



1981

Book Reviews: Tort Law in America: An Intellectual History

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Recommended Citation

Betten, Alan (1981) "Book Reviews: Tort Law in America: An Intellectual History," *University of Baltimore Law Review*: Vol. 10: Iss. 2, Article 8.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol10/iss2/8>

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BOOK REVIEWS

TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY. By G. Edward White.* Oxford University Press, New York, New York. 1980. Pp. 283. Reviewed by Alan Betten.†

In his book *Tort Law in America: An Intellectual History*,¹ G. Edward White attempts to demonstrate that the succession of doctrinal perspectives concerning tort law from 1870 to the present may best be understood "as deriving from the shifting ideas of legal scholars and judges."² Combining perspectives generally used by intellectual historians, sociologists of knowledge, and legal historians, White sets forth the thesis that "the ideas of certain elite groups within the legal profession have had an influence disproportionate to the numbers of persons advancing these ideas."³

Generally well written⁴ and entertaining, White's book is, unfortunately, disappointing, especially to those who have read his earlier books concerning American legal thought.⁵ Overshadowing the fact that some of the material contained in *Tort Law in America* has been published in these earlier works, and that the new version suffers when compared with the earlier versions, White's intellectual prosopography emphasizes the autonomous nature of law, the notion that law responds to the rational arguments and theories of treatise-writers and appellate judges, and it undervalues materialist causes underlying the development of tort law that are derived from the surrounding economic and social milieu. Although White correctly recognizes the importance of the legal intelligentsia in tracing their history, he fails either to account satisfactorily for other potentially important factors in tort law's development or to note that the intellectual tradition cannot be "organized" as neatly as he might desire.

The basic structure of *Tort Law in America* is dictated by White's perception of four major periods in the development of

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1. The book is hereinafter referred to as *Tort Law in America*.

2. TORT LAW IN AMERICA at xi.

3. *Id.* at xii.

4. The serious student of legal history will no doubt be somewhat hampered in his enjoyment of the book by the placement of the notes at the end of the text. At the least, substantive notes, in contrast to bibliographical notes, should be placed at the bottom of the page.

5. See G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978); G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1976) [hereinafter cited as THE AMERICAN JUDICIAL TRADITION].

tort law: Langdellianism (Conceptualism), 1870-1910; Legal Realism, 1910-1945; Consensus Legal Thought, 1945-1970; and Neoconceptualism, 1970 to the present. Although the discussion of each intellectual period focuses on the theories and writings of celebrated legal scholars, White also devotes entire chapters to Judge Cardozo and Judge Traynor, who represent the Realist and Consensus Legal Thought schools, respectively.

White states at the outset of his book that the "emergence of Torts as a distinct branch of the law owed as much to changes in jurisprudential thought as to the spread of industrialization."⁶ Nevertheless, much of White's discussion concerning the emergence of torts and its first developmental phase, Langdellianism, focuses on the rise of conceptualism. According to White, the post-Civil War "Victorian" intellectuals attempted to regain a sense of order and unity that they believed had existed in eighteenth-century America. Because society was becoming increasingly atomized and secularized, however, the traditional modes of social ordering — the family unit and organized religion — were unavailable as theoretical bases. The intellectuals of this period thus sought refuge in the emerging concept of the scientific ordering of knowledge.⁷ Reliance on the scientific method was accompanied by the collapse of the common law writ system, which had previously served as the surrogate for doctrinal classification. As balkanization of the special pleading rules occurred and laxity in the enforcement of the technicalities of pleading increased, the value of the writ system declined commensurately.⁸

With the growth of scientific, universalistic thought, it was only a matter of time before the writ system became obsolete. Such was the feat of Holmes in his lectures *The Common Law*,⁹ in which he asserted that there was a distinct branch of law known as torts and that it could be subdivided into three categories: absolute liability, intentional torts, and, most important, negligence. Although not in agreement with Holmes' contention that liability in tort had always been based on a determination of fault, White states that court decisions prior to 1870 illustrate the evolution of the negligence theory, from an omission of a preexisting, specific duty owed to a limited class of persons to a violation of a generalized standard of care owed to all persons.¹⁰ White notes that this change in the perception of the nature of negligence was, to some extent, due to the increased number of "stranger" cases

6. TORT LAW IN AMERICA at 3.

7. *Id.* at 6.

8. *Id.* at 7-9.

9. O.W. HOLMES, JR., *THE COMMON LAW* (M. Howe ed. 1963).

10. TORT LAW IN AMERICA at 18.

between persons with no preexisting relationship to each other.¹¹

Concomitant with the advent of monistic theories of torts, such as Holmes', was the use of the scientific method of studying law, initiated at Harvard Law School by Christopher Columbus Langdell. One learned law by means of a scientific method and, if presented with a group of cases, one could extract the "correct" principle of law.¹² Tension was inherent in this method of study, however, because the common law method of the growth of legal doctrine conflicted with the idea of the existence of universalistic principles. Thus, tort theorists were forced to recognize that judges and juries might not act in accordance with their scientifically-derived principles, and therefore their rules and theories might be disregarded.¹³

According to White, the Legal Realist movement began to emerge by the end of the first decade of this century. These Realists, within whose jurisprudential school White also places Social Jurisprudence, exhibited attitudes common to early twentieth-century reformist thought: an emphasis on relevancy, objectivity, empirical research, and antiuniversalism.¹⁴ Unlike Langdellianism, Legal Realism emulated the social sciences rather than the natural sciences. In its ideological purity, Legal Realism was without any particular set of predetermined values. Although Social Jurisprudes such as Pound disagreed primarily with Langdellianism's lack of social goals, Realists denied that the "law" could be clearly delineated or that a set of values could be consistently advanced by the courts. For the Realists, doctrine was continually in a hypothetical state.¹⁵

White focuses much deserved attention on Leon Green's "pure Realism," which tended to resurrect the discrete tort actions of the pre-Langdellian era by means of a functional approach.¹⁶ Yet he clearly perceives Cardozo as more representative of mainstream Realist thought. Cardozo knew that a judge needed to be creative in order to derive enduring principles.¹⁷ He also knew, however, that the method of derivation could not reject the traditional values of "uniformity, predictability, and orderliness in common law subjects."¹⁸ His genius as a judicial theorist stemmed from his ability to fuse these goals of the Conceptualists with Realist notions of relevance and reform by substituting, for

11. *Id.* at 16.

12. *Id.* at 26-33.

13. *Id.* at 58-59.

14. *Id.* at 65.

15. *Id.* at 73.

16. *Id.* at 83.

17. *Id.* at 120.

18. *Id.* at 118.

example, judge-controlled standards of "reasonable foreseeability" and "ambit of risk" for ambiguous standards of "proximate cause."¹⁹

Although the methodology of "pure" Legal Realism overly denigrated the idea of law as doctrine, after World War II many Realists came to believe that promoting rational decision-making processes could insure proper value choices. Properly made, law had an "inner morality" that insured its liberal beneficence. The most important value of this Consensus Legal Thought²⁰ was that tort law, rather than being utilized to admonish blameworthy persons, would be utilized to compensate injured persons. During this period, White asserts, tort law shifted from the realm of private law to public law.²¹ Just as Cardozo was forced to fuse Conceptualist and Realist ideals, torts scholars now were forced to find a doctrinal approach on which to base their new social justice policy. This doctrinal gap was admirably bridged by treatiser William Prosser. In addition to retaining the interest-balance approach of the Realists, Prosser's summaries of the "state of the law" in a given area of torts became the doctrinal bases for the new jurisprudence. Prosser's consensus approach emphasized that tort law could be subjected to doctrinal analysis and that such doctrine changed constantly, but only incrementally.²²

For Judge Traynor, White's classic Consensus Legal Thought judge, objectivity and rational decision making could be achieved by the neutral, disinterested judge's enlightened use of the then-persuasive intellectual views. If such enlightened rational decision making led to activist policy decisions, then Traynor was fully prepared to be an activist.²³ Yet, even if, as White asserts, Traynor legitimated the commonly accepted policy-making role of judges in tort cases, he was bound to his intellectual milieu by his belief in the efficacy of a rational decision-making process.²⁴ Such belief clearly disturbs White, for "there is nothing about the people selected to be judges or the process of judging itself that suggests . . . that the judiciary has a greater hold on 'rationality' than the rest of us."²⁵

White is far more disturbed, however, by the resurgence of conceptualist theorizing in the 1970's. He notes that much of this Neoconceptualism is put forth at a time when alternatives to tort

19. *Id.* at 125.

20. In an earlier work, White labeled this school of thought Process Jurisprudence. See THE AMERICAN JUDICIAL TRADITION, *supra* note 5, at 252.

21. TORT LAW IN AMERICA at 146-53.

22. *Id.* at 153-63.

23. *Id.* at 188.

24. *Id.* at 208-09.

25. *Id.* at 209.

law, such as no-fault insurance, are being increasingly devised. White dismisses both the economics-based theories of Posner and Calabresi, because they make incorrect assumptions concerning human nature and action, and the corrective justice theories of Fletcher and Epstein, because they would retain elements of interest balancing akin to the problems now found in negligence theory.²⁶

In contrast, White views torts as "a complex of diverse wrongs whose policy implications point in different directions."²⁷ Recognizing that tort law is, in part, a form of public law, he would retain elements from both the admonitory and compensatory functions of torts. White's major concern is not that a unitary standard of tort liability may be implemented but rather that those lawmakers who are in some measure accountable to the populace — judges and legislators — may permit unaccountable academics to expand unjustifiably their influence over the lawmaking process.

As outlined above, White's tale is, in the main, a familiar one; earlier discussions concerning the past century of our legal history have noted these shifting ideological tides.²⁸ White does make a genuine contribution, however, by focusing on the impact of each movement on tort doctrine. For example, he describes how the doctrine of voluntary assumption of risk was derived from contract law by the Langdellian scientists,²⁹ how the Realists attempted to lessen the jury's role by restructuring the notion of proximate cause,³⁰ and how Prosser used his "state of the law" summary method to advance the torts of privacy and infliction of emotional distress.³¹

Nevertheless, White's account of the development of torts is much too one-sided. It overly relies on the autonomous nature of law and denies, or at least too easily ignores, the materialist bases that might underlay the ideas of the academics. Economic and societal events certainly helped mold the law of torts, albeit within the constraints imposed by professional tradition and doctrine.³²

26. *Id.* at 219-30.

27. *Id.* at 233.

28. See, e.g., G. GILMORE, *THE AGES OF AMERICAN LAW* (1977) [hereinafter cited as GILMORE]; W. RUMBLE, *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND JUDICIAL PROCESS* (1968) [hereinafter cited as RUMBLE].

29. *TORT LAW IN AMERICA* at 41-45.

30. *Id.* at 96-102.

31. *Id.* at 161, 173-76.

32. See Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81, 89 [hereinafter cited as Tushnet].

In a thoughtful review of White's earlier book, *Patterns of American Legal Thought*, Jay M. Feinman states:

White emphasizes two moving forces of legal history: institutional and doctrinal beliefs of the legal system, and larger cultural attitudes and movements in social thought. Institutional norms constrain the judge's authority, for example, by requiring judges to follow approved techniques such as formally rational decision-making and adherence to precedent. Judges filter these role constraints through their own social and political inclinations, which by and large reflect the social values generated by dominant intellectual patterns. Thus judicial law results from the interaction between ideas embodied in the legal system and ideas embodied in the culture.³³

In contrast to this theory, Feinman posits that, in reality, there is a constant interaction between legal thought and social forces and that "the dominance of particular ideas is explained by their service to the social relations of domination and subordination."³⁴

Although Feinman correctly notes that White unduly overemphasizes the autonomous role of ideas, his contrasting theory of materialism does not necessarily better explain the nature of development in legal thought. Whereas Feinman states that "[i]f law is interrelated with social practice, then perhaps social practice is prior to law and not vice versa,"³⁵ social practice may at times precede but may at other times follow law. In short, reality may be too complex to be dominated by either White's idealism or Feinman's materialism.³⁶

Two examples derived from *Tort Law in America* adequately demonstrate this point. At the outset of his book, White describes how the rise of the Langdellianist method of science mirrored the decline of the utility of the writ system as a mode of doctrinal ordering. Although White clearly rejects the notion that the writ system collapsed solely due to increasing obscurantism or to the developing code movement, he does base the system's collapse on the occurrence of an expanding economy that created a need for a more complex writ system.³⁷ This appears to be a plausible explanation for the system's demise; the "stranger" cases, as White

33. Feinman, *The Role of Ideas in Legal History*, 78 MICH. L. REV. 722, 730 (1980) [hereinafter cited as Feinman].

34. *Id.* at 733.

35. *Id.* at 729.

36. For a similar point of view concerning the complexities of establishing a doctrine's genealogy, see Gordon, *Review of Tort Law in America: An Intellectual History*, 94 HARV. L. REV. 903, 907 (1981).

37. TORT LAW IN AMERICA at 8-12; Feinman, *supra* note 33, at 731.

notes, did force courts to shift their doctrinal focus from an examination of the relationship between the parties to an examination of what duty was owed by each party to the world at large.³⁸

Yet, the recognition of this shift in emphasis does not explain why the resultant tort law coalesced around the principle of negligence. If the scientific method was essentially a neutral method of gathering and ordering knowledge, why, then, did the doctrine of negligence appear to favor consistently the bourgeois entrepreneur or, at the least, a laissez-faire economy? To paraphrase Morton Horwitz's theory concerning the rise of legal formalism in the middle of the nineteenth century, could the rise of Langdellianism and its major doctrinal tool, negligence, be the result of the growing importance of an autonomous professional elite (the professoriat), a convergence of interest (even if not fully recognized by both parties) between this new legal elite and the commercial and entrepreneurial interests, and the ability of the commercial interests to have the law, even if now transformed, continue to serve their interests?³⁹

White does recognize that, at the end of the nineteenth century, the theory of negligence was used to restrict, rather than to expand, the potentially compensatory function of tort law.⁴⁰ Even so, he appears to recoil from the full implications of his discussion of, for example, the rise of the doctrine of assumption of risk from a status-based contract context to a negligence context, in which an employee was deemed fully "competent" to agree to undertake dangerous employment at his own risk.⁴¹ Although he correctly recognizes that the collapse of the writ system was primarily caused by outside economic conditions, White apparently does not perceive that the same underlying economic and social factors may have greatly affected the coalescence of tort law around the theory of negligence.

In contrast to this example, which supports Feinman's materialist view, there is the rise of strict liability in the era of Consensus Legal Thought. As described by White, Prosser, in the 1941 edition of his treatise, noted an impetus by some courts to find manufacturers strictly liable to third-party consumers who

38. TORT LAW IN AMERICA at 16.

39. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 255-56 (1977). It is also interesting to note that the rise of mid-nineteenth century formalism was, as with Langdellianism, preceded by declamations concerning the need to make law more scientific. See P. MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 156-85 (1965).

40. TORT LAW IN AMERICA at 61.

41. *Id.* at 41-45. See generally Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980).

incurred injuries from defective products. Prosser's delineation of ample justifications for extending such liability did not hasten the increased acceptance of the theory.⁴² Nevertheless, after writing a series of hortatory articles and drafting section 402A of the revised Restatement of Torts, Prosser managed to convince the legal community of the need to replace an inefficient negligence theory with a more realistic concept. As White correctly notes, the rise of strict liability in this area catalyzed change in the compensatory function of tort law and, in part, effected an expanded concept of liability insurance. The processes of legal autonomy thus helped to precipitate economic and social change.⁴³

As Feinman notes, idealism views law as a rational activity and promises reform through the exercise of reason; materialism views law as the arena of ongoing class conflict concerning truth and justice.⁴⁴ White's argument, without taking into account economic and societal factors outside of the law, cannot reflect fully the doctrinal development of torts in the last century.⁴⁵

If the lack of any serious materialist perspective was the only problem with *Tort Law in America*, one could still praise it for presenting the reader with an important synthesis of ideas. Unfortunately, however, the book has other problems. For example, in his discussion of Legal Realism, White strenuously attempts to make a virtue of chronological and doctrinal order and thereby contradicts himself, thus diminishing the effectiveness of his argument. Although it is quite difficult to separate chronologically Social Jurisprudence from Legal Realism — especially when one recognizes, as White correctly does, that both schools of thought arose in response to Langdellianism — it is also impossible to state, as does White, that both schools were part of the same movement and that they shared certain basic views. Contrary to White's assertion,⁴⁶ both schools of jurisprudence did not endorse moral relativism. The Social Jurisprudes, such as Pound, were "social engineers" who strove to improve society through the use of social science methods. Unlike the "pure" Realists, they were not distrustful of the efficacy of legal rules; rather, they wanted such rules to be used to promote social progress.⁴⁷ This distinction between the two schools of thought may be easily discerned by examining some of the writings directed by the Realists

42. TORT LAW IN AMERICA at 168.

43. *Id.* at 169-72.

44. Feinman, *supra* note 33, at 733-34.

45. When such factors are properly taken into account, then one is also able to better note the facilitative, repressive, and ideological functions of the law. See Tushnet, *supra* note 32, at 95-102.

46. TORT LAW IN AMERICA at 65-69.

47. *Id.* at 70-71.

at Pound.⁴⁸ Furthermore, to the extent that the Realists were in fact moral relativists, perhaps White should not have used Cardozo as his Realist exemplar. As White delineates quite clearly, Cardozo was adept at using tort law both to protect and promote his interpretation of the community's moral standards.⁴⁹

White's discussion of the development of Consensus Legal Thought may well be disappointing to readers of his other works because much of the discussion is derived from his already-published portrait of Judge Traynor.⁵⁰ This disappointment is compounded by the fact that White's earlier chapter on Traynor permits the reader to understand better Traynor's decision-making process, because it also discusses Traynor's decisions in other areas of the law. For example, in *Tort Law in America*, White emphasizes Traynor's belief in judicial decision making as a rational process,⁵¹ whereas in *The American Judicial Tradition* White states that, for Traynor, "judging was ultimately an art, resisting precise characterization."⁵² Also, given White's emphasis in *Tort Law in America* on the development of torts by academics and judges, it is refreshing to read in *The American Judicial Tradition* about "Traynor's partnership theory of legislative-court interaction."⁵³ Finally, one must even question why White included Traynor as a singularly important precursor of a now commonly accepted policy-making role for judges in tort cases. Although Cardozo's method of policy making might have been quite different than Traynor's, Cardozo's opinion in *MacPherson v. Buick Motor Co.*⁵⁴ represents an instance of judicial policy making as important as, for example, Traynor's opinion in *Greenman v. Yuba Power Products, Inc.*⁵⁵

White is probably correct in stating that the overarching theories constructed by the Neoconceptualists are not likely to dominate tort law and to displace the complex of diverse wrongs that presently contains both admonitory and compensatory elements.⁵⁶ Yet, White fails to discuss why these "philosophically

48. See, e.g., Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). See also GILMORE, *supra* note 28, at 78 n.25; RUMBLE, *supra* note 28, at 9-20.

49. TORT LAW IN AMERICA at 130-36.

50. THE AMERICAN JUDICIAL TRADITION, *supra* note 5, ch. 13.

51. TORT LAW IN AMERICA at 208-09.

52. THE AMERICAN JUDICIAL TRADITION, *supra* note 5, at 301.

53. *Id.* at 304.

54. 217 N.Y. 382, 111 N.E. 1050 (1916).

55. 59 Cal. 2d 57, 377 P.2d 897 (1963). Indeed, as a reviewer of *Tort Law in America* has noted, if Traynor's principal achievement was to give legitimacy to "public solutions" of torts issues, "one might well have thought that this orientation was so radical a departure from the traditional way of viewing tort liability merely as an issue between specific individuals that it would deserve to be elevated to a separate chapter in the intellectual history of the subject." Fleming, *Review of White, Tort Law in America: An Intellectual History*, 1980 A.B.A. FOUNDATION J. 614, 615.

56. TORT LAW IN AMERICA at 233.

continuous series"⁵⁷ are so popular. Are they the academic response to the somewhat self-contained legislative solutions, such as no-fault insurance, to selected problem areas in torts? Are they attempts to demonstrate that courts can also administer, with minimal balancing of interests, compensatory tort systems?

Although White states that our tort law is primarily the product of interaction between law professors and judges, he never fully explains how the ideas of the professoriat are incorporated by the judges into law. White also does not explain how, in the United States, a country with fifty-one independent jurisdictions, there is surprising uniformity of our tort law.⁵⁸

In conclusion, it should be noted that *Tort Law in America*, although myopic in scope, provides a valuable introduction to the major intellectual changes and developments that have occurred in tort law since the late nineteenth century. One hopes that in his future work White will expand the scope of his vision to produce the cultural-legal history of tort law that remains much needed.

57. O.W. HOLMES, JR., *THE COMMON LAW* (M. Howe ed. 1963).

58. In a seminal article, Martin Shapiro theorized that this situation might be best studied by using concepts derived from organization theory. Shapiro, *Decentralized Decision-Making in the Law of Torts*, in *POLITICAL DECISION-MAKING* 44 (S. Ulmer ed. 1970). Shapiro posited that "a communications system that generates a very large volume of very small, but overwhelmingly supportive, messages may serve under certain conditions as a substitute for formal, authoritative mechanisms to achieve policy unity among multiple, independent, policymakers." *Id.* at 53. The study of this communications system might bring into focus some of the elements of the lawmaking process that White ignores. For example, in addition to studying the roles of the academic lawyers and judges, one might examine the roles played by the attorneys who have the first opportunity to shape and to mold the facts for the judges. *Id.* at 53-55. Also, one might examine why certain doctrinal areas of tort law change not at all for a lengthy period of time; why some change incrementally; why some exhibit a tension and restraint pattern, in which tension builds until a sudden catalyst releases the tension and permits a rather swift doctrinal reorientation; or why some exhibit a mixture of these developmental patterns. *Id.* at 60-72.