Instead, the social scientific strand of legal realists, working to expand and legitimate the bureaucratic structures of the New Deal, was opposed by "legalist" critics of the regulatory state. Particularly in the 1950's, doubts about the ability of experts to produce "scientific, neutral, and apolitical solutions to social and legal questions" led to the reemergence of a full-blown proceduralist approach to law in the so-called legal process school. Once again, legal thinkers refused to acknowledge the political nature of law, this time by envisioning law as a content-neutral set of procedural rules and guarantees.

Horwitz ends his book just as his generation of legal radicals appear on the scene. As a result, the reader will have to look elsewhere to understand Horwitz' own encounters with the mainstream of legal thought. In Part I of this Review Essay I try to complete the story by placing *Crisis* in the context of the two great traditions of twentieth-century American historiography which Horwitz encountered as a graduate student at Harvard University in the early 1960's. I briefly describe legal process theory in law and history, which Horwitz confronted at the Harvard Law School later in the decade and which he attacked in his award-winning first book, *The Transformation of American Law, 1780-1860* ("Transformation"), published in 1977.⁹ The founding of the CLS movement in that year provided the most important context for Horwitz' subsequent work. Horwitz' general embrace of structuralism, especially as employed in the early work of the CLS scholar Duncan Kennedy, accounts for *Crisis*' trenchant reading of formal law writing on a variety of doctrinal subjects. It also accounts for the book's most significant shortcoming, an overly schematic view of legal thought and legal change.

In Part II, I turn to *Crisis* itself, which I evaluate by focusing on three topics: (1) classical legal thought and its demise; (2) the jurisprudence of Oliver Wendell

8. Pp. 270-71.

9. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) [hereinafter HORWITZ, *TRANSFORMATION*].

Holmes, Jr.; and (3) legal realism and the "turn" to social science. Horwitz' identification of an anti-corporation, "old conservatism" among the Gilded Age judges is a welcome addition to a literature that still commonly depicts the late-Victorian bench as the willing instrument of corporate wealth. Rather than develop this revisionist insight into an imaginative reconstruction of the diverse mental universe of late-Victorian judges, Horwitz reverts to a schematic and consensual interpretation of their jurisprudence. His chapter on Holmes shows how historical jurisprudence helped elite jurists navigate between potentially subversive claims of natural right and potentially redistributive acts of unconstrained legislatures—a brilliant point. It also inflates a minor shift in Holmes' theory of torts in the 1890's into a full-blown jurisprudential crisis based on an unconvincing reading of Holmes' most familiar writings. Finally, Horwitz joins Natalie E. H. Hull in rescuing the law professors of the progressive era from the condescension of the legal realists and their heirs,¹⁰ and he insists that the two groups be understood as active participants in the same, broad reform movement. Yet he never systematically discusses his legal academics' stand on the political questions of their day, and he ultimately imposes a dichotomous framework on the realists that obscures the conundrums they faced. One would never suspect from *Crisis* that many enthusiasts of the new critical legal methods—like Wigmore—insisted on the regulation of organized labor and fiercely denounced dissenters during World War I.¹¹

In short, Horwitz has written a maddening book, much like his first. Fifteen years after *Transformation* was published, some legal scholars and historians still compulsively frame their research to refute Horwitz' claims.¹² Some critics have gone beyond disagreement over fact and interpretation to charge that Horwitz was so blinded by his radical political convictions that he was incapable of producing trustworthy historical work. These critics did not bother to investigate, articulate and engage Horwitz' particular vision of historical utility, and they wrote as if their own understanding of the uses of history was incontrovertible and value-free.

Although *Crisis*, too, provides readers of many methodological persuasions with ample grounds for sharp dissent, it would be a shame if the appearance of the book set off another round of "Morty-bashing." I, for one, have no desire to pillory Horwitz for harboring biases or lacking "objectivity," as if any historian could reproduce the past *wie es eigentlich gewesen ist*. Yet once one

10. Hull, *supra* note 4.

11. On Wigmore, see ROALFE, *supra* note 4, at 226; Stephen Botein, *John Henry Wigmore*, in *DICTIONARY OF AMERICAN BIOGRAPHY* 821-22 (3d Supp. 1973); John Henry Wigmore, *A New Field for Systematic Justice*, 10 *ILL. L. REV.* 592 (1916).

12. Much of this literature is reviewed in Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 *WM. & MARY L. REV.* 663 (1982). Later examples include Peter Karsten, *Explaining the Fight over the Attractive Nuisance Doctrine: A Kinder, Gentler Instrumentalism in the "Age of Formalism,"* 10 *LAW & HIST. REV.* 45 (1992); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 *UCLA L. REV.* 641 (1989).

puts away "that noble dream," historiographic criticism can still be meaningful to the extent the critic applies standards that have gained significant support among professional historians.¹³ Judged against those standards, *Crisis* sometimes comes up short, but it also goes a long way toward effecting a major revision of American legal history, one which finally uncouples the history of legal thought from political history and joins it to broad developments in American intellectual life. Any historian who would complete this project and finally comprehend the revolutionary change apparent even to Wigmore, an outspoken opponent of radicalism in the midst of the *Lochner* era, will owe Horwitz an enormous debt.

I. *CRISIS* IN CONTEXT

One of the most important measures of a historian is the relative importance she attributes to conflict or consensus in the society she studies. By the time Horwitz commenced his graduate education at Harvard in the early 1960's, the poles of the "conflict-consensus" continuum had been clearly marked out by two great historical traditions: the "progressive history" of the interwar period, most closely identified with Charles A. Beard (1874-1948), Carl L. Becker (1873-1945), and Vernon Parrington (1871-1929), and the "consensus history" of the 1940's and 1950's, whose most prominent practitioners were Daniel Boorstin (b. 1914), Richard Hofstadter (1916-1970), and Louis Hartz (1919-1986).

Each tradition has interpreted the judiciary of the *Lochner* era in light of an overarching thesis of social conflict or social consensus. The progressive historians, as their name implies, were contemporaries of the war over the *Lochner* Court. They shared Wigmore's belief that the liberty-of-contract cases had produced a remarkable degree of social unrest, and they easily assimilated these decisions into their interpretation of American history as a great struggle between the people and the interests.¹⁴ In *The Rise of American Civilization* (1927), for example, Charles A. and Mary R. Beard treated the judiciary's war on progressive legislation as an incident in the "long and varied campaign to force *noblesse oblige* upon the third estate." Though the judges "confessed to no emotional bias," acted "with sober mien," and spoke "with tongues of logic," their "personal dislike for reformers and all their works" and their economic interests ultimately explained their decisions.¹⁵ This attack on the judiciary continued the debunking of constitutional law that Charles Beard inaugurated with his muckraking expose of the Federal Convention, *Economic Interpretation*

13. See generally PETER A. NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (1988).

14. For a discussion of the concept of "interests" in progressive thought, see DANIEL RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 176-211 (1987).

15. 2 CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 587 (1927).

of the Constitution (1913), which revealed that America had never known a true "government of the people."¹⁶ As Horwitz writes, Beard's book implied "that the Constitution itself was conceived in earthly sin, the sin of self-interest and bitter group struggle."¹⁷

The progressive historians remained enormously influential until 1940.¹⁸ But with the outbreak of the Second World War and the nation's confrontation with Nazism and Stalinism, the mainstream of American history shifted away from the progressives. If the progressives had stressed political conflict, the consensus-school historians of the late 1940's and 1950's thought that "the common climate of American opinion" was more important.¹⁹ Some historians, like Daniel Boorstin, running hard from his 1930's enthusiasm for radical politics, celebrated what he perceived as the enduring American consensus.²⁰ The most compelling interpretation of American history as "a colossal liberal absolutism," however, was produced by a dissenter, Louis Hartz. His *Liberal Tradition in America* (1955)²¹ was (in Daniel Rodgers' words) "a brilliant, scorchingly critical portrait of a political culture without exits, without critics, imprisoned in one dimensionality."²²

America, in Hartz' telling, was a "petit-bourgeois' giant" whose "Lockianism was absolute and irrational."²³ The Supreme Court was not the bulwark of the wealthy but "the Hebraic expositor of the American general will, building on the irrational acceptance of Locke the Talmudic rationality involved in [its] application to specific cases."²⁴ The maximum-hour law struck down in *Lochner* was not done in by the machinations of Big Business. Its fatal flaw was its premise: the existence of permanent classes of workers and employers, monstrosities in the Horatio Alger world of the jurists.²⁵ Judges were not the only people trapped in that world. The progressive reformer, as well, "spoke of achieving a Horatio Alger world himself by smashing trusts and bosses."²⁶ Even Charles Beard was a child of "the American absolutism" who built his histories around "a titanic struggle between 'conservative' and 'radical' which had little relevance to Western politics as a whole."²⁷

16. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); see NOVICK, *supra* note 13, at 96, 98.

17. Morton J. Horwitz, *Progressive Legal Historiography*, 63 OR. L. REV. 679, 679-80 (1984) [hereinafter Horwitz, *Progressive Historiography*].

18. See NOVICK, *supra* note 13, at 240.

19. RICHARD HOFSTADTER, AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT xxix (2d ed. 1973).

20. See NOVICK, *supra* note 13, at 327-28, 333-34.

21. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 285 (1955).

22. RODGERS, *supra* note 14, at 8.

23. HARTZ, *supra* note 21, at 204-05.

24. *Id.* at 208-09.

25. *Id.* at 242-43.

26. *Id.* at 205.

27. *Id.* at 205, 236.

As consensualism rose to dominance among historians, it also attained hegemony over legal scholarship. The most important center for the new legal consensualism was the Harvard Law School, where in the 1950's Henry M. Hart, Jr. (1904-1969) and Albert Sacks (1920-1991) articulated an impressively systematic and comprehensive model of the "legal process."²⁸ Hart and Sacks insisted that judicial decisionmaking, properly conducted, distinguished between "substantive" and "procedural" realms. The substance of the law was a matter for legislators and other popularly elected officials, who were subject to interest-group politics and presumed to represent the entire social order. Questions of "process"—about which governmental body should decide and how—could be objectively and neutrally determined. They were the proper domain of law and the courts.

Legal process theorists had a significant impact on the writing of constitutional history and judicial biography. The *Lochner* Court was the target of much obloquy, but more for its usurpation of the legislative function than for the social consequences of its decisions. Justice Louis Brandeis became a hero for his judicial restraint and insistence on following neutral principles when exercising the power of judicial review.²⁹ The antebellum bench was scoured for common-law judges who arrived at their decisions through a craftsmanlike process of "reasoned elaboration."³⁰ Roscoe Pound, dean of the Harvard Law School from 1916 to 1936, provided an influential example with his *Formative Era of American Law* (1938), in which he praised Lemuel Shaw, John Bannister Gibson, and Thomas Ruffin for defending the "taught legal tradition" against "the most powerful political and economic forces of time and place."³¹ When the legal realist Walter Nelles argued that Shaw had decided a case in favor of a trade union in order to defuse working-class radicalism, Pound rushed to defend his hero (and the legal process). "It would have been quite impossible for American judges trained in the common-law tradition, acting in the light of the received ideals of the times, to come to any other conclusion," Pound declared. He then counterattacked: "It seems to be impossible for a Marxian economic determinist to comprehend an honest man."³²

Consensual approaches in history and law were still very much alive at Harvard University when Morton Horwitz (b. 1938) arrived in Cambridge after

28. My summary of the legal process school follows Gary Peller, *Neutral Principles in the 1950's*, 21 MICH. J.L. & SOC. REFORM 561 (1988); see also William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights*, in A CULTURE OF RIGHTS 266, 297-301 (Michael J. Lacey & Knud Haakonssen eds., 1991); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286 (1973).

29. See Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 J. AM. HIST. 125 (1992).

30. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 165 (tent. ed. 1958).

31. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 82, 84 (1938):

32. *Id.* at 87, 88. On Nelles, who was not a Marxist, see Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 LAW & HIST. REV. (1993) (forthcoming).

receiving his A.B. in 1959 from the City College of New York. He commenced his graduate training in the Government Department and obtained his Ph.D. in 1964. He wrote his dissertation, *The Problem of Tyranny of the Majority in American Thought*, under the direction of Louis Hartz.³³ He then attended the Harvard Law School, receiving his J.D. in 1967. After a year clerking for Judge Spottswood Robinson of the United States Court of Appeals for the District of Columbia Circuit, he returned to the Harvard Law School as a Charles Warren Fellow and commenced work on his first book. Appointed to the Harvard law faculty in 1970, he published *Transformation* in 1977, for which he received the prestigious Bancroft Prize in American History the following year.³⁴

Horwitz' work up to and including his first book is a remarkable deposit of the academic era in which it was written. *Transformation's* first chapter, which was the first part of the book to be published (in 1971),³⁵ was reminiscent of the consensualism of his teacher, and, in particular, of Hartz' contribution to the "Commonwealth" studies of the late 1940's and 1950's.³⁶ Financed by the Rockefeller Foundation, these studies took aim at critics of the New Deal by arguing that, far from being "un-American," governmental promotion of economic development and regulation of economic activity dated from the birth of the republic. The lesson of these works, as Horwitz observed in *Transformation*, "was that there was no norm of laissez-faire and that, if anything, laissez-faire ideology itself represented an aberrational strand in defining the legitimate relationship between government and economy."³⁷ To provide the New Deal with "its own historical pedigree,"³⁸ Hartz and his colleagues showed how antebellum legislators advanced the broad, consensual goal of maximum economic growth by means of a program of regulation and the granting of franchises and monopolies. They devoted little attention to the distributive consequences of these policies, an inquiry which might have led them to incidents of sharp social conflict.

33. Morton J. Horwitz, *The Problem of Tyranny of the Majority in American Thought* (1964) (unpublished Ph.D. dissertation, Harvard University) [hereinafter Horwitz, *Dissertation*].

34. Richard B. Bernstein, *Horwitz Wins 1978 Bancroft Prize for Law History Book*, HARV. L. REC., Mar. 17, 1978, at 8. Alfred D. Chandler, Jr., author of *The Visible Hand: The Managerial Revolution in American Business* (1977) and professor at the Harvard Business School, was co-recipient of the Bancroft Prize.

35. Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, 5 PERSP. AM. HIST. 287 (1971).

36. See LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948). The school was named after a book by Oscar Handlin & Mary F. Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (1947). See Arthur H. Cole, *The Committee on Research in Economic History: An Historical Sketch*, 30 J. ECON. HIST. 723 (1970); Harry N. Scheiber, *Government and the Economy: Studies of the "Commonwealth" Policy in Nineteenth Century America*, 3 J. INTERDISCIPLINARY HIST. 135 (1972).

37. HORWITZ, *TRANSFORMATION*, *supra* note 9, at xiii. Horwitz was specifically referring to HARTZ, *supra* note 36, and HANDLIN & HANDLIN, *supra* note 36.

38. HORWITZ, *TRANSFORMATION*, *supra* note 9, at xiii.

Read apart from the rest of *Transformation*—as it was by those who came upon it in an historical periodical edited in Harvard's history department—Horwitz' first chapter seemed more like a *contribution* to the project of fashioning a legacy for liberal reform than a challenge to consensus history from the left.³⁹ Horwitz argued that the emergence of an "instrumental" style of legal reasoning by common-law judges was just as important as legislation in "underwriting and channeling economic development."⁴⁰ He attributed the rise of instrumentalism to the widely-shared experience of framing state constitutions in the revolutionary and early national periods. Even with Charles Beard's example, Horwitz did not look for conflict in the constitution-making process, and he did not investigate whether the disintegration of "the original natural law foundation of common law rules" resulted in clearly discernible groups of winners and losers.⁴¹ Indeed, as Herbert Hovenkamp has noted, to read the article alone "is virtually to conclude that the emergence of an 'instrumental' conception of American law was a good thing."⁴²

When the article reappeared in *Transformation*, it was as the first chapter of a neo-Beardian revision of the consensus history of the 1950's. The remainder of the book stressed social conflict; its author had seemingly escaped "the dogmatic business orientation of a nation 'born equal'" that Hartz had found omnipresent in America.⁴³ While admitting some doubt, and (like Charles Beard) never identifying winners and losers with much precision, Horwitz ultimately concluded 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."⁴⁴

None of this struck professional historians as outrageous, as Horwitz' receipt of the Bancroft Prize suggests. In fact, a book that used previously underutilized sources to address a major scholarly debate was precisely the kind of work most likely to impress professional historians. Among legal historians, however, the reaction was, as Robert Gordon put it, one of "horror."⁴⁵ In 1977 most of them still believed that legal history should be written to produce something which

39. This may explain why a critic of Horwitz once commended the article to me as having been written during "one of that madman at Harvard's lucid moments."

40. HORWITZ, *TRANSFORMATION*, *supra* note 9, at 1, 288.

41. HORWITZ, *TRANSFORMATION*, *supra* note 9, at 17. The article was a better fit with Gordon Wood's *Creation of the American Republic, 1776-1787* (1969), which argued that Americans came to embrace the modern tenets of liberalism in the course of adopting and revising the first state constitutions. See Daniel T. Rodgers, *Republicanism: the Career of a Concept*, 79 J. AM. HIST. 11, 15-16, 18-19 (1992).

42. Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 674 n.123 (1983).

43. HARTZ, *supra* note 21, at 205; see NOVICK, *supra* note 13, at 415-68.

44. HORWITZ, *TRANSFORMATION*, *supra* note 9, at 100-01.

45. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 97 (1984). An exception was Willard Hurst, who lauded the book as "a first-rate monograph," but who preferred a more consensual interpretation. "Along with sharp interest conflicts," Hurst wrote, "consensus, too, was part of the legal history of 1780 to 1860." Willard Hurst, Book Review, 21 AM. J. LEGAL HIST. 175, 175, 179 (1977); see Aviam Soifer, *Willard Hurst, Consensus History, and the Growth of American Law*, 20 REV. AM. HIST. 124 (1992).

a future court may need or use, or to be of other service to the legal profession.⁴⁶ Given the difficulty of the subject—and the viciousness with which the amateurs repulsed interlopers⁴⁷—few historians were hardy enough to work in the field and divert it from its premises in legal process theory.

In *Transformation* Horwitz mounted a frontal assault on this orthodoxy. Even before the book appeared, Horwitz delivered a scathing attack on Pound's history at an annual meeting of the American Society for Legal History.⁴⁸ As the first step in his demolition of the historical pedigree of the *Lochner* Court, Beard had scoffed at George Bancroft for seeing "the movement of the divine power" in the adoption of the Federal Constitution.⁴⁹ Sixty years later, Horwitz scored Pound and his epigones as the opening salvo of a full-scale attack on the liberal-pluralist jurisprudence of the legal process school. Pound's lionizing of judges who stood apart from political and economic strife overlooked the fact that the "taught legal tradition" was itself a product of politics. Pound should have acknowledged "the ideological character of professionalization," Horwitz declared. Instead Pound offered his audience of lawyers the "special anti-Marxist medicine" of an autonomous craft tradition to alleviate their anxiety over the politics of law. He "pervert[ed] the real function of history by reducing it to the pathetic role of justifying the world as it is."⁵⁰

In *Transformation* Horwitz warned that the relative autonomy of law should not be confused with "the self-justificatory claims of lawyers to mediate between social forces in the interest of a politically neutral law."⁵¹ To the contrary, behind the legal change that Pound had attributed to the taught legal tradition Horwitz saw an "alliance between intellect and power," that is, between elite lawyers and "newly powerful commercial and entrepreneurial interests."⁵² Reviewers charged Horwitz with unsuccessfully advancing a "conspiracy thesis" and, in Poundian fashion, questioned whether his radical commitments prevented him from accurately observing the past.⁵³

With *Transformation* behind him, Horwitz set out to write "a very different kind of book, . . . much less technical and much more directed at changes in

46. See JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* xxxiii-iv (1944); WILLIAM E. NELSON & JOHN P. REID, *THE LITERATURE OF AMERICAN LEGAL HISTORY* 1-2 (1985).

47. See Stephen Botein, *Scientific Mind and Legal Matter: The Long Shadow of Richard B. Morris's Studies in the History of Law*, 13 REVS. AM. HIST. 303 (1985).

48. Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973) [hereinafter Horwitz, *Conservative Tradition*].

49. BEARD, *supra* note 16, at 1 (quoting 2 GEORGE BANCROFT, *THE HISTORY OF THE CONSTITUTION OF THE UNITED STATES* 284 (1882)); see Horwitz, *Progressive Historiography*, *supra* note 17, at 679-80.

50. Horwitz, *Conservative Tradition*, *supra* note 48, at 281.

51. HORWITZ, *TRANSFORMATION*, *supra* note 9, at viii.

52. *Id.* at 266, 258-59.

53. See, e.g., Randall Bridwell, *Theme v. Reality in American Legal History: A Commentary on Horwitz, The Transformation of American Law, 1790-1860 and on the Common Law in America*, 53 IND. L.J. 449, 472 (1978) (book review); John P. Reid, *A Plot Too Doctrinaire*, 55 TEX. L. REV. 1307, 1311, 1321 (1977) (book review). For defenses of Horwitz, see Holt, *supra* note 12; Gordon, *supra* note 45, at 97.

legal theory."⁵⁴ *Crisis* is such a work. Horwitz has by no means forsaken legal doctrine; in fact, one of its best chapters reinterprets *Santa Clara Co. v. Southern Pacific Railroad*,⁵⁵ a landmark decision in corporation law. But *Crisis* is less a history of American law than a history of highbrow legal thought; Horwitz' focus has shifted from judicial chambers to the offices of law professors and treatise writers. This change in setting is not the only reason why *Crisis* is (in the words of Stanley Katz' blurb) "a surprisingly different" book than *Transformation*. Horwitz' first book appeared in early 1977, the same year as the first meeting of the Conference on Critical Legal Studies, held in the spring in Madison, Wisconsin. This event, which Horwitz helped organize, is particularly important for understanding *Crisis*, for it marked the start of a lasting and effective organization of radical legal academics.⁵⁶ *Crisis* is as much the product of Horwitz' engagement with other law professors on the left as it is a continuation of an attack on liberal or centrist variants of legal process theory. In particular, the rise and fall of structuralism as the dominant methodology in CLS histories of American legal thought is vital to understanding his new book.

Transformation was not, of course, a work of doctrinaire, "scientific" Marxism; it did not dismiss law as epiphenomenal or endow only material forces with causal significance. "Law is autonomous to the extent that ideas are autonomous, at least in the short run," Horwitz wrote in the introduction; elsewhere in the book he occasionally referred to "structure[s] of thought."⁵⁷ Moreover, in an essay published in 1977, he applauded Douglas Hay and Eugene Genovese for bringing to legal history notions of hegemony and legitimation borrowed from neo-Marxists in Western Europe.⁵⁸ Yet in the eyes of other, somewhat younger CLS scholars, *Transformation* still underestimated the causal role of ideas. These CLS scholars thought in terms borrowed from the structuralist anthropology of Claude Levi-Strauss and the phenomenological Marxism of Jean-Paul Sartre. Thus, in announcing the founding of the Conference on CLS to readers of Genovese's *Marxist Perspectives*, Mark Tushnet (b. 1945) contrasted the instrumentalism of *Transformation* with the early structuralist legal scholarship of Peter Gabel (b. 1947), Duncan Kennedy (b. 1942) and Roberto Unger (b. 1947).⁵⁹

54. Bernstein, *supra* note 34, at 8.

55. 118 U.S. 394 (1886).

56. John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 395-96 (1984).

57. HORWITZ, *TRANSFORMATION*, *supra* note 9, at xiii, 30, 35.

58. "As the dogmatic shadows cast by Stalinism and the Cold War have gradually dissipated," Horwitz wrote, "Marxists have finally begun to move away from those simplistic slogans by which thought was dismissed as mere 'ideology' and by which law was treated contemptuously as a mere 'superstructure' that simply 'reflected' class relations." Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?* 86 YALE L.J. 561, 563 (1977).

59. Mark Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSP. 96 (Spring 1978). On *Marxist Perspectives*, see NOVICK, *supra* note 13, at 460.

Kennedy's historical writings in the middle and late 1970's exerted the most influence on Horwitz. As Joan Williams made clear in her lucid account of the shifting epistemological claims of CLS scholars, Kennedy applied to legal texts the aggressive interpretive methods that Levi-Strauss used to analyze myths.⁶⁰ He billed his article on Blackstone's *Commentaries* as the first installment of a history of American legal thought in terms of "the fundamental contradiction" of the human condition—"that relations with others are both necessary to and incompatible with our freedom."⁶¹ Not only was that contradiction an aspect of every legal problem, Kennedy declared, it was "the very *essence* of every problem."⁶² Every legal epoch erected a "structure of legal thought"⁶³ to mediate the fundamental contradiction. Because the contradiction was unresolvable, the structures contained internal inconsistencies that became increasingly apparent as time went on. Eventually, the entire structure gave way, and a new one arose to take its place.⁶⁴

As Williams writes, "[j]ust as Levi-Strauss claimed to have uncovered the deep structure of all myths," in this passage Kennedy "claimed to have uncovered the deep structure of all law."⁶⁵ To be sure, Kennedy hedged his bets. He referred to his argument as "a shockingly crude model" and a "hypothesis"; he included the "disclaimers" that his work was simply descriptive and ignored "the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live it."⁶⁶ Still, the main implication of his argument, like those of the less deterministic variants of structuralism sweeping American intellectual history, was that structures of legal thought had enormous causal force.⁶⁷

A second installment of Kennedy's history was the immediate inspiration for *Crisis*' account of Victorian legal thought.⁶⁸ The essay, part of a much longer manuscript, described a classical "legal consciousness" that reigned between 1885 and 1935. Classical jurists held: (1) that private individuals and the various branches of government were the basic actors in the legal system; (2) that each legal actor possessed power delegated from the sovereign to carry out its will; (3) that an actor's will was "absolute within but void outside" the actor's sphere of authority; (4) that the role of judges was to police the

60. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 464-69, 472-79 (1987); see also Gordon, *supra* note 45, at 114-16, 118-20.

61. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 213 (1979).

62. *Id.*

63. *Id.* at 221.

64. *Id.* at 213-17.

65. Williams, *supra* note 60, at 473.

66. Kennedy, *supra* note 61, at 213, 216, 220.

67. On intellectual historians and structuralism, see Rodgers, *supra* note 41, at 22.

68. Horwitz credits Kennedy with being "the first scholar to attempt to elaborate a structure of late nineteenth-century legal thought" and to identify "the history of American legal thought as a coherent scholarly field separate from constitutional history." P. 273 n.1. Horwitz acknowledges that he has borrowed extensively from Kennedy's work. *Id.*

boundaries between these spheres; and (5) that judges could be trusted not to usurp the authority of other legal actors so long as they arrived at their decisions through a formal process of deduction from *a priori* principles of great generality and abstraction.⁶⁹ Kennedy then turned to Rufus Peckham's majority and John Marshall Harlan's dissenting opinions in *Lochner* for an illustration. With long quotations but no discussion of Peckham's and Harlan's education, legal careers, or political experiences, Kennedy argued that both men shared a common legal consciousness that was more important to the case's outcome than was the Beards' war between the people and the interests.⁷⁰

Even before Kennedy's historical articles appeared, Tushnet had objected to Kennedy's tendency to "reify structures of legal thought" and endow them with "a life of their own that resisted transformation."⁷¹ In the 1970's and 1980's historians outside of CLS published a number of studies of late-Victorian legal thought premised on less idealistic and more eclectic intellectual constructs, such as the "free labor ideology" of Eric Foner's influential study of the Republican Party.⁷² Nevertheless, a band of critical legal historians launched an ambitious voyage across late-Victorian law and jurisprudence and laid claim to the entire field in the name of classical legal thought. With some variation (including greater or lesser degrees of attention to "the fundamental contradiction"), Gregory Alexander, Robert Gordon, Wythe Holt, Elizabeth Mensch, Rudolph Peritz, and Kenneth Vandavelde used Kennedy's formulation in studies of corporate law, the Wall Street bar, judicial review of labor legislation, property, trusts and estates, antitrust, and labor law.⁷³ In addition, Mensch

69. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC'Y 3, 7-8 (1980).

70. *Id.* at 9-14.

71. Tushnet, *supra* note 59, at 107.

72. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970). Foner was heavily indebted to the anthropologist Clifford Geertz for his understanding of ideology, not as "a rigid, doctrinaire, black-and-white understanding of the world, but, rather, as the system of beliefs, values, fears, prejudices, reflexes, and commitments—in sum, the social consciousness—of a social group." *Id.* at 4. Studies of late-Victorian legal thought in this tradition include Michael L. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767; James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20 [hereinafter McCurdy, *Liberty of Contract*]; Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987); Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980).

73. Gregory S. Alexander, *The Transformation of Trusts as a Legal Category, 1800-1914*, 5 LAW & HIST. REV. 303 (1987); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983); Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51 (Gerard W. Gawalt ed., 1984); Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century*

performed the invaluable service of producing a succinct and accessible survey of "the history of mainstream legal thought" in Kennedyesque terms.⁷⁴

As the structuralist enterprise steamed ahead, however, its captain jumped ship. By 1983, Kennedy decided that structuralism had lost the destabilizing value it once possessed, and he dropped it for a post-modern stance.⁷⁵ As late as 1980 Kennedy still maintained that legal structures integrated the diverse elements of legal consciousness into fixed, formal arrangements that mediated the contradictions of everyday life.⁷⁶ Now he and a smaller circle of associates argued that legal concepts were far too open-ended and plastic to be corralled into structures. Having demolished the notion of logical necessity within legal thought, they turned to social theory, arguing that its terms and concepts were ambiguous and implied contradictory conclusions.⁷⁷ All of this might have opened Kennedy to the charge of anti-intellectualism (which Peter Gabel in fact mockingly leveled at Kennedy in a published dialogue).⁷⁸ Fortunately, an imposing scholarly apparatus was at hand in post-modern literary and social theory, and this provided the necessary cover for Kennedy and his compatriots as they set out on a new search for the grail of authentic, unmediated human connection.

Post-structuralist CLS has produced a legal history of its own, most successfully in the work of Gary Peller (b. 1955).⁷⁹ A full treatment of the "critical tradition" in American legal historiography would have to study this history in its own right. To understand *Crisis*, however, it is enough to know that Horwitz considered post-structuralism and, like most professional historians, rejected it. As early as 1984 John Henry Schlegel could adopt a nostalgic tone in describing CLS gatherings at which "the balding, almost elfin, Morty Horwitz" defended "his limited version of the socioeconomic determinism of legal ideas from the onslaught of his neighbor in Langdell Hall, Mr. Kennedy."⁸⁰ And in 1985 Horwitz published a study of corporation law in the *Lochner* era (now the third chapter of *Crisis*) that committed his response to the post-structuralists to print.⁸¹

Contract Law, 1986 WIS. L. REV. 677; Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 286-87 (David Kairys ed. 1982); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263. In Holt's case, the use of Kennedy's structuralism was for illustrative purposes only; Holt preferred a less idealist account of the labor contract cases. Holt, *supra*, at 716-25.

74. Mensch, *supra* note 73.

75. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 14-16 (1986); see also Williams, *supra* note 60, at 474-75; Fisher, *supra* note 28, at 289-90.

76. Kennedy, *supra* note 69, at 23-24.

77. Mark V. Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 26 J. LEGAL EDUC. 505, 510 (1986).

78. Gabel & Kennedy, *supra* note 75, at 5.

79. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Peller, *supra* note 28.

80. Schlegel, *supra* note 56, at 402-03.

81. Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175 (1985) [hereinafter Horwitz, *Corporate Theory*].

Although he conceded the post-structuralists a realist antecedent in the form of an article on corporate personality by the pragmatic philosopher John Dewey, Horwitz nevertheless dissented from the position that abstract conceptions have no "entailment in terms of more concrete legal doctrines or rules."⁸² Rather, Horwitz argued, "most important controversial legal abstractions do have determinate legal or political significance. In the jargon of the current Critical Legal Studies debate, I wish to deny that legal conceptions are infinitely 'flippable' and instead to insist that they do have 'tilt' or influence in determining outcomes."⁸³ As "a matter of legal *logic*," the attack on formal legal concepts was correct.⁸⁴ But in attempting to discredit orthodox claims to "a non-political, non-discretionary mode of legal *reasoning*," the post-structuralist approach, as Horwitz saw it, ignored

the obvious fact that when abstract conceptions are used in specific historical contexts they have more limited meanings and more specific argumentative functions. We have spent too much effort repeating the demonstrations of the indeterminacy of concepts in a logical vacuum; but not enough time trying to show that in particular contexts the choice of one theory over another is not random or accidental because history and usage have limited their deepest meanings and applications.⁸⁵

In the field of corporation law, for example, each of the two main conceptions of corporate personality (the "partnership" and "natural entity" theories) "carried with them considerable legal and intellectual baggage that did not permit random deployment or infinite manipulability."⁸⁶ Horwitz concluded with a call to make history speak to legal theory by "uncover[ing] the specific historical possibilities of legal conceptions—to 'decode' their true concrete meanings in real historical situations."⁸⁷

Horwitz maintains this position in *Crisis*. He notes the view among "scholars in all fields of social thought" that claims to objectivity are in fact "contests over the appropriate generality of discourse" and that "categories, theories, and frames of reference" are contingent. He wisely observes that historians need to be aware of such theoretical debates "without either solving the problems or being paralyzed by them." Is the book "just my story, with all the connotations of skepticism and subjectivity that the word 'story' implies?" Horwitz asks. "No; I still aspire to give the best possible explanation, but without the wish

82. *Id.* at 175-76 (referring to John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926)).

83. *Id.* at 175-76.

84. *Id.* at 176.

85. *Id.*

86. Pp. 106-07.

87. *Id.*; cf. p. 202 ("Yet it should be emphasized that this [Realist] critique of deductive reasoning does not question the necessity of using concepts to bring order to experience. Rather, it is critical of concepts only to the extent that they are so general as to be inherently random in their application.").

to suppress all difficulties by intoning pieties about what a terrible place the world would be without an objective account."⁸⁸

With this aspiration, Horwitz has come to rest well within the outer limits of the conventions of professional historians, who have overwhelmingly rejected French structuralist and post-structuralist methods for a position that "allowed for contingency, stressed human agency, [and] was expressed in an 'empirical idiom.'"⁸⁹ To use terms suggested by Joan Williams, Horwitz' limited endorsement of the indeterminacy thesis simply acknowledges the "implication of modernism . . . that all histories are either presentist or boring" given "that every interpretation reflects a particular viewpoint," and that all compelling historical interpretations persuade "because they speak to current concerns."⁹⁰ On the other hand, Horwitz' insistence on the existence of "tilt" and of "intellectual and legal baggage"⁹¹ saves his undeniably politically engaged work from embracing "bad" presentism—from producing a history that "cares so much about the present that it ceases to concern itself with a conscientious respect for the pastness of the past."⁹²

For my part, I tend to evaluate history in terms that are consistent with those of Williams, if more metaphoric. Good historians, it seems to me, write to learn something from the past about an abiding aspect of the human condition. The historian strikes up a conversation with the past, just as the anthropologist in the Geertzian tradition does her job by "plaguing subtle people with obtuse questions."⁹³ Properly conducted, the conversation is two-sided and respectful. The historian finds that much of what the past has to say is of little or no immediate use. The past, like a person with whom we converse, has other things on its mind, events transpiring well before we arrived on the scene. The historian should be sensitive to this context, because it gives meaning to what the past has to say. By ignoring context the historian might overlook meaning that is important for her own purposes. Moreover, if critics conclude that the missed meaning was a vital part of the message of the past, they will feel free to attack her history in absolute terms (even though at best they pronounce judgment according to the reigning conventions of the historical profession). The historian was not respectful of the past but rude, the critics will charge. She got her facts wrong; what she produced may not be "nonsense, but neither is it history."⁹⁴

88. P. viii.

89. NOVICK, *supra* note 13, at 461, 598-605. Novick observes that at the influential Wingspread Conference on New Directions in American Intellectual History, "Levi-Strauss was mentioned only to be put down" and Foucault, Derrida and other post-structuralists were, with few exceptions, either disparaged or ignored altogether. *Id.* at 605-06.

90. Joan C. Williams, *Culture and Certainty: Legal History and the Reconstructive Project*, 76 VA. L. REV. 713, 720, 744 (1990).

91. See Horwitz, *Corporate Theory*, *supra* note 81, at 173.

92. Williams, *supra* note 90, at 720.

93. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 29 (1973).

94. Williams, *supra* note 90, at 720; see NOVICK, *supra* note 13, at 625-28.

Just what questions the historian asks the past turns in some measure on her own sense of what is most pressing in the world around her.⁹⁵ Kennedy's structuralist legal history, for example, addressed the radical concern that most people took too much of the world for granted, that (in Gabel's words) people experienced "falsely mediated forms of unity" which had to be called to mind and then "broken through before people can in fact experience what's going on between them in a real, honest, experiential way."⁹⁶ By revealing the determining force of structures in the past, Kennedy meant to flush out and reveal as contingent comparable structures in the present.⁹⁷ Given that purpose, he felt no need to provide anything beyond the most cursory "background information" on Blackstone in his study of the *Commentaries*. His reading paid so little attention to context that he violated professional historians' sense of fair play with the past. As a result, his study was attacked as bad history, "interesting but wrong."⁹⁸

Structuralist historians sometimes sense that traditional narrative histories—ones that follow the choices of individual actors in particular contexts and therefore escape the anathemas pronounced on Kennedy—are the products of historians located to their right on the political spectrum. That structuralist historians want to call structures of thought to their readers' minds as the first step in overthrowing them is, after all, what makes many of them radicals. In fact, the past that many narrative historians recover is intended for use in a very different present than the one radical structuralists inhabit, a present in which people do the best they can in a world they can improve or worsen but not remake.⁹⁹ To the extent such narrative historians address a broad audience, they write to provide their readers with useful analogies for the commonplace world in which they live. They resist the implication that structures of thought determine individual conduct or render individual variation essentially uninteresting. What good is it to provide readers with thought-provoking examples if they lack the freedom to act on them? If narrative historians grant the structuralist point that what their subjects took as given was in fact historically contingent, they do not make the demonstration of that fact the central point of their accounts. They are more interested in chronicling the diversity of human thought and action under constraint, which is how they imagine their own social world.

95. If only her need to have a nice day. See J. H. HEXTER, *The Historian and His Day*, in REAPPRAISALS IN HISTORY 1 (1961).

96. Gabel & Kennedy, *supra* note 75, at 17-18; see also Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW, *supra* note 73, at 286-87.

97. Robert W. Gordon described this process as making clear "the menace of historicity." Robert W. Gordon, *Summary of Discussion of Historicism in Legal Scholarship*, 90 YALE L.J. 1060, 1061 (1981).

98. Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 795 (1988).

99. Cf. NOVICK, *supra* note 13, at 622. For a revealing exchange on structure and contingency in the context of early twentieth-century history of the regulatory state, see Gerald Berk, *Corporate Liberalism Reconsidered: A Review Essay*, 3 J. POL'Y HIST. 70 (1991); James Livingston, *A Reply to Gerald Berk*, 3 J. POL'Y HIST. 85 (1991).

II. *CRISIS* CRITIQUED

In *Crisis*, then, Horwitz continues his neo-Beardian, post-legal-process history of American law, but he does so with a greater emphasis on revealing structures of legal thought than he displayed in *Transformation*. "Every complex legal system presents a structure of classification and categorization that reveals many of its dominant concerns and points of tension and contradiction," Horwitz explains in a section headed "Legal Architecture."¹⁰⁰ He investigates those structures for the same reason Kennedy did, to reveal the analogous assumptions of the "legal orthodoxy" of the present. In particular, Horwitz has targeted "the core of ideas that constitute the 'rule of law'—the conviction that there existed a structure of impartial and self-executing norms suggested by the phrase 'a government of laws, not of men.'"¹⁰¹ This is, as we have seen, an abiding focus of his scholarship stretching back through *Transformation* and his essay on Pound¹⁰² to his dissertation on the problem of tyranny of the majority.¹⁰³

Crisis commences its study of law as politics with a description of the "structure of Classical Legal Thought." Horwitz presents the beliefs of late-Victorian jurists in as reified and abstract terms as any work in the "Kennedy school." His structure even comes complete with a Kennedyesque set of "points of tension and contradiction," which will in time give way under the pressure of social unrest.¹⁰⁴ With the stage set, Horwitz then proceeds to set forth the first of the two main conflicts in the book. In the introduction he describes this conflict as a clash between rival structures: on the one hand, "Classical Legal Thought"; on the other, "Progressive Legal Thought," which originated in Holmes' essays in the 1890's and culminated in the legal realist movement of the 1920's.¹⁰⁵ It turns out in the remainder of the book, however, that heterodox legal scholars enjoy much more independence of mind than their orthodox counterparts. The progressives' beliefs appear in nothing like the structured idea-systems of the classical thinkers; unlike their opponents, they are free to pursue political ends unconstrained by a coherent, integrated structure of thought.¹⁰⁶ This allowance for human agency permits Horwitz to present his second principal

100. P. 10; see also Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1835 (1987) ("All legal systems have a legal architecture that categorizes and classifies legal phenomena. And every system of legal architecture incorporates deep into that structure a set of normative premises about the proper way to talk about law.").

101. P. 4.

102. Horwitz, *Conservative Tradition*, *supra* note 48.

103. Horwitz, *Dissertation*, *supra* note 33, at 9; see also Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655 (1989).

104. P. 10.

105. P. 3. For a caveat on Horwitz' use of the term "progressive," see *infra* note 300.

106. Horwitz is silent on this methodological double standard—structuralism and homogeneity for the legal orthodoxy; contingency and diversity for the legal heterodoxy—but it seems to be an artifact of his present concerns. In critical legal histories, it would appear that structuralism is the preferred methodology for describing an orthodoxy to be debunked. The heterodox enjoy a measure of the author's Olympian freedom of movement.

conflict: a fundamental disagreement within legal realism over whether the ideal of a neutral and apolitical rule of law could be salvaged from the wreckage of classical legal thought and placed on the sounder foundation of modern social science.

A. *Victorian Legal Thought*

"Although in every other field of American history," Horwitz writes, "Progressive historiography, premised on a conflict between the 'people' and the 'interests,' has been overthrown as simplistic, in the constitutional history of the *Lochner* era it has continued to be the standard mode of explanation."¹⁰⁷ *Crisis* revises the progressive historians in two ways. First, Horwitz ties the jurisprudence of the *Lochner* era to a particular social vision, one which bears a striking resemblance to the "Horatio Alger world" of Hartz' nineteenth-century America. Second, Horwitz attributes much more causal significance to ideas than Charles Beard allowed.

In Horwitz' account, classical legal thought grew out of a coherent understanding of American society and politics, which he dubs the "'old conservative' world view."¹⁰⁸ Old conservatives believed that decentralized economic and political institutions—a "self-regulating, competitive market economy presided over by a neutral, impartial, and decentralized 'night-watchman' state"—were the fundamental conditions of American freedom.¹⁰⁹ As old conservatives, the Classical legal thinkers on the *Lochner* Court were just as appalled as any progressive reformer by the rise of the giant business corporation in the great merger wave of 1895-1904. They were not the willing servants of corporate wealth that the progressive historians made them out to be.¹¹⁰

Once it took shape, classical legal thought became relatively autonomous from society and politics. Indeed, it powerfully influenced how lawyers and judges interpreted the world around them. In setting out "the essential structure of Classical Legal Thought," Horwitz follows Kennedy closely.¹¹¹ Classical thinkers (1) sharply distinguished between "what was thought to be a coercive public law—mainly criminal and regulatory law—and a non-coercive private law of tort, contract, property, and commercial law";¹¹² (2) believed that a judge's only concern in a private law dispute was to vindicate the "pre-political natural rights" of individuals;¹¹³ (3) tried to make legal reasoning "self-

107. P. 7.

108. P. 4.

109. *Id.*

110. *Id.*

111. See p. 16.

112. Pp. 10-11.

113. P. 11.

executing and non-discretionary" through abstract and general classifications that turned on clear, distinct, bright-line distinctions;¹¹⁴ (4) assumed that economic markets "reflected natural and impartial economic laws that needed to remain uncorrupted by political interference";¹¹⁵ and (5) insisted that the state must be "neutral" and "non-redistributive" in its conduct.¹¹⁶

Two examples illustrate the value of Horwitz' approach. His account of *Lochner* shows how late-Victorian jurists used the common law of nuisance and constitutional doctrine on the police power to construct a bright line between the rights of private individuals and the larger public against which legislation could be judged. This resort to lines of cases previously treated as distinct shows the classical jurists' penchant for systematizing large areas of the law. Furthermore, justifying public regulation by reference to the law of nuisance allowed for the growth of modest administrative structures without upsetting the classical commitment to a nonredistributive state. It even permitted classical jurists to argue in *Mugler v. Kansas*¹¹⁷ that the legislative prohibition of alcohol did not redistribute wealth from saloon keepers to their opponents. Because saloon keeping could be considered an offense against the public interest in health, safety, and morals, prohibition simply corrected an unjust state of affairs—the liquor-sellers' trespass on the rights of the public. In contrast, the ten-hours law in *Lochner* could only be a redistributive act. The public-oriented justifications offered on its behalf were merely a pretence for interfering in the essentially private dealings of employers and employees. Horwitz thus provides a more compelling political and moral explanation of *Lochner* than did Kennedy, and he better relates the decision to the late-Victorian jurists' style of legal reasoning than did earlier historians of judicial review in the *Lochner* era.¹¹⁸

Even more original is *Crisis*' treatment of tort, contract, and property. Perhaps the most striking illustration is found in Horwitz' discussion of classical thinking about objective causation in tort. A progressive historian might be forgiven for deciding that the question of how to assign causal responsibility for the commission of a tort was too arcane to reveal much about the war between the people and the interests. Horwitz, however, shows how the idea of objective causation played "a central role in preventing the infusion of politics into law."¹¹⁹ He commences by reminding the reader that the aim of private law in classical jurisprudence was to do corrective justice to private individuals possessed of natural, pre-political rights. In tort law this would be possible only if a court could objectively identify which person caused another's injury. Otherwise, ordering someone to compensate another would be a redistributive

114. *Id.*

115. *Id.*

116. P. 4.

117. 123 U.S. 623 (1887).

118. For example, Forbath, *supra* note 72; McCurdy, *Liberty of Contract*, *supra* note 72.

119. P. 51.

act. The problem, as Holmes' friend Nicholas St. John Green recognized, was that accidents commonly result from multiple causes. "If the question of which of several acts caused the plaintiff's injury was open to judicial discretion," Horwitz asks, "how could private law stay clear of the dangers of the political uses of law for purposes of redistribution?"¹²⁰

Horwitz finds an answer in Francis Wharton's *Treatise on the Law of Negligence* (1878). While conceding the ambiguity of causation in the physical world, Wharton argued that courts should distinguish between "physical and moral forces."¹²¹ Wharton held that only the latter counted as causes for legal purposes, and that jurists could distinguish moral causes from "merely consecutive" ones, thanks to the determinate nature of moral law. Treating all antecedents as causal, Wharton claimed, would lead to the ruin of the free market system. Because one could always locate a capitalist who was in some way responsible for an accident, he reasoned, actors with shallow pockets would learn to act negligently, confident that they would be passed over "to reach the capitalist who is a remoter condition."¹²² Rather than be held liable for all disasters, capitalists would stop conducting business. "No factory would be built," and in time there would be "no capitalist to be found to be sued."¹²³ Horwitz' comment seems apt: "This seemingly sudden leap that Wharton makes from the technical question of legal causation to his warning of the destruction of capitalism is startling only if one fails to understand the systemic character of legal thought in the late nineteenth century."¹²⁴

If a structuralist approach to legal thought can produce insights such as these, no further evidence of its value as a historical methodology is necessary. The shortcomings of Horwitz' approach are worth noting, however. They suggest the kind of insights to be gained from historians who are more willing than is Horwitz to pursue the origins and limits of classical legal thought—or even to concede that the thought of late-Victorian jurists was too diverse and contradictory to be captured in anything as rigid and precise as a structure. Approached in this spirit, late-Victorian jurisprudence looks significantly different from what we see in *Crisis*. It appears better grounded in moral and religious thought and more the project of a particular segment of Victorian society than a consensual construct. Finally, a less structural approach to legal thought can produce a more convincing account of the decline of late-Victorian legal thought than Horwitz has provided.

Where *did* classical legal thought come from, anyway? As compellingly as Kennedy's and Horwitz' structure accounts for much of the law between the Civil War and the Great Depression, classical legal thought is, after all, an

120. P. 52.

121. P. 54 (quoting FRANCIS WHARTON, A SUGGESTION AS TO CAUSATION 11 (1874)).

122. P. 55.

123. *Id.*

124. *Id.*

historian's artifact and not an historical phenomenon. Late-Victorian lawyers and judges never learned its tenets in the static and systematic form they take in critical legal histories. No single mind produced the cultural universe in which these figures moved; no coherent, neatly-organized system of thought lay in wait until the moment it could leap undisturbed into their minds.¹²⁵ Yet once one sets out to investigate where late-Victorian jurists found their ideas and why they thought them useful, one quickly leaves behind the sweeping prospect structuralism affords and descends into a jungle of contingency and detail.

A jungle, but not a chaos. Regularities and generalities await the historian, but only if she is willing to think of late-Victorian legal thought in less consensual and structured terms than does Horwitz. For Horwitz' account of the late-nineteenth century is consensual: classical legal thought enjoys the seemingly universal allegiance of the Victorian bench and bar.¹²⁶ We would have a more dynamic understanding of classical legal thought if we investigated the breadth of support for its tenets rather than assumed its omnipresence. The result of our investigations might not upset *Crisis*' premise that classical jurisprudence obtained a hegemony over its rivals, any more than R. Kent Newmyer's remarkable essay made the "New England legal culture" of Joseph Story and the Harvard Law School appear any less influential during the antebellum period.¹²⁷ The advantages of viewing late-Victorian legal thought as the dynamic project of jurists from a particular class, region, and ethnicity are important nonetheless.¹²⁸

Consider the example of Daniel Davenport, a lawyer born to well-to-do parents in small-town Connecticut in 1852, educated at Yale College between 1869 and 1873, active in Democratic Party politics from before Grover Cleveland's first presidency down to the triumph of the Silver Democrats in 1896, and lawyer to private individuals in their personal and commercial affairs until the turn of the twentieth century. In 1902 he gave up his regular practice to assume the leadership of the American Anti-Boycott Association (AABA), a group formed by proprietary capitalists to bring test cases against organized labor. A Horwitz-inspired historian who stumbled upon Davenport's speeches for the AABA could easily mine them to show how the law of industrial disputes instantiated the structure of classical legal thought. When those speeches are

125. For historians' growing doubts about structuralism in the historiography of the "republican ideology," see James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987); see also RODGERS, *supra* note 14.

126. This is analogous to Horwitz' account of eighteenth-century jurisprudence in *Transformation*, which even a friendly reviewer felt he presented in overly consensual terms. Holt, *supra* note 12, at 704-07.

127. R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, 74 J. AM. HIST. 814 (1987); see also DANIEL W. HOWE, *Victorian Culture in America*, in VICTORIAN AMERICA 3, 6 (1976).

128. One advantage of this approach is that it invites inquiry into how legal thought varied across regions. Harry Scheiber faulted *Transformation* for not taking regional differences into account. Harry N. Scheiber, *Back to "The Legal Mind"? Doctrinal Analysis and the History of Law*, 5 REVS. AM. HIST. 458, 462 (1977) (book review). The same criticism holds for *Crisis*.

placed in biographical context, however, one can account for much content that is ignored by or rests uneasily within structuralist histories. One can also develop accounts of causal change that are more convincing and that better relate our legal past to other branches of American history.

In a forthcoming book, I have tried to do this by putting Davenport's legal thought in the context of developments in gender, politics and industry at the turn of the twentieth century. If Davenport was representative of the college-educated lawyers who dominated the bar associations and law schools of the industrial Northeast and Midwest, his example calls for significant revisions of the critical history of late-Victorian legal thought. What Davenport encountered as he prepared for the bar was nothing so coherent as a structure. In his preparatory academy and at Yale he read the classics of civic humanism, discovering in them the ideas we now know of as the "republican ideology."¹²⁹ Under the guidance of William Graham Sumner, Davenport also read works in the liberal tradition, such as textbooks on classical economics and Francis Lieber's *On Civil Liberty* (1856). He learned of the natural rights tradition through his avid interest in the revolutionary era. He also encountered, but apparently failed to appreciate, the historicist learning his teachers had either brought back from their studies in Germany, discovered in Lieber's book, or found in Herbert Spencer's sociology. Finally, Davenport was still taught the rudiments of common sense moral philosophy, in his case from Yale President Noah Porter. Believing with Porter that God had endowed all human beings with the same capacity for knowing right and wrong, Davenport did not hesitate to measure human conduct against universal and immutable standards, to judge public officials less by the consequences of their actions than the morality of their intentions, and to treat social ills as the product of moral shortcomings and human sinfulness.¹³⁰

If this or something like it was the diverse and potentially conflicting cultural inheritance that late-Victorians brought to the law, then some of the anomalies left unexplained by Horwitz can be explained. Take, for example, the unabashed moralism of Wharton's discussion of causation in his 1873 treatise on negligence. Horwitz recognizes this as a problem, given his premise that classical jurists distinguished sharply between objective law and subjective politics. If politics could not produce determinate legal rules, then why in the world did Wharton think morality could? Horwitz tells us that by the end of the century jurists would downplay the "moral element in causation," thereby revealing "their own skepticism about the objectivity of moral categories." He does not convincingly

129. See Daniel W. Howe, *Classical Education and Political Culture in Nineteenth-Century America*, 5 INTELL. HIST. GROUP NEWSL. (Intell. Hist. Group, New York, N.Y.), Spring 1983, at 9.

130. See Daniel R. Ernst, Davenport (June 25, 1992) (unpublished manuscript, on file with author). The greater attention to formal education that I advocate here is similar to the approach employed in HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937* (1991), although I would not confine myself to highbrow economic thought and would admit to more contingency and diversity.

explain why, well into the twentieth century, James Barr Ames—a classical jurist if ever there was one—continued to believe that law should follow moral precepts.¹³¹

Once we look for the influence of moral philosophy, however, we can account for the certainty of Wharton and Ames, as well as judges like Stephen J. Field.¹³² We can understand that a system of morality grounded in Protestant Christianity was at least as important a source of their belief in the justice of a priori rules as the notion that legal outcomes could (in Holmes' words) "be worked out like mathematics from some general axioms of conduct." As Holmes' *The Path of the Law* suggests, the "confusion between morality and law" was the more widespread error, at least among Holmes' brethren on the Supreme Judicial Court. "[T]he notion that the only force at work in the development of the law is logic" was merely "the natural error of the schools,"¹³³ notably the Harvard Law School of Christopher Columbus Langdell.

Another unexplained anomaly in *Crisis* is the coexistence in Victorian thought of natural rights and historicist jurisprudence. At times Horwitz states without qualification that classical jurists considered rights "natural" and "pre-political."¹³⁴ Yet his chapter on Holmes acknowledges that Victorian legal writers "as distinguished as Sir Henry Maine and as pedestrian as James Coolidge Carter deified custom" and deployed it "as a conservative intellectual construct . . . to neutralize or delegitimize legislative authority and to defend the slow process of common law decision making under the guidance of judges."¹³⁵ Since Horwitz first gave the chapter as the Rosenthal Lectures at the Northwestern University Law School in 1981, a flurry of articles have demonstrated the influence of historicist thought on such important late nineteenth-century treatise writers as Christopher Tiedeman, Thomas Cooley, and John Norton Pomeroy.¹³⁶ Read with Dorothy Ross' landmark history of

131. See James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908). Horwitz attempts an answer by discovering "a return to an individualistic morality" in the early twentieth century and argues that Ames "revived a moralistic attack upon strict liability." Pp. 125-26. He offers no authority for the proposition that orthodox legal thought in general or Ames in particular ever categorically rejected the moral underpinnings of jurisprudence. Randall Bridwell accused Horwitz of inventing about-faces to explain the course of antebellum commercial law in *Transformation*. Bridwell, *supra* note 53, at 493 n.121. I regard the "revival" of moralistic jurisprudence as another such invention.

132. RALPH H. GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT: AN INTELLECTUAL HISTORY SINCE 1815*, at 216-27 (1940) (describing the philosophy of Judge Field).

133. OLIVER WENDELL HOLMES, JR., *The Path of the Law* (1897), in *COLLECTED LEGAL PAPERS* 167, 180 (1920) [hereinafter HOLMES, *COLLECTED LEGAL PAPERS*]. Thus, Horwitz' claim that, above all, "late-nineteenth-century orthodox legal thinkers" tried to "represent legal reasoning as fundamentally different from political or moral reasoning" needs qualification. Pp. 198-99. Both middlebrow jurists and highbrow legal scientists agreed that legal reasoning was fundamentally different from partisan politics. Many judges and some legal academics would deny that legal and moral reasoning was "fundamentally different." Pp. 198-99.

134. P. 155.

135. P. 121.

136. RODGERS, *supra* note 14, at 152-55; Louise A. Halper, *Christopher G. Tiedeman, "Laissez-Faire Constitutionalism" and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1363-65 (1990); William P. LaPiana, *The Legal Culture of the Formative Period in Sherman Act Juris-*

American social science and other works,¹³⁷ these articles suggest that historicist thought sprang from more diverse and diffuse sources than Darwin's *Origin of the Species* or Herbert Spencer's *Social Statics*.

The recent studies leave many questions unclear. We do not know how many Victorian lawyers and judges joined the academicians in sensing a conflict between a Lockean view of rights originating in a pre-political state of nature and a historicist understanding of rights as "created for the individual by laws and institutions."¹³⁸ We do not know how many believed, with Noah Porter, that the state could defend not only "the so-called natural rights of life, liberty, and property" but also "the traditions of the past, the habits of the present, and, above all . . . the intelligence, the self-reliance, and the moral worth of the people."¹³⁹ We do not understand what circumstances led some late-Victorians—notably Supreme Court Justices Stephen Field, David Brewer, and Rufus Peckham—to prefer natural rights arguments and others to prefer an historicist jurisprudence.

Finally, we have no good idea what difference the two jurisprudential approaches made in concrete cases. Some evidence suggests that historicist jurists were more tolerant of new claims of authority for the state. Cooley, for example, could easily bring himself to serve as the first chairman of the Interstate Commerce Commission, which Brewer considered an abomination.¹⁴⁰ The historicist Holmes considered eugenics one of the demands the state could legitimately make on its citizens.¹⁴¹ In contrast, Daniel Davenport, a believer in natural rights, opposed compulsory sterilization of the criminally insane.¹⁴² Yet even historicist thinkers could oppose novel uses of state power because they believed the laws of history followed a certain, divine logic. This was true of Sumner. He saw the United States developing teleologically toward the "more

prudence, 35 N.Y.L. SCH. L. REV. 827 (1990); David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93 (1990); Stephan A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431. As early as 1967, Alan Jones objected to treating Cooley as a natural rights jurist, but Jones' work was overlooked by the historians of classical legal thought. Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 762-63 (1967).

137. DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 106, 112, 153-54 (1991); LOUISE L. STEVENSON, *SCHOLARLY MEANS TO EVANGELICAL ENDS: THE NEW HAVEN SCHOLARS AND THE TRANSFORMATION OF HIGHER LEARNING IN AMERICA, 1830-1890* (1986).

138. WILLIAM GRAHAM SUMNER, *WHAT SOCIAL CLASSES OWE TO EACH OTHER* 30 (New York, Harper & Bros. 1883).

139. NOAH PORTER, *THE ELEMENTS OF MORAL SCIENCE* 490-92 (New York, Charles Scribner's Sons 1885). Novack's recent work suggests that Porter's view enjoyed broad support. WILLIAM J. NOVACK, *INTELLECTUAL ORIGINS OF THE STATE POLICE POWER: THE COMMON LAW VISION OF A WELL-REGULATED SOCIETY* (Institute for Legal Studies, University of Wisconsin at Madison, Legal History Program Working Papers Series No. 2, 1989).

140. Jones, *supra* note 136, at 767-77; SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901*, at 128-29 (1956).

141. *Buck v. Bell*, 274 U.S. 200, 207 (1927); see also Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986).

142. Letter from Daniel Davenport to W. O. Burr (Dec. 6, 1909) (on file with Yale University Archives).

complete realization of a society of free men united by contract."¹⁴³ Any social practices incompatible with that ideal ran counter to the mainstream of historical development and were illegitimate.

Crisis does not help us much with these matters. Horwitz offers a shrewd and convincing assessment of the strategic value of historicism; for example, he calls custom "a Rorschach blot onto which conservative social thinkers could project their fantasies of a naturally harmonious society free from the twin dangers of anarchy and coercion, yet capable of organic change and growth."¹⁴⁴ But his premise that classical legal thought existed as a coherent structure keeps Horwitz from pursuing the diversity of Victorian jurisprudence. A narrative historian might think that exploring this diversity could turn up crucial context for the drawing of sensible analogies from the past. Horwitz apparently has concluded that more context would simply obscure the "essential structure" of thought and hamper the debunking force of his history.¹⁴⁵

One aspect of *Crisis*' treatment of Victorian jurisprudence makes matters worse: Horwitz' somewhat vague and schematic explanation of the fall of classical legal thought. His basic strategy is to argue that sweeping economic or social development aggravated the internal contradictions of the structure until a triggering event (the *Lochner* decision, according to the Introduction) precipitated a sustained, political, and progressive critique of the old order.¹⁴⁶ In *Crisis*, Horwitz advances a cataclysmic model of legal change. Like geologic epochs, his legal eras begin and end in catastrophic events.

In *Crisis*, Horwitz identifies several different aggravating socioeconomic forces. One candidate is the rise of the "business" or "large national" corporation.¹⁴⁷ "The large national corporation not only drew into question the orthodox separation of public and private law," he writes at one point, "but it also challenged the notion that modern property could continue to be represented as a pre-political right and not as a creature of social choice."¹⁴⁸ Another is "the emergence of organizational society," a related but more general development suggested in the work of Robert Wiebe, Ellis Hawley and others.¹⁴⁹ Finally, and most emphatically, Horwitz argues in his chapter on

143. SUMNER, *supra* note 138, at 24; see FINE, *supra* note 140, at 84.

144. P. 123.

145. This is how I account for Horwitz' complaint that "the ratio of interesting theoretical generality to undigested historical detail is too small" in E. P. Thompson's *Whigs and Hunters*. Horwitz, *supra* note 58, at 564.

146. P. 3.

147. Pp. 145, 167. The distinction may make a difference. The "business corporation" that in Chapter Five generated valuable but "non-physical" property, flushing into the open "all of the contradictions that had been barely suppressed in traditional doctrine," has been in existence since the antebellum period. P. 151. The large, nationally organized corporation with significant market power, which Horwitz seems more frequently to have in mind, only became a regular feature of the industrial landscape after 1895.

148. P. 167.

149. Pp. 5, 66. The "organizational synthesis" posits that the example of the large business corporation encouraged a broad section of the American populace to pursue social order and stability through bureaucratic structures and administrative expertise. See ELLIS W. HAWLEY, *THE GREAT WAR AND THE SEARCH FOR*

Holmes that the "radical social and economic conflicts of the 1890's" permanently changed the course of American legal thought in two ways. First, the appearance of great social unrest belied the existence of "widely shared customary norms" (thus destroying a premise of historicist jurisprudence).¹⁵⁰ Second, the "emergence of fundamentally new problems" such as economic concentration, labor strife, and "the shift from landed to intangible property" highlighted "the internal inconsistency of natural rights conceptions."¹⁵¹ The "widespread experience of Americans during the 1890s that the country was falling apart," Horwitz concludes, "is perhaps the most important key to understanding the shift in thought not only in law but in virtually every field of intellectual inquiry."¹⁵²

None of this is unambiguously wrong. It might even be sufficient if experience translated itself into thought uniformly and without the mediation of culture and circumstance. The difficulty is that far too many lawyers and judges ignored these great social events or found that they could account for them without discarding their basic assumptions about law and life. Horwitz rightly notes the appearance in the 1890's of the belief that society was to some extent amenable to self-conscious attempts at social control. To the extent that historicist jurisprudence assumed society developed organically, in response to natural or divine laws, it lost adherents in the first decades of the twentieth century.¹⁵³ What survived into the 1920's and beyond was the belief that social processes had a life of their own and that they sometimes produced widely-shared norms. If the mores of early twentieth-century social science lost the *gemeinschaftlich* quality of their counterparts in German historicism, social process and social consensus continued to function as mediating forces between natural rights individualism and democratic statism long after the triumph of the corporation, the advent of organizational society, and the social upheavals of the 1890's.¹⁵⁴

Rather than trace the persistence of consensualism in American legal thought, Horwitz retains conflict as his main engine of historical change. Horwitz forsakes Hartz and joins Charles Beard in seeing the progressive era as a period of fundamental political struggle between progressive legal thinkers and anti-corporate "old conservatives" and pro-corporate "new conservatives." Horwitz'

A MODERN ORDER 6-9 (1979); RICHARD L. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* 313-15 (1986); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967); Daniel T. Rodgers, *In Search of Progressivism*, 10 *REVS. AM. HIST.* 113, 119-21 (1982).

150. P. 138.

151. Pp. 138-39.

152. P. 142.

153. Note, however, that James Coolidge Carter wrote Horwitz' exemplar of customary jurisprudence in the twentieth century. JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN, GROWTH AND FUNCTION: BEING A COURSE OF LECTURES PREPARED FOR DELIVERY BEFORE THE LAW SCHOOL OF HARVARD UNIVERSITY* (1907).

154. See Ernst, *supra* note 32.

use of the Beardian terms "conservative" and "progressive" succeeds in underlining the political content of legal thought, but in light of later works of cultural and political history the terms seem terribly blunt and somewhat idiosyncratic. For example, Henry May's interpretation of the prewar era as the end of American innocence is called by Horwitz the last days of a "Victorian world view" before the skepticism and doubt of the 1920's.¹⁵⁵ Yet he never shows us what was "conservative" or "progressive" in the thought of, say, James Barr Ames or Roscoe Pound; what if anything they shared with Lyman Abbott, a leader of the Social Gospel movement; or where either law professor differed from a younger figure like Walter Lippmann. Horwitz' abstract approach raises the specter of legal historians miring themselves in a parochial debate over the content of old conservative, new conservative, progressive, and realist legal thought—a repeat, if you will, of the quarrels over instrumentalism and formalism Horwitz helped provoke with his first article.¹⁵⁶

Horwitz, of course, breaks no historical conventions in choosing to privilege conflict over consensus. Historical eras are not innately conflictual or consensual. They can be characterized as either, depending upon where the historian looks. As we shall see, Horwitz' attempts to connect legal realism to political conflict produce enormously valuable insights. One drawback of Horwitz' choice, however, is that he leaves to other historians the work of sorting out the common and the contested elements in early twentieth-century legal thought. Only when someone turns to the period without Horwitz' limiting assumptions, with more interest in studying thinkers in their social and political contexts, and with a greater desire to relate developments in legal thought to the history of social thought and social science, will we understand how a progressive academician like Pound and an outspoken conservative like Wigmore could differ so sharply on political matters and still reject Langdell's legal science as hopelessly unrealistic.

B. *Holmes Misplaced*

It happens that Horwitz himself provides an excellent argument for jettisoning the labels "conservative" and "progressive" in his extraordinary chapter on Oliver Wendell Holmes, Jr.¹⁵⁷ By pointing out the similarities in

155. P. 170; see HENRY F. MAY, *The Rebellion of the Intellectuals, 1912-1917*, in IDEAS, FAITHS, AND FEELINGS: ESSAYS ON AMERICAN INTELLECTUAL AND RELIGIOUS HISTORY 1952-1982, at 3, 11 (1983); HENRY F. MAY, *THE END OF AMERICAN INNOCENCE: A STUDY OF THE FIRST YEARS OF OUR OWN TIME, 1912-1917* (1959).

156. See William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974); Lynda Sharp Paine, *Instrumentalism v. Formalism: Dissolving the Dichotomy*, 1978 WIS. L. REV. 997; Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1.

157. Pp. 125-42.

Holmes' thought to the customary jurisprudence of the Wall Street lawyer James Coolidge Carter,¹⁵⁸ Horwitz shows that the longstanding debate about whether Holmes was a "liberal" or a "conservative" was beside the point.¹⁵⁹ He was neither, as those terms have come to be understood over the course of the twentieth century, but something quite different: an elite believer in historicist jurisprudence. This insight, combined with Horwitz' shrewd sense of the politics of legal thought and his years of teaching torts at Harvard, has produced a brilliant analysis of Holmes' *The Common Law*.¹⁶⁰

Horwitz offers this account of Holmes' great book as the first step in a larger interpretation of the jurist's thought: "I believe it has never been argued that in reality there is an early and a late Holmes," Horwitz writes, "and that his own intellectual journey from *The Common Law* in 1881 to 'The Path of the Law' in 1897 parallels a major change in American social, economic, and legal thought and in the structures of legitimacy in the two periods."¹⁶¹ In Horwitz' interpretation, *The Common Law* represents the "early" Holmes, the Holmes for whom consensual customs still mediated between law as "pre-political natural right" and law as "the arbitrary command of the sovereign."¹⁶² The "late" Holmes makes his appearance after 1890 in the essays *Privilege, Malice, and Intent*¹⁶³ (1894), *The Path of the Law*¹⁶⁴ (1897), and *Law in Science and Science in Law*¹⁶⁵ (1899), and in his famous dissents in the labor cases *Vegelahn v. Guntner*¹⁶⁶ and *Plant v. Woods*.¹⁶⁷

In Horwitz' telling, the dramatic changes in Holmes' thought can be seen in the jurist's loss of faith both in custom as a standard for judging and in the existence of "external standards" in the law of torts. Holmes came to doubt his earlier positions on these two issues as he reflected on the alarming rise of industrial concentration and industrial strife in the mid-1890's.¹⁶⁸ Well before *Lochner* prompted a full-blown assault on classical legal thought, Holmes could no longer ignore the contradictions inherent in that structure. Holmes' response to his predicament was twofold. First, he dropped the belief in the existence of stable, certain, and consensual customs and urged judges to acknowledge the existence of interest groups and to engage in "direct policy analysis."¹⁶⁹

158. P. 123.

159. See G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971).

160. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 123-25 (Boston, Little, Brown & Co. 1881).

161. P. 110.

162. P. 116.

163. HOLMES, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 117.

164. See HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 167.

165. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 210.

166. 44 N.E. 1077, 1079 (1896) (Holmes, J., dissenting).

167. 57 N.E. 1011, 1015 (1900) (Holmes, C.J., dissenting).

168. Pp. 130-31.

169. P. 127.

In so doing, Horwitz argues, Holmes "pushed American legal thought into the twentieth century."¹⁷⁰

At the same time, according to Horwitz, Holmes made "a complete about-face"¹⁷¹ in his thinking about the standards judges should apply in resolving cases of intentional torts, such as the harm labor unions inflicted upon employers in their strikes and boycotts. In *The Common Law* Holmes had argued that judges should consult objective, external, customary norms rather than the moral blameworthiness of the defendant's conduct. In *Privilege, Malice, and Intent*, as well as in *Vegeahn*, and *Plant*, Holmes returned to "the traditional common law subjective tests of 'malice' and 'intent'" he had attacked in his earlier work.¹⁷² In Horwitz' view, Holmes' insistence that malice was material to both the prima facie case in tort and to the defense of privilege marked "a major retreat from the idea of the external objective standard that Holmes had always regarded as his major contribution to legal theory."¹⁷³

This account of Holmes' renunciation of customary jurisprudence and external standards in tort misdescribes Holmes' historicism and overlooks evidence that the jurist remained a historicist throughout his career. Horwitz also misstates the role Holmes envisioned for social science in legal education, which was much less prescriptive than Horwitz suggests. Holmes' thinking about external standards did change after the start of his judicial career, but the shift was nothing like the dramatic *volte-face* Horwitz sees. It commenced earlier than Horwitz allows and is evident in cases having nothing to do with labor strife. Holmes never treated the subjective intent of the defendant as an element in the prima facie case for intentional torts, although as a judge he treated it as one factor to be considered in determining whether the defendant's conduct was justified. Holmes' own characterization of this position as a "supplement"¹⁷⁴ to his chapters on torts in *The Common Law* seems more accurate than Horwitz' description of a "complete about-face."¹⁷⁵

Holmes wrote the essays of the 1890's not to abandon the historical jurisprudence of his early legal scholarship but to correct his brethren on the Anglo-American bench when they attempted to evade their responsibility as historical jurists by invoking an abstract proposition they claimed to have derived from—of all things—Holmes' own work. The dictum that malicious intent could never make a lawful act unlawful was, to the Holmes of the 1890's, just as wrongheaded as the view he attacked in *The Common Law*—that moral culpability was the sole test of liability. Both approaches were poor substitutes

170. P. 142.

171. P. 133.

172. P. 135.

173. P. 133.

174. Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (June 26, 1894), in 1 HOLMES-POLLOCK LETTERS 54 (Mark D. Howe ed., 1946).

175. P. 133.

for the proper inquiry: determining which litigant represented the preponderant social force in the great historical struggles of the day. If this inquiry sometimes led Holmes to a posture of "judicial self-restraint,"¹⁷⁶ the philosophy behind it was very different from that behind the legal process school's deference to the bargaining of interest groups.

The difference between Holmes' historicism and the judicial restraint of legal process scholars is worth noting, if only because of the continuing importance of many decisions Holmes wrote while on the Supreme Court. This seems particularly true in the field of regulatory takings, where as recently as last term Justice Scalia cited Holmes' opinion in *Pennsylvania Coal Company v. Mahon*¹⁷⁷ in support of aggressive judicial review of land-use regulation.¹⁷⁸ Horwitz' willingness to attribute to Holmes the liberal pluralism of mid-century jurisprudence suggests that Justice Scalia was right to treat *Mahon* as consistent with the work of the legal process theorists who taught him at the Harvard Law School in the late 1950's.¹⁷⁹ In fact, it was the product of a judge who thought he could strike down legislation when, in his independent estimation, it ran counter to the forces of history.

1. *Holmes' Historicism*

Horwitz commences his chapter on Holmes by characterizing the jurist's predicament in *The Common Law* as "a two-front war." On one front, Holmes "challenged orthodox legal theory for its moralism and individualism, qualities that . . . unrealistically ignored the actual regulatory functions of law."¹⁸⁰ On the other, Holmes opposed unbridled, Austinian legislative supremacy, because this would produce "a redistribution of wealth in the interest of the general welfare."¹⁸¹ Horwitz then turns to Carter and convincingly shows how custom addressed both concerns in his work. "[C]ustom served both to defeat the democratic impulse for legislative supremacy," Horwitz writes, "and, at the same time, to avoid the potential anarchy of a common law based solely on individual natural rights."¹⁸² *The Common Law*, Horwitz writes, was a similar attempt to find "a middle position through the mediating notion of custom."¹⁸³ In support of this claim Horwitz cites passages that certainly suggest Holmes believed the law to be the product of a natural evolutionary process rather than a system of morality or the command of an all-powerful state. Horwitz offers

176. P. 142.

177. 260 U.S. 393 (1922).

178. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2892 (1992).

179. See Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950's*, 12 CARDOZO L. REV. 1799, 1799-1801 (1991).

180. Pp. 112-13.

181. P. 113.

182. P. 121.

183. P. 123.

no quotation, however, in which Holmes describes that process as Carter did, in consensual terms.

Having established to his satisfaction that the early Holmes believed law to be grounded in widely-observed custom, Horwitz turns to some of the most familiar passages in the Holmes *oeuvre* to argue for a dramatic change in the judge's thought. They fall into two categories: (1) acknowledgements of social conflict; and (2) calls for lawyers to study not only history but also statistics and economics.

Horwitz' first example of Holmes' recognition of social conflict is the famous rebuke in *The Path of the Law* to lawyers who believe that questions such as whether to imply a contractual term could be settled through a process of logical deduction. "Such matters are really battle grounds where the means do not exist for determinations that shall be good for all time," Holmes wrote, "and where the decision can do no more than embody the preference of a given body in a given time."¹⁸⁴ Horwitz comments: "For Holmes the customary theory of law had collapsed. Law is the product of social struggle. Nothing stands between the state and the individual."¹⁸⁵ Several pages later Horwitz quotes Holmes' remark in *Privilege, Malice, and Intent* that the issue in labor cases "really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants," a question which judges with "different economic sympathies" might well decide differently.¹⁸⁶ Horwitz observes: "Here, for the first time, Holmes suggests that there may be no neutral way of deciding between the claims of labor and of capital."¹⁸⁷ Finally, Horwitz repeats Holmes' position in his *Vegeahn* dissent that the harm workers inflict upon employers in simple, "mine-run" labor disputes was privileged for the same reason as loss incurred in business competition. According to Holmes, both were part of the "free struggle for life."¹⁸⁸

Horwitz also relies on Holmes' comments on legal education. The Holmes of *The Common Law*, Horwitz points out, was convinced that a historical survey of the development of various legal doctrines would reveal fundamental legal principles, yet in *The Path of the Law* Holmes accorded history a critical place only in "the rational study of law." "It is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of . . . rules." Once historical analysis drew the jurist's attention to the existence of a particular rule, he needed to bring other skills to bear to reach the proper conclusion. "For the rational study of the law the black-letter man may be the man of the present," Holmes wrote, "but the man of the future is the man of

184. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 181.

185. P. 130.

186. Holmes, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 128.

187. P. 132.

188. *Vegeahn v. Guntner*, 44 N.E. 1077, 1080-81 (1896) (Holmes, J. dissenting).

statistics and the master of economics."¹⁸⁹ With this comment, Horwitz argues, "the source of experience has shifted from custom to policy" in Holmes' thought.¹⁹⁰ Henceforth the only ground of judicial decisionmaking he would consider was "direct policy analysis."¹⁹¹

The Path of the Law, in Horwitz' estimation, "marks the first clear articulation of legal positivism—that is, an insistence on a sharp distinction between law and morals—by any American legal thinker."¹⁹² Convinced that "law is merely politics," forswearing his "search for immanent rationality in customary law," Holmes took up "the mantle of judicial self-restraint for which he became famous eight years later in *Lochner v. New York*."¹⁹³ Once "interest group conflict had replaced historical evolution as the key to understanding the law," it was for the legislature to weigh and measure the various competing interests.¹⁹⁴ Horwitz thus paints the late Holmes much as a legal-process theorist would, as a liberal pluralist who deferred to the political bargains worked out in legislative settings.¹⁹⁵ Horwitz completes this portrait of Holmes by citing Arthur Bentley's *Process of Government* (1908), the work commonly considered the first full-length study of pluralism in American political thought.¹⁹⁶

One problem with Horwitz' account is that he equates Carter's consensual, custom-centered jurisprudence with Holmes' more conflictual and nonteleological historicism when he should have treated the two as species of the larger category of late-Victorian historical jurisprudence. Both men believed that natural historical processes mediated between natural rights and legislative absolutism, but Carter understood that process to be the consensual production of custom, while Holmes understood it as a fierce, Darwinian struggle. Holmes conceived of social conflict not as a lesson of the 1890's but as a conviction dating from the start of his professional career. This thrice-wounded veteran of the Civil War never believed that society could fairly be understood in consensual terms.

Most historicist legal thinkers, as Stephen Siegel notes, believed that "societies, social norms and institutions evolve according to moral ordering principles that are discoverable through historical studies."¹⁹⁷ Without this premise of an immanent morality in history, evolutionary models of social development would have accorded too small a role for divine will to make much headway among the Protestant elite. They would also have provided Victorian

189. HOLMES, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 187.

190. P. 141.

191. P. 127.

192. P. 140. This claim is in some tension with Horwitz' earlier argument that classical jurists sought to separate law and morals.

193. P. 142.

194. *Id.*

195. Cf. HARRY H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 24-25 (1968) (noting Holmes' belief that courts should privilege labor activities in pursuit of self-interest).

196. P. 142 n.242.

197. Siegel, *supra* note 136, at 1438.

thinkers with no basis for condemning novel social practices, for any such practice could be justified as an adaptation to novel social circumstances. Herbert Spencer's writings would never have enjoyed the enthusiastic reception they received in the United States had Spencer not declared his laws of social evolution to be the will of God.¹⁹⁸

In contrast, as Siegel suggests, Holmes rejected the divine teleology which most of his fellow Victorian jurists needed to square evolutionary thought with Protestant theology.¹⁹⁹ Holmes' history was a blind, amoral process, much like war. He studied the legal past not to detect the hand of God, whose existence he doubted, but as a naturalist, with "a harshness in his judgments upon men of good will, a contempt for humanitarianism as an ingredient of public policy, and an expressed preference for the predatory type of individual that his friends usually managed to overlook with embarrassed silence."²⁰⁰ Thus, while Holmes admired Spencer, he thought the Englishman's insistence upon a divine first principle was "a singular anomaly" in a theory of "the natural development of institutions by successive adaptations to the environment."²⁰¹

As a judge, Holmes considered his sole job to be determining whether one side or the other represented the dominant social force of the day. He once proposed as his epitaph, "Here lies the supple tool of power."²⁰² When Holmes detected no deep-rooted controversy on a particular issue he spoke of that social force in consensual terms. As early as 1873, however, Holmes clearly acknowledged that judges sometimes confronted the task of determining whether legislation actually represented the dominant of two or more conflicting social tendencies.

This discussion of judging amidst social conflict came in a comment on proposals to revise the English law of conspiracy following a successful prosecution of London "gas stokers" in 1872.²⁰³ American judges had long condemned legislation that favored one social group at the expense of another as a violation of the natural and equal rights of citizens.²⁰⁴ Holmes felt that this "class legislation" doctrine was premised on a false assumption, "the solidarity of the interests of society."²⁰⁵ All one could require was "that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and

198. See FINE, *supra* note 140, at 32-46.

199. Siegel, *supra* note 136, at 1546-47.

200. STOW PERSONS, AMERICAN MINDS: A HISTORY OF IDEAS 285 (1958).

201. Oliver Wendell Holmes, Jr., *Herbert Spencer: Legislation and Empiricism*, in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 106-07 (Harry C. Shriver ed., 1936) [hereinafter *Legislation and Empiricism*].

202. MERLO J. PUSEY, 1 CHARLES EVANS HUGHES 287 (1951) (quoting Charles Evans Hughes, Biographical Notes).

203. See MARK D. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, at 42-47 (1963).

204. See Benedict, *supra* note 72, at 327-31.

205. Holmes, *Legislation and Empiricism*, *supra* note 201, at 107-08.

that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum."²⁰⁶ Legislation would inevitably serve the "more powerful interests" which triumphed over their unsuccessful competitors. "[L]ike every other device of man or beast," Holmes concluded, "[legislation] must tend in the long run to aid the survival of the fittest."²⁰⁷

How should judges do their job given the fact of social conflict? In common law cases, courts should give effect to the greater of the historical forces implicated in the dispute. Thus, in *Law in Science* Holmes explained that doubtful cases presented judges with "a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way."²⁰⁸ Judges may defer to precedent in such cases "because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before" them. Where the precedent is doubtful, "judges are called on to exercise the sovereign prerogative of choice."²⁰⁹

Here, and in *Vegeahn*,²¹⁰ Holmes was doing nothing so banal as urging deference to the bargains of interest groups. Rather, he was calling upon judges to defer to history, to "the organization of the world, now going on so fast," a tendency plain from "the most superficial reading of industrial history," one which would be "futile to set our faces against."²¹¹ In the field of labor disputes, this fatalism generally implied that courts should refrain from intervening in nonviolent labor disputes, although Holmes did believe judges could act to defend some overriding social interest. "[W]hen the power of either capital or labor is exerted in such a way as to attack the life of the community," Holmes once wrote, "those who seek their private interest at such cost are public enemies and should be dealt with as such."²¹²

In passing on the constitutionality of a statute, judges normally could assume that the legislation was an authentic expression of a dominant social force, but it was always open to them to resolve this "empirical" question against the legislature. "I always say that I regard legislation like buying a ticket to the theatre," he wrote Franklin Ford in 1911. "If you're sure you want to go to the

206. *Id.*

207. *Id.*

208. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 239.

209. *Id.*

210. *Vegeahn v. Guntner*, 44 N.E. 1077 (1896) (Holmes, J., dissenting).

211. *Id.* at 1081.

212. Holmes made this remark in a draft opinion in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917). Writing Sir Frederick Pollock two years later in the midst of a postwar strike wave, he regretted he never published the sentiment, although he also thought steel magnate Elbert Gary should recognize the unions in his industry. Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (Oct. 26, 1919) in 2 HOLMES-POLLOCK LETTERS, *supra* note 174, at 28.

show and have money to pay for it there is an end of the matter. I may think you foolish to want to go, but that has nothing to do with my duty."²¹³

To see what Holmes meant by a judge determining whether a legislative majority in fact "had the money to pay for" a statute, consider his decisions under the Takings Clause while on the Supreme Court. Decided long after Horwitz' "late Holmes" should have taken the stage, the cases show the Justice deferring to custom, traditions, and history. In *Laurel Hill Cemetery v. San Francisco*,²¹⁴ for example, Holmes upheld a statute forbidding burials within the city and county of San Francisco. How far a legislature could go in restricting the use of property consistent with the Constitution was not, Holmes observed, "a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic." Long before "the making of constitutions, regulation of burial and prohibition of it in certain spots" were common in the Western world. Holmes concluded, "The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own State uphold."²¹⁵

Holmes made a similar argument in *Jackman v. Rosenbaum Co.*²¹⁶ in upholding a Pennsylvania statute that empowered one landowner to place half of a party wall on the land of a neighbor. Holmes noted that the statute was based on a "custom" that dated from the first settlement of the state and had prevailed ever since.²¹⁷ "If a thing has been practised for two hundred years by common consent," Holmes wrote, "it will need a strong case for the Fourteenth Amendment to affect it."²¹⁸ Were the statute an innovation, he suggested, he might have found it to have effected a taking of the neighbor's land. "But if, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified."²¹⁹

In contrast, Holmes struck down a statute in *Pennsylvania Coal Co. v. Mahon*²²⁰ that transferred a well-recognized property interest (the right of support) from the owners of mineral rights and to the holder of the surface estate. Holmes decided that the statute in question was an innovation. Was it nonetheless valid as a defense of an overriding common interest, such as the public safety that justifies tearing down a house to stop the spread of fire? That, Holmes

213. Letter from Oliver Wendell Holmes, Jr., to Franklin Ford (Apr. 6, 1911), *in id.* at 44 n. 38. Holmes claimed that his thinking on the subject had not changed since his days as an editor of the *American Law Review*. Letter from Oliver Wendell Holmes, Jr., to Felix Frankfurter (Mar. 24, 1914), *in id.*, at 44 n.38.

214. 216 U.S. 358, 366 (1910).

215. *Id.*

216. 260 U.S. 22 (1922).

217. *Id.* at 31.

218. *Id.*

219. *Id.*

220. 260 U.S. 393 (1922).

wrote, was a "question of degree—and therefore cannot be disposed of by general propositions."²²¹ Horwitz argued that similar language in *Privilege, Malice, and Intent* signalled Holmes' loss of faith in the possibility of objective or external standards.²²² In *Mahon*, however, Holmes was quite confident of his ability to divine in tradition, custom, and existing social practices the line beyond which "regulation goes too far" and becomes a taking.²²³ A year earlier, after upholding a rent control statute in *Block v. Hirsch*,²²⁴ Holmes scoffed at Justice McKenna, who had filed a vigorous dissent: "[H]e not infrequently recurs to the tyro's question: Where are you going to draw the line?—as if all life were not the marking of grades between black and white."²²⁵ No tyro, Holmes decided that the rent control statute in *Block* "went to the verge of the law" but fell short.²²⁶ The act in *Mahon*, he concluded, went too far.²²⁷

With the benefit of hindsight, of course, one can glimpse the origins of interest-group pluralism in Holmes' writings, including those from before the 1890's. But turning Holmes into a pluralist runs counter to the mainstream of the history of American social science, which holds that pluralism did not succeed as a descriptive political model until the 1920's, and as a normative theory until mid-century.²²⁸ It also leaves the *Mahon* case a mystery. If Holmes was a pluralist, why did he not uphold the statute, as the pluralists Louis Brandeis, Felix Frankfurter, and Dean Acheson believed he should have?²²⁹ If we understand Holmes' opinion as belonging to an older jurisprudential tradition then perhaps *Mahon* would be less valuable than it is to today's opponents of land-use regulation, for whom it remains an important precedent.²³⁰ In sum, Horwitz' depiction of the late Holmes as a liberal pluralist is an anachronism. Horwitz would not have tricked himself into making it but for his assumption that the 1890's had immediate, cataclysmic consequences for American legal thought.

Horwitz' attempt to turn Holmes into a proponent of "direct policy analysis"²³¹ similarly rushes the jurist too quickly into modern times. As Dorothy Ross has shown, historicism was a transitional phase in American social thought. It rejected claims to the timelessness and divine origin of the social

221. *Id.* at 416.

222. P. 132.

223. *Mahon*, 260 U.S. at 415.

224. 256 U.S. 135 (1921).

225. Letter from Oliver Wendell Holmes, Jr., to Harold Laski (May 8, 1921), in 1 HOLMES-LASKI LETTERS 331-32 (Mark D. Howe ed., 1953).

226. *See Mahon*, 260 U.S. at 416.

227. *Id.*

228. RODGERS, *supra* note 14, at 176-211; ROSS, *supra* note 137, at 330-39; John Gunnell, *The Declination of the State* (1992) (unpublished manuscript, on file with author).

229. Brandeis blamed *Mahon* on Holmes' recent prostate operation. *See* Joseph F. Dimento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. LEGAL HIST. 396, 415-18 (1990).

230. *See, e.g., Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2892-93 (1992); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

231. P. 127.

prescriptions of moral philosophers without fully endorsing the ambitious, positivistic claims of twentieth-century social science. It helped reorient social thought from inquiries into human nature to studies of the physical world, but it did not endow humans with much power to change the course of history.²³² For most elite Victorians, social control amounted to (in Sumner's phrase) an "absurd effort to make the world over."²³³ In this respect, Holmes recognized Sumner as a kindred spirit. Both men counselled that social circumstance determined human affairs; neither held out much hope that humans could change the course of history.²³⁴

Holmes' discussion in the 1890's of the relative merits of history and economics in legal education illustrates this point. In general, his essays evidence no waning of interest in historical jurisprudence.²³⁵ In *The Path of the Law*, Holmes did award the legal future to "the man of statistics and the master of economics,"²³⁶ but this remark should be read with Holmes' elaboration two years later in *Law in Science*. Legal rules should only be recognized insofar as they help advance "a social end which the governing power of the community has made up its mind that it wants."²³⁷ History had a real if limited value in revealing the original purpose a legal rule addressed. Lawyers could then independently determine whether the original purpose was still important or, if not, whether the rule advanced some new purpose of equal social significance.²³⁸

The role Holmes proposes for social science in this passage is not the aggressive social engineering of Horwitz' "late" Holmes. To the Holmes of *Law in Science*, social science was valuable insofar as it helped judges with a descriptive task: discovering what social ends the governing power of the community desires. Without social science, the judges could rely only upon formulaic maxims or their own "often blind and unconscious" estimates of the relative strengths of conflicting social ends.²³⁹ What statistics and economics promised was *not* a basis for judges to impose their own desires upon society. Judges should not "undertake to renovate the law," Holmes insisted. "That is not their province."²⁴⁰ Rather, "the only way to solve the problem presented

232. ROSS, *supra* note 137, at 91-97.

233. William Graham Sumner, *The Absurd Effort to Make the World Over*, in 1 ESSAYS OF WILLIAM GRAHAM SUMNER 91 (Albert G. Keller and Maurice R. Davie eds., 1934).

234. PERSONS, *supra* note 200, at 268-69; see also Gary J. Aichele, *Self-Preference, Competition, and the Rule of Force: The Holmesian Legacy*, 1988 S. CT. HIST. SOC'Y Y.B. 11, 15-16 (collecting Holmes quotes).

235. On several occasions he traced the evolution of legal doctrines just as he did in *The Common Law*. HOLMES, *THE COMMON LAW*, *supra* note 160, at 183-84; HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 214-16.

236. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 187.

237. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 225.

238. *Id.*

239. *Id.* at 242.

240. *Id.* at 239.

is to weigh the reasons for the particular right claimed and those for the competing right . . . as well as one can, and to decide which set preponderates."²⁴¹ We may doubt the possibility of making this decision without permitting our own desires to alter the outcome. Holmes did not.

2. *Holmes and Malice*

One of Horwitz' great strengths as a legal historian has been his insistence on illustrating his "transformations" in American law with examples drawn from the workaday doctrines of lawyers and treatise writers, as well as formal and self-conscious works of jurisprudence. Torts, the field of private law he knows best, provides Horwitz with his most convincing examples.²⁴² Not surprisingly, then, Horwitz completes his portrait of Holmes as the prescient observer of the crisis of classical legal thought by drawing upon the jurist's writings on standards of liability in tort. This time, however, Horwitz' discussion is much less persuasive. His self-imposed burden of discovering a dramatic change in Holmes' thinking in the 1890's has led him to exaggerate the change in Holmes' theory of torts and to overlook an explanation for this shift that had little to do with the social unrest of the decade. This explanation was Holmes' changing attitude toward "continuous, logical, philosophic exposition"²⁴³ in legal analysis. Systematic argument was extremely important to the young scholar striving to produce a tour de force in *The Common Law*. It was much less important for the sitting judge, forced to make up his mind at his peril on "a living question."²⁴⁴

In his lectures on tort in *The Common Law*, Holmes was most concerned with the first of Horwitz' two fronts: the moralism and individualism of Kant, Rousseau, and the Massachusetts Bill of Rights, and of the middlebrow moralists of the Victorian bench.²⁴⁵ Holmes advanced his famous notion of "external standards" to make two different assaults on this position.²⁴⁶ First, he took aim at the moralists' claim that in deciding legal issues judges should consult some a priori system of morals grounded in the natural rights tradition. "[T]he law does still and always, in a certain sense, measure legal liability by moral

241. *Id.* at 242.

242. See, e.g., Horwitz' reading of Francis Wharton's views on objective causation, discussed *supra*, text accompanying notes 121-124.

243. Oliver Wendell Holmes, Jr., *Speech at a Dinner Given to Chief Justice Holmes By the Bar Association of Boston on March 7, 1900*, in OCCASIONAL SPEECHES 122, 123 (Mark D. Howe ed., 1962).

244. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 224; see William A. Lundquist, Comment, *Oliver Wendell Holmes and External Standards of Criminal and Tort Liability*, 28 BUFF. L. REV. 607, 623 (1979); Mark V. Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 978-79 (1977).

245. HOLMES, *THE COMMON LAW*, *supra* note 160, at 77-163.

246. I am indebted to Horwitz for the point that Holmes conflated these two meanings of "external standards" in *The Common Law*. P. 136.

standards . . . ,” Holmes acknowledged.²⁴⁷ Yet this moral standard was not some elaborate ethical system, such as Kant’s elaborate deductions from the impossible axiom that people must be treated as ends in themselves. Rather, the source of law was an “objective,” “external” standard, morality as “generally accepted,” as found in the “actual feelings and demands of the community, whether right or wrong.”²⁴⁸ Holmes would restate the point in *The Path of the Law*: “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.”²⁴⁹ But the morality of the community was “not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time.”²⁵⁰

Holmes also used the term “external standards” to attack the Victorian judges’ assumption that the moral blameworthiness of defendants was the ultimate reason why the law held them liable for tortious or contractual wrongs. As a rule, legal liability was only remotely connected to the moral condition of the defendant or his actual state of mind. “[T]he tendency of the law everywhere is to transcend moral and reach external standards” of liability.²⁵¹ Thus, Holmes argued that judges punished unintentional acts not because the actor was blameworthy, but because the actor had failed “to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know.”²⁵² Pushing his insight to the limit, Holmes even attempted to argue that subjective intent was immaterial in such intentional torts as fraud, slander, libel, malicious prosecution, and conspiracy.²⁵³ It is important to note, given Horwitz’ use of *The Common Law* as the initial position for Holmes’ later “about-face,” that the jurist conceded that the case law did not bear him out. This was particularly true for conspiracy, the action upon which much of the law of industrial disputes rested before the New Deal.²⁵⁴ The most Holmes claimed was that “it would be a strong thing if the presence of malice made any difference” in intentional torts.²⁵⁵

Horwitz argues that the 1890’s cases involving business and labor combinations led Holmes to renounce his notion of “external standards” as a source of law and a test of tortious liability. In *Privilege, Malice, and Intent* and in his labor dissents, Horwitz writes, Holmes returned to “the traditional common law

247. HOLMES, *THE COMMON LAW*, *supra* note 160, at 38.

248. *Id.* at 44, 41.

249. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS*, *supra* note 133, at 170.

250. *Id.* at 172.

251. HOLMES, *THE COMMON LAW*, *supra* note 160, at 135.

252. *Id.* at 111.

253. *Id.* at 130-63.

254. *Id.* at 142-43.

255. *Id.* at 145.

subjective tests of 'malice' and 'intent.'"²⁵⁶ Without "empirically determinable customary norms," Horwitz writes, Holmes found it "difficult, if not impossible, to construct external standards to distinguish between legitimate and illegitimate forms of competition."²⁵⁷ He therefore "sought in the concept of 'malice' a mediating force that custom could no longer provide."²⁵⁸ Thus, Horwitz believes Holmes urged his judges to adopt a wholly subjective standard in deciding labor cases such as *Vegeahn* and *Plant*: "Allow the privilege to injure whenever the defendant is furthering his own interests through economic struggle, but deny the privilege where harm is inflicted simply for the purpose of injuring the plaintiff."²⁵⁹ Under this standard, Horwitz argues, trade unions would generally escape liability, because the trier of fact would rarely be able to find the requisite element of personal ill will toward an employer. To this extent, Holmes "was justly a hero to the next generation of Progressive social reformers."²⁶⁰

Horwitz' claim that Holmes completely renounced the notion of external standards cannot be reconciled with Holmes' continued use of the concept in *Privilege, Malice, and Intent* and later writings. Horwitz implies that Holmes made subjective intent the sole consideration in determining whether the workers' intentional infliction of harm was justifiable in *Vegeahn* and *Plant*. In fact, the jurist urged his brethren to treat the purpose of labor combinations as one factor in deciding whether the defendants' conduct could be justified in terms of the external and objective requirements of the community. This modest change in Holmes' tort theory was well underway before the social unrest of the 1890's.

Holmes' doubts about the extent to which external standards explained the law of intentional torts grew with his years on the bench. Two cases in particular led him to conclude that the subjective mental state of a defendant was relevant in determining whether to privilege intentionally inflicted harm. One was *Morasse v. Brochu*,²⁶¹ in which Holmes joined a decision holding that a physician had a good cause of action against "a priest who had intimated that he would not administer last rites to his parishioners while they were under the same roof as the plaintiff."²⁶² The other, *Tasker v. Stanley*,²⁶³ was a suit for the alienation of a wife's affections. Holmes upheld the introduction of evidence that the defendant had advised the wife honestly and in good faith. "[I]n order to make a man who has no special influence or authority answerable for mere advice of this kind because it is followed," Holmes wrote, "we think that it ought

256. P. 135.

257. *Id.*

258. P. 132.

259. P. 135.

260. P. 136.

261. 25 N.E. 74 (1890).

262. *Id.* See also letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (Mar. 17, 1898), in 1 HOLMES-POLLOCK LETTERS, *supra* note 174, at 82.

263. 26 N.E. 417 (1891).

to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives."²⁶⁴

A labor dispute seems to have prompted Holmes to prepare a formal statement of his new position on malice and privilege. *Temperton v. Russell*²⁶⁵ was an English case upholding a damage suit against unions in the construction industry over a secondary boycott. Holmes thought the case should have been governed by *Mogul Steamship Co. v. McGregor, Gow & Co.*,²⁶⁶ in which the loss inflicted by a combination of businessmen was held to have been privileged. After *Mogul*, Holmes wrote the eminent English jurist Sir Frederick Pollock that only "class sympathy" could explain the result in *Temperton*. To model a sounder, historicist approach to intentional torts, Holmes prepared what he termed "a supplement to the notion of the external standard which I have gradually worked out in a series of decisions."²⁶⁷

Holmes commenced *Privilege, Malice and Intent* by restating the greater part of his chapters on torts in *The Common Law*. In determining whether a plaintiff had made out a prima facie case, he wrote, "[t]he standard applied is external, and the words malice, intent, and negligence, as used in this connection, refer to an external standard." Only when the judge reached the issue of justification would Holmes permit him to consider actual malice.²⁶⁸ As Holmes later wrote in *Aikens v. Wisconsin*,²⁶⁹ on this issue the defendant could not argue that his motive was immaterial and that "the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen."²⁷⁰

Furthermore, even in questions of privilege, Holmes never viewed the presence of actual malice as dispositive. In *Privilege Malice, and Intent*, Holmes explained that the extent of a defendant's privilege was "a question of policy" and turned not on "empty general propositions" but on the peculiarities of particular cases. Sometimes, as in disputes over "spite fences," the defendant's conduct was privileged regardless of motive.²⁷¹ Sometimes, as in disputes over medical advice, the loss occasioned was actionable if offered out of actual ill-will toward a plaintiff.²⁷²

264. *Id.* at 150.

265. [1893] 1 Q.B. 715.

266. *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1889] 23 Q.B.D. 598.

267. Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (June 26, 1894), in 1 HOLMES-POLLOCK LETTERS, *supra* note 174, at 54.

268. HOLMES, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 119. Holmes consistently followed this protocol in his tort decisions while on the Supreme Judicial Court. Lundquist, *supra* note 244, at 623.

269. 195 U.S. 194 (1904).

270. *Id.* at 204.

271. HOLMES, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 120-21.

272. *Id.* at 124-25. "[J]ustifications may vary in extent according to the principle of policy upon which they are founded," Holmes wrote in *Aikens*. 195 U.S. at 204. While some, such as "those affecting the use of land, are absolute . . . others may depend upon the end for which the act is done." *Id.* (citation omitted).

Holmes was troubled by several American cases excusing business combinations from liability under the "abstract proposition" that malice could never make unlawful an otherwise lawful act.²⁷³ This struck Holmes as being as indefensible an evasion of the judge's duty to consult the dominant social forces as the position that malice was always the test of liability, which he attacked in *The Common Law*. Sometimes, "serious legislative considerations" such as "the organization of the world"²⁷⁴ demanded that judges ignore motive; sometimes they demanded that judges take motive into account.²⁷⁵ In *Privilege, Malice, and Intent* Holmes thus distinguished between external sources of law and external standards of liability more clearly than he had in his earlier work. He more willingly acknowledged a role for subjective motive in justifying intentional torts than he did in *The Common Law*. He otherwise restated his belief in external standards of liability, and he in no way qualified his belief in external sources of law.

Several years later, another widely noted English labor case prompted Holmes to return to the subject.²⁷⁶ "[I]n the elaborate, although to my notion inadequate, discussion which took place," Holmes wrote, "eminent judges intimated that anything which a man has a right to do he has a right to do whatever his motives, and this has been hailed as a triumph of the principle of external standards in the law, a principle which I have done my best to advocate as well as name."²⁷⁷ This development threatened to turn what Holmes had offered as an antidote to a priori reasoning in *The Common Law* into a new "unreal" and "inadequate" generality.²⁷⁸ The only way to resolve the issue of justification was to weigh the "grounds of policy and . . . histories" on either side of the question and decide which set prevailed.²⁷⁹

Holmes followed his own advice while on the Supreme Judicial Court in his two greatest labor cases. In *Vegelahn* he noted that the defendants had picketed their employer in order to win "a victory in the battle of trade" and not to inflict damage for its own sake.²⁸⁰ Rather than stop there, Holmes went on to weigh other "considerations of policy and of social advantage,"²⁸¹ most notably the tendency toward combination, apparent from even "the most superficial reading of industrial history." Given the inevitable fact of combination on the side of capital, he concluded, the organization of labor was necessary if the battle between employers and employees was to be conducted "in a fair

273. HOLMES, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 122-23. The cases were *Heywood v. Tillson*, 75 Me. 225 (1883); *Payne v. W. & Atl. R.R.*, 81 Tenn. 507 (1884).

274. HOLMES, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS, *supra* note 133, at 129.

275. *Id.*

276. *Allen v. Flood*, [1898] App. Cas. 1; see James Barr Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411, 411-12 (1905).

277. HOLMES, *THE COMMON LAW*, *supra* note 160, at 241.

278. *Id.* at 229.

279. *Id.* at 241.

280. *Vegelahn v. Guntner*, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

281. *Id.*

and equal way."²⁸² In *Plant*, Holmes similarly inquired into the object of the defendants' conduct, but, as in *Vegeahn*, his decision ultimately turned on the industrial conditions of his day.²⁸³

In his account of Holmes then, as in his account of late-Victorian legal thought, Horwitz went astray because of his assumption that the social conflict of the 1890's doomed all attempts to ground law in consensual norms, and because he did not listen when his subjects attempted to explain why they wrote what they did. After reading *Crisis*, one imagines Holmes wrote *Privilege, Malice, and Intent* Newton-like, after being hit by a striker's brick. Social change provided Holmes with occasions for his essays and opinions in the 1890's, but he intended them to join ongoing debates about the nature of law that were not revolutionized by the Homestead Strike, Coxey's Army, the Pullman Boycott, or the rise of the holding company. Holmes viewed the momentous events of the 1890's in terms of a historicist jurisprudence that he retained with remarkable tenacity throughout his professional career. His example suggests the need for a less schematic understanding of legal change than the structuralist model Horwitz offers in *Crisis*.

C. Realist Legacies

"It is a curious phenomenon of American scholarship," writes Joyce Appleby, "that everyone wants Jefferson on their side."²⁸⁴ The same might almost be said of the legal realists. Edmund Kitch has called law-and-economics scholarship an outgrowth of the realist's research agenda;²⁸⁵ G. Edward White has awarded the realist legacy to the law-and-society movement;²⁸⁶ Mark Tushnet has dubbed CLS in its structuralist phase the "direct descendant of American Legal Realism";²⁸⁷ and Gary Peller believes that when radical legal thinkers take the post-structuralist turn they find themselves face-to-face with Felix Cohen and Robert Hale.²⁸⁸ Horwitz joins this scramble for the realist aegis with an interpretation that professes to connect the movement to "the real political

282. *Id.* at 1083.

283. *Plant v. Woods*, 57 N.E. 1011, 1015 (1900) (Holmes, C.J., dissenting).

284. Joyce Appleby, *Historians, Community and the Pursuit of Jefferson: Comment on Professor Tomlins*, 4 STUD. AM. POL. DEV. 35, 41 (1990).

285. Edmund W. Kitch, *The Intellectual Foundations of "Law and Economics,"* 33 J. LEGAL EDUC. 184 (1983).

286. G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819 (1986).

287. Tushnet, *supra* note 77, at 505.

288. Peller, *supra* note 79, at 1219-40. Judge Richard Posner is more reluctant than Kitch to claim the legal realists for the law-and-economics movement. The realists' unsystematic, "liberal meliorism," he writes, makes the relation between the two movements equivocal at best. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 441-42 (1990).

Critical race and feminist legal scholars sometimes cite the realists in acknowledging that their post-realist position in legal thought. As a rule, however, they have looked elsewhere for inspiration. *See, e.g.*, Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 988-89 (1990).

struggles"²⁸⁹ of the day and that casts legal realism as "a continuation of the reformist agenda of early-twentieth-century Progressivism."²⁹⁰

Horwitz' creation of a realist legacy for his own position within CLS has produced some of the most exciting and engaging writing in *Crisis*. In these passages we see a historian looking to the past for a conversation about an issue that has fascinated him since his days as a graduate student: how it happened, "in this most democratic country in the world," that Americans came to endorse the ideal of a government of laws and not men.²⁹¹ Horwitz is especially intrigued by how many of the same realists who convincingly debunked the apolitical pretensions of late-Victorian jurisprudence thought they could avoid their elders' mistakes simply by making the law conform more closely to social conditions. Horwitz' heroes are legal realists who doubted this positivistic reconstructive project. Espousing some form of epistemological relativism, these figures rejected the distinction between fact and value. They understood "the social and historical contingency of structures of thought,"²⁹² and they recognized that even the proponents of "sociological jurisprudence" were compelled to acknowledge and defend their political and moral values.²⁹³

In *Crisis* the epistemological relativists receive ample time to establish the radical potential of their views. With the exception of Karl Llewellyn, legal realists who thought social science could provide a workable and neutral basis have little opportunity to explain themselves. Horwitz believes the latter have already received too much attention in previous studies of the realists. Laura Kalman, Edward Purcell, John Henry Schlegel, and others have so exaggerated the realists' enthusiasm for social science, Horwitz writes, that the "critical thrust of Realism has been virtually smothered."²⁹⁴ We have been left with a vision of legal realism as an adjunct of "naively behaviorist" social science, while "the most significant legacy of Realism"²⁹⁵—that is, "the socially constructed character of frames of reference, categories of thought, and legitimating concepts"²⁹⁶—has been largely ignored.

My quarrel with Horwitz' interpretation is less with his presentist aims than with the dogmatic way in which he pursues them. He insists on a dichotomous understanding of the movement, captured in his section heading "Realism:

289. P. 170.

290. P. 169.

291. P. 193.

292. P. 270.

293. See pp. 173-74.

294. P. 182; see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 74-94, 159-78 (1973); John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFF. L. REV.* 195 (1980); John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459 (1979); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 *VA. L. REV.* 999 (1972).

295. P. 181.

296. P. 182.

Critical or Scientific."²⁹⁷ He etches the two positions in structuralist terms as a rigid framework of inescapably connected concepts. Horwitz has ordered a variety of realist texts into rival formations that bear a striking resemblance to a CLS scholar's understanding of troop alignments in the current warfare between leftist and law-and-economics scholars at the Harvard Law School. In the process, he has downplayed or ignored aspects of legal realist thought that would upset the order he has imposed. In particular, Horwitz underestimates the importance of a third position within legal realism, a continuation of the historicist tradition in American law, albeit updated in light of pluralist theories of society. For all the strengths of his treatment of the realists, Horwitz' assumption that evolutionary theories of law ended with the 1890's obscures the valuable legacy of the realists' pioneering efforts to envision a role for law in a plural world.

Horwitz commences his account of the legal realists generously enough, by insisting that their ranks be broadened beyond those named on Llewellyn's famous list.²⁹⁸ He argues that we should devote less time to exploring differences between legal realism and Roscoe Pound's "sociological jurisprudence" and more time to envisioning both movements as part of a larger whole, "Progressive legal thought."²⁹⁹ In Horwitz' usage, "Progressive jurisprudence" denotes not just the legal phase of the reform movement that appeared before World War I. It extends over the first four decades of the twentieth century and includes not only the legal realists of the 1920's and 1930's, but also prewar figures like John Chipman Gray, Pound, and Harlan Fiske Stone; institutional economists like Richard Ely, John Commons, and Thorstein Veblen; the philosophers John Dewey, Morris Cohen, and Felix Cohen; such "sophisticated doctrinal critics" as Francis Bohlen, Jeremiah Smith, and Fleming James; and the administrative lawyers Felix Frankfurter and John Landis.³⁰⁰

According to Horwitz, *Lochner* provoked Pound and other reform-minded law professors into firing the first salvos in a broad assault on late-Victorian jurisprudence. Pound's work in particular set out "the basic consequentialist

297. P. 208. Two CLS scholars who studied legal history with Horwitz at Harvard have previously published accounts of the legal realists that anticipate *Crisis* in important and imperfectly acknowledged respects. Gary Peller distinguished between "Realism as Critique" and "Realism as Science," in an article published in 1985. Peller illustrated the former "strand" of legal thought with selections from Hale and the Cohens; he illustrated the latter with references to Llewellyn's writing. Peller, *supra* note 79, at 1219-59. Three years later Joseph Singer devoted much of his review of Laura Kalman's *Legal Realism at Yale* to stating Hale's and the Cohens' "attack on the public/private distinction or the attack on the idea of the self-regulating market." Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 475 (1988) (book review). In *Crisis*, Horwitz refers to Singer's essay as the "interpretation whose perspective I most share." P. 308 n.7. He cites Peller's article only in a chapter on postwar legal scholarship. *Id.* at 338 n.47.

298. Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226-27 n.18 (1931); see N. E. H. Hull, *Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921.

299. P. 171.

300. Pp. 182-85. I should add that Horwitz does not consistently reserve the term "Progressive legal thought" for the generic category. At times it refers exclusively to work published before the First World War. See, e.g., p. 189.

critique of orthodox legal doctrine," namely, that judicial decisions were lagging behind the needs of industrial America, that "the law in the books" bore only a distant resemblance to the "the law in action."³⁰¹ Progressive legal thinkers from Pound through the legal realists agreed that the judges were consulting their own moral and political agendas, when they should have considered how the law they made would function in society. The progressives differed sharply on a remedy.

One set of reformers, Horwitz' "scientific realists," decided that the courts needed "a purer and more neutral system of legal concepts."³⁰² They proposed a jurisprudence in which "law became the dependent variable, society the independent variable."³⁰³ To know society better, they turned to social science for expert guidance,³⁰⁴ a disastrous decision in Horwitz' judgment. "Behavioral and value-free social science not only suppressed the moralism of early Progressive social science," he writes; "it was also dependent on a completely naive view of social thought."³⁰⁵ With the mustering of many legal realists and their students into the New Deal, the scientific strand of legal realism legitimated the rise of the bureaucratic state and pushed social reform "into a starkly technocratic mode."³⁰⁶

Horwitz' critical realists, in contrast, believed the legal orthodoxy had erred, not in permitting its morals and politics to infect the law, but in embracing the wrong kind of morals and politics. These realists "[b]arely conceal[ed]" their political commitments as they set about the task of demonstrating the indeterminacy of orthodox legal reasoning.³⁰⁷ Most were not moral relativists, and in fact drew upon "a reservoir of political and moral outrage at the injustices of the old order."³⁰⁸ Their writings were above all contributions to the cause of reform.

Horwitz makes a strong case for the radical potential of critical realism by tracing attacks on natural rights jurisprudence from the historicist Holmes to the law professor Wesley Newcomb Hohfeld to the lawyer and institutional economist Robert Hale. Horwitz starts with Holmes' argument in *The Common Law* that "[l]egal duties . . . come before legal rights."³⁰⁹ By insisting that rights and duties were correlative and by asserting that historically defined duties were the basis for evaluating a priori claims of right, Holmes mounted a sharp challenge to the natural rights tradition.³¹⁰ He would also inspire Hohfeld, who

301. P. 195; see Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

302. Pp. 208-09.

303. P. 209.

304. *Id.*

305. P. 210.

306. Morton J. Horwitz, Book Review, 75 J. AM. HIST. 299, 299 (1988).

307. P. 209.

308. *Id.*

309. HOLMES, *THE COMMON LAW*, *supra* note 160, at 173.

310. Cf. William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship*, 90 COLUM. L. REV. 809, 817-26 (1990).

developed the point into his famous taxonomy of "fundamental legal conceptions."³¹¹ Horwitz writes that Hohfeld's dismantling of property into a bundle of rights, privileges, powers, and immunities "seems to have been" motivated by the growing use of injunctions in the labor disputes of the progressive era. In any event, Hohfeld's system won him a job at Yale and the praise of other reform-minded law professors, who eagerly employed it to contest the formal logic of the judges and the notion of property as "a pre-political, Lockean natural right."³¹²

After Hohfeld's death in 1918, Hale developed his system into a full-blown attack on the "naturalness of the market."³¹³ Hale argued that because buyers and sellers took for granted a set of legally created entitlements, no economic exchange was truly voluntary. Public and private were not distinct spheres in American society; rather, the public realm recognized private rights as it saw fit. Ownership was not a natural right but a delegation by public authority to private individuals of "a discretionary power over the rights and duties of others."³¹⁴ Economic regulation was not a coercive intrusion by the state into the private sphere of individual rights but the substitution of one form of state-sponsored coercion for another. With Hale's articles and Morris Cohen's "Property and Sovereignty," Horwitz concludes, property law was recast as a species of public law.³¹⁵

The insight that property and markets are human artifacts is of continuing importance, and not simply for CLS scholars in search of a pedigree, but for all defenders of economic regulation against challenges framed in libertarian terms. Perhaps only someone with Horwitz' political commitments could have recovered that legacy and presented it so well. Yet even taken on its own neo-Beardian terms, *Crisis* has its shortcomings. I will note three: Horwitz' failure to detail the positions of his critical realists on the political issues of their day, his equation of enthusiasm for Hohfeld's system with a politically progressive stance, and his refusal to acknowledge that even his favorite realists slid back into empiricism and functionalism in proposing constructive reforms. Each shortcoming results from Horwitz' structuralist indifference to the context that was part of the meaning his subjects attributed to their texts. Leaving that context unexplored permits Horwitz to sidestep aspects of his critical realists' thought that would lessen their value as role models for contemporary legal scholars on the left.

311. Pp. 128-29; see WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1919). On Hohfeld's system, see Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986-94.

312. Pp. 197, 155.

313. P. 194.

314. P. 164 (quoting ROBERT L. HALE, *RATE MAKING AND THE REVISION OF THE PROPERTY CONCEPT* 214 (1922)).

315. P. 165; see Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

The first shortcoming goes to the peculiarly abstract and bloodless way in which Horwitz connects legal realism to the "real political struggles" of early twentieth-century America.³¹⁶ From his criticism of the existing literature, one might have expected Horwitz to detail the way in which the realists used their legal theories in commenting on or participating in the great reform causes of the day. Surely without such examples we cannot determine whether the realists themselves derived from their work the political positions Horwitz has discovered there. The only figure whose political activities *Crisis* describes at any length, however, is Karl Llewellyn. His vigorous effort in the Sacco-Vanzetti crusade provides little support for Horwitz' claim that realists like Llewellyn "subordinated political and moral passion to social science expertise."³¹⁷

As far as it goes, Horwitz' research supports his claim that the critical realists considered themselves reformers of one sort or another. Some, like Hale, who received hate mail over the "Bolshevick ideas" he published in the *American Bar Association Journal*, were even perceived as dangerous radicals by their contemporaries.³¹⁸ But the mantle of reform covered a wide range of political positions in early twentieth-century America. Lumping the critics of legal orthodoxy together as "progressives" obscures distinctions that made a difference. For example, Horwitz dubs Hohfeld a progressive on the basis of his enthusiasm for Woodrow Wilson's New Freedom.³¹⁹ Can we infer that Hohfeld supported Wilson in his refusal to exempt organized labor from the Sherman Antitrust Act?³²⁰ If so, then why should he be classed with the realist Leon Green, who made a critical-realist case for the sit-down strike that would have horrified Wilson?³²¹ In fact, and as I will argue, realists in both of Horwitz' camps were ambivalent about the legal program of the labor movement. Rather than permit the critical realists to voice their misgivings, Horwitz preserves their heroic stature by rendering their politics in abstract and general terms.

For similar reasons, I think, Horwitz does not explore a more narrowly "political" function Hohfeld's system performed in the 1910's and 1920's, that of demarcating the boundary between law professors and the rest of the legal profession. When Hohfeld wrote, full-time law professors were still actively vying with practitioners for control of legal education. Many saw in his system just the kind of elegant and arcane learning that could support the professoriat's claim to a special competence beyond the ken of the judge or practicing lawyer.³²² That Hohfeld himself saw a link between his system and the

316. P. 170.

317. Pp. 209-10.

318. Letter from Lawrence C. Brooks to Robert L. Hale (Jan. 4, 1923), *quoted in* Gerald Fetner, *The Law Teacher as Legal Reformer: 1900-1945*, 28 J. LEGAL EDUC. 508, 528 (1977).

319. P. 152.

320. ARTHUR S. LINK, *WILSON: THE NEW FREEDOM* 432-33 (1956), Dallas L. Jones, *The Enigma of the Clayton Act*, 10 INDUS. & LAB. REL. REV. 201, 207-14 (1957).

321. Leon Green, *The Case for the Sit-Down Strike*, 90 NEW REPUBLIC, Mar. 24, 1937, at 199.

322. For this reason Schlegel has called Hohfeld's system "the lynch pin of the grand vocation for the

professionalization of law teaching became clear when he outlined his "Vital School of Jurisprudence and Law." This was in 1914, the same year Wigmore, a social conservative, defended the "specialist in legal science" from the academy of the Wall Street bar.³²³

The legal realists seemed at least as interested in demonstrating the superiority of Hohfeld's "professorial jurists" as they were in advancing a reformist political agenda.³²⁴ Thus, as Schlegel has noted, in 1918 Walter Wheeler Cook used Hohfeld's system not only to contest Justice Pitney's reasoning in the anti-union decision *Hitchman Coal & Coke Co. v. Mitchell*,³²⁵ but also to pillory the New York Court of Appeals for pretending that it had decided to uphold a secondary boycott "by the simple process of deductive reasoning."³²⁶ Felix Cohen thought Chief Justice Taft spoke "Transcendental Nonsense" in the *Coronado Coal*³²⁷ case when he declared the United Mine Workers (in Cohen's words) "a quasi-corporation" and therefore suable under the Sherman Act. Cohen also rejected the union's "metaphysical argument" that it was not subject to liability because it was not a person.³²⁸ Horwitz suggests (without supporting authority) that Hohfeld's system was a response to the attack on the labor injunction.³²⁹ If it was, then it gave support to the defenders of the labor injunction and not to its attackers. The trade unionists' strategy for curtailing the injunction was to distinguish between tangible and intangible property and to limit injunctive relief to the protection of the former.³³⁰ As a social scientist friendly to labor pointed out,³³¹ a critical-realist approach—the "really radical reconceptualization of property"³³²—exploded the very distinction upon which the trade unionists had premised their argument.

Finally, Horwitz is not always sensitive to the rhetorical context in which his critical realists advanced the argument for social construction. He insists that critical realism was a sustained, fully-rounded intellectual position and not just a method to be employed strategically in attacking orthodox legal thought. Yet once his favorites put aside their critique and stated an affirmative program

law professor." John Henry Schlegel, *American Legal Realism and Empirical Social Science* 41 (1991) (unpublished manuscript, on file with author). I am grateful to Professor Schlegel for permission to quote from his forthcoming book.

323. Wesley N. Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?* 1914 ASS'N AM. L. SCH. PROC. 76; see Schlegel, *supra* note 322, at 39-40.

324. Hohfeld, *supra* note 323, at 110; Schlegel, *supra* note 322, at 39.

325. 245 U.S. 229 (1917); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918).

326. Walter Wheeler Cook, *Boycotts of "Non-Union Materials,"* 27 YALE L.J. 539, 540 (1918); see Schlegel, *supra* note 322, at 54-58.

327. *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922).

328. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 813 (1935); see Peller, *supra* note 79, at 1228.

329. P. 197.

330. WILLIAM E. FORBATH, *THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 154-62 (1991).

331. EDWIN E. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 105-06 (1932).

332. P. 165.

of reform they typically resorted to arguments that were scarcely less functionalist and empiricist than their "naive," scientific counterparts. Felix Cohen, for example, mixed critical debunking with the "scientific" claim that law was "a product of social determinants and an index of social consequences."³³³ Hale surely believed that economic analysis could not free lawyers and judges from making normative judgments. Once economic study clarified a problem, he wrote in 1922, "the final judgment on the issues is an ethical one."³³⁴ Even when Hale debunked the public-private distinction in a brilliant analysis of the state action requirement, however, he then advanced a potentially consequentialist standard ("some matter of high public importance") for making discrimination actionable under the Reconstruction amendments.³³⁵

In short, Horwitz' distinction between critical and scientific realists is overdrawn. We do not know whether or how his two groups divided on the political quarrels of the day. We have good reason to think that they joined politically quiescent or even conservative academics in using Hohfeldian analysis to keep the practitioners at bay. Finally, whatever theoretical differences separate Llewellyn's famous call for a "temporary divorce of Is and Ought"³³⁶ from Hale's ultimately ethical policymaking, they scarcely seem substantial enough to justify pillorying the former as a proponent of "austere positivism" and lionizing the latter as an anti-positivist hero.³³⁷

I think a more satisfying approach to the history of legal realism begins by noting a strand of legal realism not captured in Horwitz' dichotomy.³³⁸ Horwitz himself notes that the social scientists who most influenced the legal realists were institutionalists who adopted neither "the impoverished behavioral methodological apparatus of logical positivism" nor "the sharp distinction between facts and values characteristic of ethical positivism."³³⁹ Horwitz' treatment of this fact in *Crisis* is contradictory. At one point, he insists on broadening the category of progressive legal thinkers to include such institutional economists as Ely and Commons.³⁴⁰ At another, he writes that legal progressives "never really adopted the historicist mode that was so powerful in turning the social sciences toward relational thinking."³⁴¹ This follows from Horwitz' assumption that the "collapse of Darwinism" in the 1890's left legal progressives with no other choice besides moral reform and technocratic social engineering.

333. Cohen, *supra* note 328, at 843; see Peller, *supra* note 79, at 1245-48.

334. Robert L. Hale, *Economic Theory and the Statesman*, in *THE TREND OF ECONOMICS* 225 (Rexford G. Tugwell ed., 1924).

335. Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 *LAW. GUILD REV.* 627, 630 (1946).

336. Llewellyn, *supra* note 298, at 1236.

337. P. 5.

338. On the perils of dichotomy in historical writing, see DAVID H. FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 9-12 (1970).

339. P. 270.

340. P. 182.

341. P. 324 n.36.

To use Horwitz' terms, they could no longer believe that social processes might somehow "combine the descriptive and the prescriptive, the Is with the Ought."³⁴²

In fact, this historicist tenet reached many realists through institutionalist social science.³⁴³ The middle way between anarchic individualism and democratic statism that some late-Victorian jurists found in the moral sense and others in custom or evolution, some realists found in twentieth-century notions of human life as an ongoing, pervasive social process.³⁴⁴ Early social scientists, like Sumner, tended to think of the process as encompassing all segments of society. Later scholars continued to think of social development as an organic process, but envisioned it as taking place within groups or institutions, where it could create diverse ways of knowing right and truth. By the 1920's, the problem of governing in a plural society was moving to the center of political thought.³⁴⁵

Commons' writing on labor law illustrates one form that the confluence of historicism and pluralism could take. In *Legal Foundations of Capitalism* (1924), Commons endorsed Carter's claims that law was the organic product of social exchanges and that the customs emerging from such exchanges were "a highly intractable force [that] even the most powerful state cannot override."³⁴⁶ He parted company with Carter in insisting that custom developed in the context of particular groups, so that customs might well differ and conflict. In labor relations, for example, Commons found not one, but two, equally legitimate legal systems. One was "the common law of labor," customary work rules and practices developed in particular industries over time. The other was the law of contract and property of the employers. The latter was more generally incorporated into the decisions of common law judges, but it was just as customary in origin and partial in nature as the law of the workers.³⁴⁷

Such social theories had critical and constructive implications for legal realists across Horwitz' positivist divide. As a critical matter, realists could now join Holmes' point about the contested nature of the *Lochner* Court's social theory to a pluralist model of the social order. In his historical articles, for example, the Yale realist Walter Nelles debunked the universals of late-Victorian

342. P. 210.

343. For a succinct overview of the intellectual influences on legal realism, see KALMAN, *supra* note 294, at 14-20.

344. Fred Matthews, *Social Scientists and the Culture Concept, 1930-1950: The Conflict Between Processual and Structural Approaches*, 7 SOC. THEORY 87, 88-90 (1989); see also ROSS, *supra* note 137, at 242-47.

345. RODGERS, *supra* note 14, at 176-203; Mary O. Fumer, *Knowing Capitalism: Public Investigation and the Labor Question in the Long Progressive Era*, in THE STATE AND ECONOMIC KNOWLEDGE: THE AMERICAN AND BRITISH EXPERIENCE 241-46 (Mary O. Fumer & Barry Supple eds., 1990); Gunnell, *supra* note 228.

346. JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 299-300 (1924) (quoting John R. Commons, *Law and Economics*, 34 YALE L.J. 371, 376 (1925)).

347. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM*, *supra* note 346, at 304-05.

labor law as the rationalizations of a particular social group.³⁴⁸ The constructive implications of the new institutionalism were less definite. Realists who believed with Commons that groups and institutions were natural and homogeneous phenomena, and that their lawmaking imposed few burdens on outsiders, might conclude that the law should limit itself to ratifying and enforcing the preexisting arrangements of social groups. Well before the 1950's, then, we should expect to find precursors of the legal process school. Realists who thought of groups as constructed and manipulable, who were concerned about the fate of individuals within groups, and who appreciated the third-party effects of interest-group bargaining would search for some consensual basis to justify more vigorous regulation by the state of its constituent groups.

Perhaps Llewellyn's jurisprudence best illustrates the more deferential approach. Horwitz struggles to comprehend Llewellyn within his dichotomous framework. While noting the realist's eclecticism, his "typically undogmatic generosity,"³⁴⁹ and his poetic intellect,³⁵⁰ Horwitz ultimately classifies Llewellyn as an advocate of "austere positivism."³⁵¹ Horwitz does not acknowledge the historicist strain in the realist's thought, which Llewellyn acquired from a variety of sources including Holmes, Commons, and Pound.³⁵² The most important conduit, however, was Llewellyn's undergraduate reading of Sumner's *Folkways*.³⁵³ In this early landmark work of sociology, the self-confident and politically engaged moralist of Daniel Davenport's college days adopted a detached, scientific tone, describing "the modern mass man with the same cool eye with which he would have looked at a Bushman, expecting in truth to find little difference."³⁵⁴ Sumner's readers learned that the mores of the masses had a determining force on all aspects of society. Elites and outsiders could influence mass society, but only indirectly and with the certainty that their ideas would be debased as they grew in currency.³⁵⁵

Llewellyn's principal mentor at the Yale Law School, Arthur L. Corbin, was a great enthusiast of Sumner's mores, which he saw as combining "the Is with the Ought" in just the way Horwitz thinks was impossible after the fall

348. See, e.g., Walter Nelles, *A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 YALE L.J. 507, 511-12, 526 (1931).

349. P. 179.

350. P. 181.

351. P. 5.

352. Karl N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 665 n.1 (1925). Pound discussed historical jurisprudence in the United States in *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 598-604 (1911).

353. WILLIAM TWining, KARL LLEWELLYN AND THE REALIST MOVEMENT 92-93, 414 n.25 (1973); see also WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* (Ayer Co. 1992) (1940). On the similarities between Sumner's and Commons' work, see Jeff E. Biddle, *Purpose and Evolution in Commons's Institutionalism*, 22 HIST. POL. ECON. 19, 38-45 (1990).

354. STOW PERSONS, *THE DECLINE OF AMERICAN GENTILITY* 244 (1973).

355. See ROSS, *supra* note 137, 219-24; Ernst, *supra* note 32, at 36-38.

of "Darwinism."³⁵⁶ Corbin argued that law represented "the custom and the interest and the average man," and he urged judges to follow "the multitude." "That judge is just and wise," he wrote, "who draws from the weltering mass the principle actually immanent therein and declares it as the law."³⁵⁷ Corbin frequently referred to *Folkways* during his classes,³⁵⁸ and Sumner's influence was discernible even in Corbin's technical studies of contract doctrine, as where he opposed applying the doctrine of privity of contract when its application would run contrary to "the mores of the time."³⁵⁹

What Llewellyn found in Sumner was not a mandate for technocratic social engineering but a chastening lesson about the possibilities of planned social change. "But for the early and deep-cut influences of Sumner's writings," Llewellyn wrote in 1924, "I should by now hold some obnoxious fighting faith and be stump-speaking a vigorous progress into jail." Attempts to effect social change seemed useless until one discovered "the laws of change—what can be changed, and how, and with what result?"³⁶⁰ Llewellyn found the same message in Carter's customary jurisprudence, which demonstrated to Llewellyn's satisfaction "the huge scope of extra-official controls in law and the limits set thereby to official action."³⁶¹ One need not invent a "Realist turn to social science" to account for Llewellyn's tendency in drafting the Uniform Commercial Code to endow "economically dominant commercial practices with undeserved normativity."³⁶² The Code's premise that courts should consult "the mores and usages of honest dealers" (Corbin's words) was much older.³⁶³ It belonged to a historicist strand of American jurisprudence that ran back through the 1890's to the mid-century reception of German historicism by American scholars and intellectuals.³⁶⁴

In the field of labor relations, in contrast, legal realists were not content to follow Llewellyn's practice of deferring to group custom. "Scientific" and "critical" realists alike were concerned about the fate of the individual worker in well-organized industries. Walter Wheeler Cook, one of Horwitz' scientific

356. P. 210.

357. Arthur L. Corbin, *The Law and the Judges*, 3 YALE REV. 234, 250 (1914); see also TWNING, *supra* note 353, at 30-32.

358. Douglas Arant, *Professor Arthur L. Corbin*, 74 YALE L.J. 212, 214 (1964).

359. Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 YALE L.J. 1008 (1918) (italics omitted), *cited* p. 50.

360. Karl N. Llewellyn, *Non-Conformist Puzzles over Education* (1924) (Karl N. Llewellyn Papers, University of Chicago Law School), *quoted in* TWNING, *supra* note 353, at 93. *Cf.* Pp. 186-87.

361. Karl N. Llewellyn, *James Coolidge Carter*, 3 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 243, 244 (1937). Among the drawbacks of Carter's work Llewellyn identified was his failure to acknowledge the "multiformity and conflict of subgroup 'customs.'" *Id.*

362. Pp. 212, 211.

363. TWNING, *supra* note 353, at 303 (citing Arthur L. Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?* 59 YALE L.J. 821, 835 (1950)). See, e.g., U.C.C. §1-102(2)(b) (1990).

364. See, e.g., Thomas M. Cooley, *Labor and Capital before the Law*, 337 N. AM. REV. 503, 503-06 (1884); cf. James Whitman, Note, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 157-58 (1987).

realists, concluded his attack on the *Hitchman* case by noting that if the labor movement were freed from the threat of labor injunctions, the "community" would require legislation to ensure that unions were "open on fair terms to all alike."³⁶⁵ To do otherwise would be to permit them to exclude reputable workers for "some unsubstantial reason."³⁶⁶ When Robert Hale testified in favor of the National Labor Relations Act, he attacked the notion that a closed union shop "destroys the freedom of the worker to be independent of a union if he wishes to be." The claim was true but irrelevant: "in a complicated modern society like ours," Hale explained, "nobody is going to be entirely free." Yet even Hale acknowledged that the choice between the coercion of the employer and the coercion of the union was "a choice between evils," and he conceded that unions sometimes oppressed their members.³⁶⁷

The realist figure who perhaps most thoroughly confounds Horwitz' dichotomy is Thurman Arnold.³⁶⁸ While a law professor at Yale he combined quantitative studies of the courts with some of the most gleeful debunking of legal and economic orthodoxies ever produced by a legal realist. Thanks in part to the influence of his colleague and good friend, the institutional economist Walton Hale Hamilton, Arnold attacked neoclassical economics for (among other things) ignoring "the complex character of political institutions."³⁶⁹ In 1938 he left academia to run the antitrust division of the Department of Justice. In that capacity he prosecuted over one hundred trade unions for labor practices that disadvantaged "the economy as a whole all out of proportion to any transient advantage which they may give to any smaller group."³⁷⁰ Notwithstanding the presence of economists on his staff, Arnold's prosecutions owed more to his "progressive moralism"³⁷¹ than to the abstractions of welfare economics. In particular, "the exploitation of labor by labor" through the high admissions fees of trade unions and the suppression of internal dissent troubled Arnold.³⁷² "This sort of thing is not democracy," Arnold declared in the pages of the *Reader's Digest*. "It must not be allowed to spread."³⁷³

365. Cook, *supra* note 325, at 800-01 & n.56.

366. *Id.* at 801 n.56.

367. 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 81 (1949). I am grateful to Mark Barenberg of the Columbia University Law School for drawing Hale's testimony to my attention. Barenberg is at work on an important study of the intellectual and political origins of the Wagner Act.

368. See Ernst, *supra* note 32, at 42-53.

369. Thurman W. Arnold, *Theories about Economic Theories*, 172 ANNALS AM. ACAD. POL. & SOC. SCI. 26, Mar. 1934, at 28.

370. Thurman W. Arnold, Statement of Thurman W. Arnold, Assistant Attorney General of the United States, before the Temporary National Economic Committee, with Respect to the Application of Antitrust Laws to Labor Unions, February 13, 1941, at 2 (Department of Justice Papers, National Archives, File 60-194-0, Box 641).

371. See Douglas Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period*, 23 STAN. L. REV. 1049, 1052-53 (1971) (tracing the strand of "progressive moralism" in Arnold's youth and early career).

372. Thurman W. Arnold, *Labor's Hidden Holdup Men*, 38 READER'S DIG., June 1941, at 136, 138.

373. *Id.* at 139.

Arnold thoroughly appreciated the critical force of legal realism; he became a vigorous agent of the New Deal state; he never lost sight of the need to square the exercise of public power with ethical ideals.³⁷⁴ We cannot tell from *Crisis* how many of the other legal realists who left the Yale Law School or the Johns Hopkins Institute of Law for the New Deal escaped with their "political and moral passion"³⁷⁵ intact. These important figures rarely escape *Crisis*' footnotes, where they suffer a kind of historiographic exile for the crime of enthusiasm for quantitative methods.³⁷⁶ Arnold's cases suggests that Horwitz was too quick to dismiss the larger portion of the realists as naive, technocratic positivists. Horwitz' structuralist linkage of social science and positivism may serve his present political purposes, but it unduly constrains our view of the legal realists. Allowing for more contingency and contradiction in their thought would have preserved the realist legacy of the Yale-educated members of CLS, many of whom will doubtless be surprised to learn that the "greatest and most enduring contribution of Realism" owed little to their positivistic teachers.³⁷⁷ It would also have permitted all of us to learn more about the other things on the realists' minds, including the dilemmas of governance in a pluralist society.

III. CONCLUSION

"It is much more important to understand than to criticize."³⁷⁸ Pound's remark remains good advice long after his quarrel with the legal realists, particularly for scholars engaged in the common project of studying the history of American law. In pointing out some of the missteps and missed opportunities in Horwitz' study of ninety years of American legal thought, I do not wish to minimize his contribution to our understanding of Victorian lawyers and judges and their successors. Read with Horwitz' earlier *Transformation*, *Crisis* successfully completes a legal analogue to Hartz' great survey of American history, one that shares Hartz' dissatisfaction with the liberal tradition, but not his pessimism about the viability of a radical alternative.

Crisis is the summation of the structuralist tradition in American legal history, a tradition launched by CLS scholars intent on unmasking the supposed necessities of everyday life. The book will serve as the capstone of this historical

374. In this Arnold is consistent with recent studies of fiscal and antitrust policy in the New Deal, which date the rise of a technocratic, managerial approach much later than one would expect from *Crisis*. Alan Brinkley, *The New Deal and the Idea of the State*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 85 (Steve Fraser & Gary Gerstle eds., 1989); Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 *GEO. L.J.* 1511, 1520-24 (1984).

375. P. 209.

376. Pp. 312-14 n.85.

377. *Id.* at 270. On the Yale-educated CLS founders, see Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255 (1961); Schlegel, *supra* note 56, at 392-96.

378. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 *HARV. L. REV.* 697, 709 (1931), *quoted* p. 173.

edifice, rather than the cornerstone for a new structuralist project. In part, this is because *Crisis*' contribution to American legal thought is not nearly as novel and important as *Transformation*'s assault on legal process theory. The avant-garde among CLS scholars have already left structuralism behind them; to other legal academics Horwitz' insistence on the social construction of law will come as old news.³⁷⁹

More importantly, *Crisis* appears just as the structuralist understanding of the uses of history is coming under attack. As intellectual historians attempt to accommodate the diversity Horwitz overlooks, their studies are growing increasingly contingent and openended. In theory, at least, Horwitz' methodology could accommodate many of my objections to *Crisis*. Horwitz could admit that there was some diversity in late-Victorian legal thought, and still insist that it was reducible to a handful of rival structures, perhaps originating in several broad social categories.³⁸⁰ He could concede that Holmes' historicism weathered the social upheavals of the 1890's, and still maintain that the next generation of legal thinkers required a new belief system to comprehend the unprecedented social realities of the early twentieth century. He could moderate his criticism of the scientific realists and recognize that critical realism advanced the law teachers' project of professionalization, and still argue that most realists worked from fundamentally different premises than the generations of legal thinkers who preceded and followed them.

As a practical matter, however, any study that fully addressed my objections to *Crisis* would be hard to justify in terms of the critical tradition's notion of the use of history. In such a study, ideas would not rise and fall with the triumph or defeat of the structure in which they are embedded. Instead, they would garner support by proving their worth to individuals in the diverse facets of everyday life, where their remote implications are more easily evaded than CLS historians have suggested. Readers would still learn that their ideas are historically contingent, but they would not be asked to search out and renounce the structures that constrain their own thought. Rather, analogies drawn from rounded portrayals of similarly situated people in the past would broaden their appreciation of the consequences of their beliefs and actions.

One can disagree with Horwitz on this historiographic level without denying him a permanent place among scholars of American legal history. Professional historians will always differ on the relative importance of conflict and consensus, structure and contingency, change and continuity, text and context, difference

379. Thus Cass Sunstein commences his review of *Crisis* with the exasperated remark, "Some people think that it is very important to establish that what we consider 'law' is really 'politics.'" Cass R. Sunstein, *Where Politics Ends*, 207 NEW REPUBLIC, Aug. 3, 1992, at 38. Sunstein's readiness to grant the point validates William N. Eskridge and Gary Peller's observation that mainstream scholars of American public law "deradicalize the left's intellectual discourse even as they embrace it." William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 764 (1991).

380. Cf. Gordon, *supra* note 45, at 117-19.

and similarity; and they will always bring political sensibilities to their work. Horwitz has gone to the past for insight into one of the abiding concerns of the CLS movement: how “American jurists since the Revolution have striven to embody ‘a government of laws and not men’ in a conception of an autonomous system of law untainted by politics.”³⁸¹ If *Crisis* suggests that its subjects have other insights to offer those who approach them with different concerns and a more generous spirit, the book nevertheless sets a high standard of intelligence and intellectual ambition that all legal historians would do well to emulate.

381. P. 9.