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# American Legal History in Retrospect and Prospect: Reflections on the Twenty-fifth Anniversary of Morton Horwitz's Transformation of American Law Review Symposium on the 25th Anniversary of Horwitz's Transformation I

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# American Legal History in Retrospect and Prospect: Reflections on the Twenty-fifth Anniversary of Morton Horwitz's *Transformation of American Law*

Christopher Tomlins

Fifteen years ago, a decade after the appearance of his *Transformation of American Law, 1780–1860*, Morton Horwitz was the keynote speaker at the American Society for Legal History's annual meeting in Toronto. His address was an erudite, if idiosyncratic, excavation of the historiography of Anglo-American legal history. The occasion was particularly memorable, however, for the moment when Horwitz offered his interpretation of the scholarship of John Pocock, who as chance inevitably would have it, was at that moment sitting some 20 rows back in the audience. A tremor of disturbance rippled outward from the twentieth row, where Professor Pocock's body language signified a certain disagreement with what he was hearing. Horwitz paused. "I am aware of the likely effects of offering an intellectual history of someone who is sitting in the audience." But he didn't stop.

This short essay attempts no intellectual history of Morton Horwitz. Others have already pursued that task with accomplishment (see, for example, Ernst 1993). Honoring the spirit of Horwitz's Toronto address, however, my comments will range widely across the terrain of American legal history

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as I see it. My point of departure is, of course, furnished by the subject immediately at hand—Horwitz's first *Transformation of American Law*.

From a vantage point more than 25 years after its publication, it is undeniable that *Transformation* had a major influence on the field of American legal history. The book quickly became a focus for legal historical scholarship: For at least a decade following its appearance, innumerable legal historians devoted the greater part of their energies to confirming or, more usually, refuting Horwitz's argument and conclusions.<sup>1</sup> As important, *Transformation* successfully broke the bounds of disciplinary specialism, attracting significant (and more respectful) attention from nonlegal historians. During the past quarter century, legal history has become a highly influential component in the wider world of American history. The beginnings of that influence can properly be traced to the publication of Horwitz's first book.

Certainly *Transformation* made a major impression on me, though in my case the influence took a little time to come about. When the book was published, I was in graduate school at Johns Hopkins, feeding a burgeoning interest in American labor history. I was not at that time aware that there was such a field of study as "American legal history," far less that *Transformation* was setting it abuzz like almost no other Bancroft prize winner until *Arming America* (Bellesiles 2000). Ironically, had I read the book at that moment, I might have been less influenced by it than proved subsequently to be the case. Horwitz's key claim to innovation within the field was that the history of law was in crucial respects indistinguishable from past politics. The claim was exciting, qua law, yet it was being advanced almost exactly at a time when more and more American historians were engaged in a search for almost any means *other* than "past politics" to organize their historical practice: Witness the massive upsurge of social history, the beginnings of cultural history, the struggles over the import of the "linguistic turn" in intellectual history, and the experimentation with post-New Left conceptual structures like "the organizational synthesis."<sup>2</sup> One might argue that legal history's rising influence and presence in American history in general has come about as a result of its capacity to fill partially the vacuum left by American historians' abandonment of politics.

In any case, I didn't read *Transformation* until the serendipity of academic circumstance led me to reinvent myself as a legal historian in the early 1980s. Even then, for two reasons, I did not fully grasp the book's significance. First, before engaging with *Transformation* I had already become thoroughly enmeshed in *Whigs and Hunters* (Thompson 1975), *Albion's Fatal*

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1. See Laura Kalman's essay in this symposium (2003).

2. For social history's antipolitical implications, see Fox-Genovese and Genovese 1976; Eley and Nield 1980. For early commentary on the tendencies manifest in cultural history, see Walters 1980 and Cohn 1981. On the linguistic turn in intellectual history, see Toews 1987; Appleby 1989; also Thompson 1984, 3–5. For the organizational synthesis, see Galambos 1970, 1983.

*Tree* (Hay et al. 1975), and the historicized British criminology of the 1970s (see, for example, Taylor, Walton, and Young 1973; Rock and McIntosh 1974)—work that generally seemed more palatable than *Transformation*: more theorized, more historical, less legalistic. For a labor historian coming to law from Left social history and historical criminology, it did not seem all that odd that an American legal historian too should discover that law was so thoroughly embedded in social conflict and covered with the fingerprints of the powerful. Second, and perhaps more significant, my engagement with American legal history was occurring in an autodidact's vacuum. I was not then at all well acquainted with the historiography against which the book was reacting. When I read *Transformation* I spent so much of my time just trying to get my head around the parsing of legal detail on which Horwitz so heavily relies to carry his revisionist case, that I ended up failing fully to understand the nature of the revision itself.

*Transformation*'s introduction clearly reveals its author's anxiety that the latter might indeed be a difficulty some readers—"the general historian . . . general readers"—would experience. Writing the book brought Horwitz "face to face with the problems of being faithful to the internal technical structure of a discipline while at the same time providing a more general perspective from which to measure its significance" (p. xi), and it preoccupied him so much that, notwithstanding the book's substantive ambitions, its opening statement is not about changing our vision of American law at all. The reader eventually receives the necessary guidance: "In this book, I seek to show that one of the crucial choices made during the antebellum period was to promote economic growth primarily through the legal, not the tax, system, a choice which had major consequences for the distribution of wealth and power in American society" (p. xv). But this historically significant statement of intent was buried on the fifth page of the introduction. The author's agonized discussion of the pros and cons of technical and general history took pride of place. The issue is stated and restated seven times over (pp. xi, xv). Failure to resolve this matter kept the author from realizing his larger goals and priorities. On the evidence of the book itself, Horwitz had decided, whether consciously or not, to remain as far as possible within law's "internal technical structure," suggesting either anticipation of the scholarly challenges the book would meet from his law school peers, or perhaps simply the predilections imparted by training. But the choice clashed with his ambition to provide the "more general perspective" that, contextualized in general history, would have anchored his revisionist agenda.

Ironically, rather than forestalling lawyerly objections, Horwitz's decision actually encouraged the drubbing that *Transformation* took from some legal scholars. Look at the detail of my technical legal analysis, the author seemed to invite: Here, in microcosm, lies my big picture. Well, as Charles Beard (1913) would tell us, no one who so fearlessly reveals his argument's structural reliance on subjective assessment of myriad technical details all

pointing one way, like iron filings to a magnet, is likely to pass unscathed. *Transformation's* legally trained antagonists fell on what Horwitz denoted "the necessary data" with virtually audible squeaks of critical pleasure. When I met the author for the first time, around a seminar table in Madison in 1981, his assessment as I recall was that only two chapters remained to be carpet bombed.

At the time, Horwitz did not seem too concerned at the fury of the reaction he had provoked—though perhaps, in hindsight, that was my own subjective misjudgment. The larger point is that Horwitz had no need to feel concern. For even though the ideal of determinate technical "proof" had turned out to be a near-fatal mirage, the larger claim had by then very clearly entered circulation, and indeed had become in important ways an essential pole in legal and general historical debates. "During the eighty years after the American Revolution, a major transformation of the legal system took place, which reflected a variety of aspects of social struggle. That the conflict was turned into legal channels (and thus rendered somewhat mysterious) should not obscure the fact that it took place and that it enabled emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power in American society" (p. xvi).

That such a claim for dramatic, substantive, and consequential change in the law was then worth making, and continues to be worthy of investigation, I have little doubt. In important ways my own subsequent analyses of the history of labor law (see, for example, Tomlins 1993) comport with the claim. (What better vindication could there be?) How much, though, was the book a transformation of American legal history? To the extent that Horwitz's work inspired new curiosity about legal history as a field for historical practice, and brought new entrants, then certainly it was that too. I have already remarked on the vigor legal history has demonstrated this last quarter century. The correlation with *Transformation's* appearance and the debates it sparked is suggestive, and even though correlations can tell us nothing about causation, the implication at least is deserved. But considering American law as subject and historical analysis as practice, was *Transformation* itself a transformational work? Did it introduce us to a new metanarrative?

Here, I am less persuaded. The ground that Horwitz trod had long before been pegged out, albeit synoptically, by Willard Hurst's *Law and the Conditions of Freedom* (1956). The ground was the relationship of law to the economy and, to a lesser extent, the social and political institutions of white settlement. The intent of the inquiry was to ascertain the part law played in meeting the challenge of what Hurst capaciously denoted "environment," by which he meant institutional strictures and the innovations they provoked, no less than trees and whatever it took to chop them down, for profit, with impunity. The most revealing subject matter was not public law, which we might best describe as high-level, constitutional, flashy but intermittent, but private law—low-level and piecemeal, but common, constant and cu-

mulative. The chronology was that of a static, premodern, archaically collectivist or communal colonial period succeeded by a dynamically selfish, dramatically modern, nineteenth century. The actors were those, white and male, who struggled for, or over, the accumulation of wealth. And what law did was, for good or ill, release energy.

This, it seems to me, is a fair statement of common ground between Hurst and his successor. It suggests continuity in historical discourse, not transformation. Where Hurst and Horwitz parted company was in the theory that informed their work and hence, unsurprisingly, in their assessments of intentions and outcomes. Hurst placed pragmatism at the core of American legal culture. His goal was a synthetic structural-functional sociology of law's relationship to other instrumentalities of social order. His assessment of outcomes concentrated on process—how effectively the goals of a presumptively shared national consciousness and national purpose were realized. In much of this he showed the colors of Holmes and the early Pound, and also traces of the German historical school of Savigny and the later Jhering, which had so influenced them (Grey 1989; Reimann 1992 ; Herget 1993). Followers turned Hurst's account into a more functionalist instrumentalism (see, for example, Friedman 1973), but they remained oriented to society and culture, not simply to economic development.

Horwitz's assessment, in contrast, concentrated on the politics of distribution, on who got what, and by what means, and how much. The assessment was fed not by pragmatism but by a non-Marxist radicalism, a vision of the relationship between legal-political order and material transformation that owed not a little to Beard on its surface and to Polanyi in its deep structure. The result was a major critique of the Hurstian metanarrative. Hurst had not interrogated the legal conditions of American freedom critically. Freedom obscured distributional choke-points; it had too many unacknowledged conditions for Horwitz to stomach. Freedom's achievements were legally asymmetrical; they could not pass a just distributional test. Energy was released, but its product was skewed toward the powerful.<sup>3</sup>

As important as these substantive differences, maybe more so, Hurst's and Horwitz's narratives differed in genre. Hurst's history is an organic romance of the nation—not unusual for the consensual 1950s, or for one who, we may argue, was an intellectual successor of the nineteenth century's German historical school. It articulates what Hayden White describes as “a drama of self-identification” in which the hero, who is everyman—or as Hurst has it, “we”—triumphs over the world of experience and its constraints (White 1973). I must say that each time I read *Law and the Conditions of Freedom* I see more hesitancy in its celebration of pragmatic transcen-

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3. It is worth noting that just as I identify Holmes as a predecessor of Hurst, so Horwitz attempts to prise Holmes out of that path to stand him instead as a precursor to theories of law as a social construct produced in social struggle. See Horwitz 1992b, 31–71.

dence, more degrees of ambivalence about the doings and the failings of its famous “we.” In the conclusion to *Law and the Conditions of Freedom* dwells a degree of uncertainty about the future rather than an obviously happy ending. But Hurst’s romance is not qualified enough to become what has penetratingly been called “gothic romance,” a genre of deep ambivalence and knowing caution, in which passionate attachment to something—a nation, a people, a principle—at the same time expresses a knowing and justifiable fear of it (Honig 2001). As Carl Landauer has suggested, Hurst simply has too much confidence in the ultimate promise of “our” organized intelligence for that (Landauer 2000). This was, after all, postwar America, not gray, agonized Europe; its middle class was an expansive “people of plenty” (Potter 1954), living far from the quiet cramped desperation of David Lean’s *Brief Encounter* or Rattigan’s *Separate Tables*, or the rationing and outcrops of “prefabs” (temporary housing) that dotted 1950s England.<sup>4</sup>

*Transformation* invokes no “we.” Horwitz’s population is overall the same population as Hurst’s: European settlers and their descendants, albeit they inhabit a different locale—not Hurst’s yeoman interior but predominantly the Atlantic seaboard and, within that, the Northeast. Strikingly, however, this population is not a single organism “we” but very much divided, as befits a new history born in the late 1960s, into a “them” and an “us.” “Them”—what William Manning back in the 1790s called “the few” (Morison 1956)—first seize the handles that direct the release of energy. Once maneuvered into the right position, “them” locks the controls. The combination of initial seizure and final lock render “us”—those whom Manning called the “many”—helpless. The wonderfully sonorous rhetoric of *Transformation*’s last page underlines the fate of the many like the tolling of a bell. “A scientific, objective, professional and apolitical conception of law . . . now comes to extend its domain and to infiltrate . . . the every day categories of adjudication” (p. 266). Although, as I have said, this is not a Marxist history, that sentence always reminds me of Marx. The rhetorically brilliant use of the present tense forces the reader out of the stream of past history and directly into a personal confrontation with, and choice about, the expression of power in law. For Marx, history was a means of analysis to a current political end. In *Transformation*, what Horwitz was attempting was essentially no different.

The new conception of law—formalism, in Horwitz’s shorthand—was what society’s “powerful groups” used to confound and confine the rest. It was their means to “disguis[e] and suppress[ ] the inevitably political and redistributive functions of law,” (p. 266) functions that, left clear, might

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4. For a synopsis and analysis of *Brief Encounter*, go to <http://www.filmsite.org/brie.html>; for a description of *Separate Tables*, go to <http://members.tripod.com/claudia79/separate.html>.

otherwise have been pressed into service to redress the imbalance between the powerful and the subaltern. And that is literally the book's final word. No backsliding or qualification here. Unlike Edward Thompson's retreat from the logic of his history in the famous reflection on the rule of law that concludes *Whigs and Hunters* ("We might be wise to end here. But . . .") [Thompson 1975, 258–69]), Horwitz knew exactly where the story should properly end. To invoke once more the work of Bonnie Honig (2001), Horwitz writes here in the genre of gothic horror. Through disguise and infiltration, the powerful have rendered the masses helpless. Their belief in their agency is naive self-delusion. Their hopes are frustrated, their struggles useless. The future holds no promise of change. *Matrix*-like, we do not even see the mechanism that controls us.

Horwitz's withering appraisal of outcomes was highly influential, and of course, his unapologetic attribution of an instrumental role to law in crafting those outcomes was highly controversial. But American legal history's metanarrative remained essentially unaltered. Flotillas of imitators and detractors formed in the wake of *Transformation* to test "the Horwitz thesis" this way or that. But none defined a new empirical or methodological locale for American legal history, because at bottom *Transformation* pointed to none: Here, rather, was simply a very effective reversal of some of the ruling metanarrative's operational polarities. Nor, I believe, has the situation changed since. Horwitz himself did not provide further guidance. *Transformation II* (Horwitz 1992a) was less an exercise in deepening the narrative implications of its predecessor than a departure from them in search of new ideas about causation. Nor has the sum of activity in the field during this last and most vibrant quarter century of scholarship brought comprehensive alteration. The flood of outstanding work that we have been witnessing for years now has taken legal historians substantively everywhere, into all the nooks and crannies of life that the Hurstian metanarrative passed over; our historiography has successfully categorized the multiple interpretive and substantive trends that have developed as a result (see, for example, Gordon 1984, 1996). In the 1970s, class, and in the 80s and 90s, race and gender, became established as essential standpoints from which legal history could be written, and with great success. But still, no new and overarching conceptual-organizational structure for the subject emerged.

In other words, though hollowed out by a quarter-century of vital and creative substantive research, Hurst's metanarrative, his romance of the nation the law built, endures as a default setting. As Barbara Welke recently put it, we now have a social history of law lying alongside a history of law in society, but that social history is an archipelago, not a continent. And in creating this archipelago, as we have rethought the substantive boundaries of legal history, we have not touched what Welke calls "the heart of Hurst's work . . . that law and legal process suffuse American life" (Welke 2000,

203). Our rich substantive work has furnished plurality, but it has not led us to a new overview. A historiography that is essentially one of categorization has organized plurality, but in doing so, it has confirmed its dominance.

Now certainly this outcome may well have been the product of conscious choice. Historians in the 1980s and 1990s were deeply suspicious of metanarrative, particularly its potential to confine the imagination within interpretive structures unfriendly to particular modes of inquiry, or particular subjects. One may prefer a history without metanarrative; piecemeal pluralism may indeed be the better row to hoe. If left alone, however, metanarratives continue to rule by default. Better, then, to engage and attempt to replace them. In any case, here our subject is transformation, and given that I have argued that Hurst gave us the metanarrative that we still use by default, and that Horwitz's *Transformation* gave us no new metanarrative, it seems to me at least worth speculating what a new metanarrative for our field would look like. Where would its emphases be? What would be its genre? Could it tell us more than that law and legal process suffuse American life. Could it tell us why?

Attractive though it might be, I don't want to borrow Barbara Welke's image of law as a bridge that connects disparate islands (Welke 2000, 204). That image proposes law as a foundation for *synthesis* in history, a proposal I have elsewhere advanced myself (Tomlins 1995, 1999). But here my obsession is with metanarrative, not synthesis. The work of metanarrative is not to explain law everywhere in American history, or to use law to explain everything else. It is to try to capture law's most active historical essence. I seek a means to characterize law, not as a foundation or a common denominator that unites disparate historical phenomena, but as an active force in American history. The metanarrative that I embrace is law's work as the active agent of the most important force in American history—the force of colonization.

As historians, time is our most important dimension.<sup>5</sup> Hurst and, after him, Horwitz were, I think, overconfident in their understanding of historical time, to the detriment of their history. In both cases, nothing that happened in America much before the beginning of the nineteenth century really had any relevance to the meaning of American modernity, except as the point from which their Americas, liberal and modernizing on the one hand, increasingly commercialized and divided on the other, departed. In one swoop, our default metanarrative of legal history wrote off as irrelevant—it ignored; it simply forgot—the whole history of European colonization of America. Because colonizing simultaneously projected on the continent modernism's contrapuntal anthropologies of civility and savagery, refinement and barbarism, improvement and wilderness, progress and stasis,

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5. This and following paragraphs lean heavily on arguments developed in Tomlins 2001a, 2001b, and 2003.

this was to neglect perhaps the most strategic moment in the formation of the character of American modernity itself, and its most enduring expression.

In Horwitz's case, writing within the chronology and on the ground already established by Hurst, this is perhaps not so surprising. It is fair to say, without being a condemnation, that Horwitz has nothing much to say about the legal dynamics of expansion per se. His intention was to show that what appeared consensual was in fact not so. In Hurst's case, however, it is surprising.

What is so profoundly odd about Hurst's excision of two centuries of American history is not the excision per se: Metanarrative makes precisely those kinds of choices about what is foundational, what merely interesting. As I have said, a metanarrative is not a synthesis. What is odd about it is that in seeking a metaphorical representation of liberal, modernizing American law's qualitative difference from what had been, Hurst chose a scenario that was in fact utterly continuous with the primal motive force of those excised centuries—relentless expansion. For Hurst figured his unique American legal culture precisely in an emblematic instance of the legal economy of colonizing. Hurst's legendary figuration of the release of energy is of course his narrative of the establishment in 1836 of a claimants' union on the newly settled banks of Pike River, in the southeast corner of what is now the state of Wisconsin, what was then the old northwest territory. The documents that he used to construct the narrative show that this group of settlers had originally joined together in a "Western Emigration Company," to remove from Oswego County in New York to what would eventually be Kenosha County, Wisconsin—territory they described as a "new country." Their effort of removal itself entitled them to reward, they said, because it was a transforming journey, conducted on behalf of civilization, into a void. "We have left our friends, deprived ourselves of the many blessings and privileges of society, have borne the expenses, and encountered the hardships of a perilous journey, advancing into a space beyond the bounds of civilization." Their civilizing mission was to transform that space, through labor, from open prairie hunted by Indians to enclosed agricultural smallholdings, the exclusive possession of which would be signified by the erection of "a house body, or frame of sufficient dimensions for a family to dwell in, or half an acre ploughed, or a piece enclosed with at least 100 rails." They considered their place of settlement fruitful, but perilous, "a state of nature," prone to "anarchy, confusion," and often leading to "bitter quarrels, even bloodshed." In advance of government instrumentalities, their "protective union" was constituted to resolve disputes among themselves and to guard their claims against threats from the "unfeeling speculator" and from other migrants, described variously as "malignant . . . unprincipled, avaricious," and the "mob." They also sought protection from Indians, whose presence was threatening legally, "as the country had not yet been surveyed"; whose com-

peting uses were threatening physically, as they “fired the prairies . . . for hunting purposes” and endangered the settlers’ farms; and whose growing dependency bred thieving and a “constant desire for whiskey,” which was both wretched and repugnant (Lothrop 1856, 45–79, particularly 461–64, 472–79).

The discourse of these emblematic settlers is absolutely continuous with that which animated English colonizing from its outset. The polarity between sovereignty’s civility and the space beyond, a space of confusion and threats, of violence, and of barbarism; the penetration of boundaries and the reformation of space on behalf of civilization; the creation of an occidental jurisdiction of legalities; and the legal economy of transforming waste into product: Nothing here was novel.

What, however, was the reality of the space where Willard Hurst chose to stage the opening scene of his romance of American law? It seems appropriately pristine, appropriately liberal—safely divorced from the coastal colonies and their compromised histories, far from the warfare and removals of the South’s contemporary western frontier, dug deep in the rich yeoman sod of the Upper Mississippi valley, and fully a part of the old northwest territory, where America’s founding fathers, as a recent paper of Lea VanderVelde’s points out (2003), supposedly got slavery right (as they did not in their first birthing of the nation), by banishing slavery from all the territory northwest of the Ohio. Unfortunately for them, and also for Hurst, whose history ignored slavery as well as the removals of the indigenous population (as indeed did *Transformation*), VanderVelde has helped us understand that slavery was alive and well in the northwest territory, taken there by the federal army sent to police the boundary. Of course, the political economies of colonizing, indigenous removals, and slavery deeply implicate each other. It should be no surprise to find them so intimately related; it is unfortunate to find that relationship unexplored in the story of how American law came to be. Our default metanarrative’s deepest flaw is that it does precisely that.

What is the significance of these elisions and omissions in a history? To quote from Francis Barker’s *The Culture of Violence*, “If the land is a place of fulsomeness and abundance, it is at the same moment one of ideal emptiness, a depopulated landscape. . . . [F]rom the point of view of those for whom there is space and validity, emptiness . . . may even be a definition of the ideal” (Barker 1993, 3–4). As for earlier colonizers, so for Hurst: America was an empty place. It could safely be appropriated and organized with law by a few squatters.

As indeed, to all intents and purposes, it was—hence the substitute sketched here. Not the release of energy but colonization’s possession of the continent, of what lay beyond it, and of the means to effect that possession, in my view, gives American legal history its foundational and enduring meaning. Hurst’s metanarrative centers American history on the myth of a state created from nature by incipient bourgeois proprietors. He occluded

their violent intrusion on what had been—the long story of how they came to be who they were and where they were—instead indulging self-creation as their originary act, emblematic of their Lockean claim, as Carol Pateman has put it, of “an original political right . . . to fill the empty vessel,” to appropriate to themselves reproductive power and give birth to new political life (Pateman 1988, 87). What they created was a liberal, modernizing regime in territory expropriated from its inhabitants under the protection of a colonizing army serviced by slaves: a reasonable enough microcosm, one might suggest, of the political economy of the antebellum republic. And this was in fact nothing new. These were the conditions of the freedom in whose creation law had been thoroughly implicated ever since the late sixteenth century, ever since the elder Richard Hakluyt succinctly described the problem of colonizing America as how to “man it, to plant it, and to keepe it” (Taylor 1935, 333); ever since Tudor-Stuart projectors of colonies chose law as their technology of planning, jurisdictional design, and state creation (Tomlins 2001a); ever since Locke’s discourse on property in the *Second Treatise* returned time and again to the conditions of possession of American land, decreeing it justly appropriated for the “use of the Industrious and Rational” and condemning anyone who interfered to destruction “as a Lyon or a Tyger, one of those wild Savage Beasts, with whom men can have no Society nor Security” (Locke 1980, 21, 11; see also Pagden 1998).

What genre is this substitute metanarrative? Certainly it is no romance. Neither, I think, is it gothic horror. Here is no determining of human fate from places beyond the reach of human agency, no exploration of paralysis in the face of pervasive power. Here, rather, is a history of the effects of choice, and of the constructions of power that resulted. It is a history that, from the beginning of European colonizing, places law in America in the full flood of occidental modernity’s chaotic emergence, of its proponents’ will to order, of that order’s effects, and of the conflicts and chaos that it in turn created for others. Such a genre is tragedy—not the tragedy of a hero’s inevitable fall, but tragedy in historical mode—the tragic necessity in all to confront chaos, to seek order; the tragic realization that any order’s essence is deeply provisional and contradictory, that what we fight for, as well as against, contains its own contradictions and its own seeds of destruction. The goal is not to stop fighting, but also not to mythologize outcomes. The goal is rather to understand them in all their plasticity, and so bring about some maturation of consciousness in both participants and spectators.

Pursuit of metanarrative has led us from familiarity into a forbidding landscape, where figures might wander “in ye deserte willdernes out of ye way . . . both hungrie, & thirstie, their sowle . . . overwhelmed in them” (Bradford 1898, 97). Rather than linger among them, let us return to our initial point of departure, *The Transformation of American Law*, and its author. I began with a story of subjectivities—a speaker and his involuntary

subject and their polite but insistent determinations to proceed on their paths of thought. In this essay, I have been the speaker and Morton Horwitz, or rather his book and its metanarrative context, the involuntary subject. Whether he disagrees or not, as a scholar of insistent determination in following his own lines of thought, he will not mind that I have done the same. We can debate the matter. Not to avoid the debate, but to contextualize the commentary, let me say that if I had any intimation that the book I am writing now would be debated 25 years hence, and that on re-reading it, the commentators would find it as fresh, as lively, and as unafraid as it was when conceived, I would be a very happy author. It is a rare achievement to force an audience to think as much as *The Transformation of American Law* forced and still forces its audience to think, especially when one considers that its audience is not simply antebellum American legal historians but an entire scholarly field.

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