# Anti Intellectual History

*Tort Law in America: An Intellectual History. By* G. Edward White. *New York: Oxford University Press,* 1980. Pp. 283, $19.95.

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In the introduction to his book, *Tort Law in America,*[1] Professor G. Edward White disclaims the "staggering task" of writing the history of tort law. He nevertheless gives himself a substantial assignment: to write an intellectual history of torts in America, describing the "way the subject of torts has been conceived" and "why [tort rules and doctrines] changed and who did the changing."[2] Professor White assumes that the origins of "dominant theories of tort law" can be traced to the writings of a small but influential group of persons, particularly law professors at Harvard, Columbia, Yale, and the University of Pennsylvania and judges of state courts in New York and California.[3] What Professor White has given us, therefore, is a synopsis of the writings of those whom he considers to be the leading American tort law theoreticians from 1850 to the present.

## I

White succeeds admirably at his first task, describing how the subject of torts has been viewed by leading torts theorists. Although his tour contains few surprises, he has managed to pull together a disparate range of materials and to articulate a plausible scheme for cataloging them.

White divides his intellectual history of torts into four periods. The first, from 1850 to 1910, he labels the era of "conceptualism," during which torts first developed as an "independent branch of law." White attributes this development, and much of what followed during the era of conceptualism, to the reaction of intellectuals to the decline of both religion and a natural-law view, which had been unifying forces in America. In order to fill the void left by the weakening of these forces, conceptualist torts theorists attempted to develop what White calls "comprehensive theories of potentially universal applicability."[4] The main principle of liabil-

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1. G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY xi-xvi (1980) [hereinafter cited by page number only].
2. P. xi.
3. P. xii.
4. P. 6.

ity in tort that emerged from this period was the principle of negligence, which Holmes and others took from vague suggestions in preconceptualist decisions and transformed into a universal and "comprehensive" doctrine.

Like others who have written before him,[5] White describes a new period, beginning in the second decade of the twentieth century, in which conceptualism gave way to "realism." During this era, which lasted until the end of the Second World War, torts scholars and others came to reject the comprehensive, universal doctrines developed over the preceding sixty years. At first, the realists objected, not to universal principles as such, but rather to the failure of the particular principles that their predecessors developed to speak to contemporary needs. White argues that by the 1930s, however, the realists rejected the very notion of universal doctrines as obscuring what they saw as the essence of legal decisionmaking: legal process and its effect on individual litigants in individual situations. Realist influence fundamentally altered the negligence principle developed by the conceptualists by removing its premise of a universal duty owed to all and putting in its place a "relational" concept of negligence in which the magnitude of the risks to which a particular plaintiff was exposed and the social worth of the class to which he belonged were balanced against the utility of the defendant's conduct.[6] Moreover, realist legal scholars gave greater recognition to notions of strict liability.[7]

After the Second World War, realism in turn gave way to what White calls the period of "consensus thought," which lasted for twenty-five years. Unlike its predecessor, consensus thought did not break radically with the views and attitudes that immediately preceded it. Consensus thinkers kept much of the substance of the realists' work but, unlike the realists, focused on explaining changes in tort law through the processes and institutional settings that gave rise to them. Although the consensus thinkers saw their project as descriptive in nature, White argues, prescriptive implications were never far from the surface.[8] Where the realists had seen much that was *ad hoc* and non-rational in legal decisionmaking, consensus thinkers found rationality, consistency, and predictability in judicial decisions. Consensus thinkers apparently had little effect on substantive negligence doctrine, but judges in this period expanded the scope of strict liability in reliance on insights of realist scholars.

Finally, White describes the period from 1970 to the present as one characterized by the return of conceptualism or, as he puts it, "neoconceptualism." According to White, neoconceptualism has not yet made a sub-

5. *See* G. GILMORE, THE DEATH OF CONTRACT (1974).
6. P. 107.
7. Pp. 109-10.
8. *See* pp. 139-53.

stantive mark on tort law, in part because there is no agreement among neoconceptualists on the universal principles or doctrines to be pursued. Despite their disagreement about whether torts principles should promote efficiency or admonish defendants for blameworthy conduct, neoconceptualist scholars stand on common ground in their efforts to articulate overarching legal principles, often drawn from the insights of other disciplines such as history or economics. For his part, White finds all conceptualism inadequate because, he believes, the conceptualists' search for unifying principles cannot serve the diverse purposes and needs of tort law.[9]

## II

Professor White is less successful in explaining why tort doctrines changed and who changed them. In fact, he offers no convincing explanation of the reasons for change, and he assumes without justification or explanation the identity of those who did the changing.

One problem is that the book is badly written, and the problems with the writing make it nearly impossible at critical points to know what White means to say. The book is riddled with opaque terms used without definition or explanation. Thus, for example, White repeatedly exalts the "integrity" of tort law[10] without making clear whether he means its coherence over time, its resistance to infiltration by ideas from other bodies of law, or something else entirely. Similarly, White places heavy emphasis throughout his book on a distinction between "public law" and "private law."[11] But it is not until late in the book that he even briefly explains that his distinction between "private" and "public" depends on whether the law is intended to deal with "two-party private relations" or "multiparty public relations" among persons who are not parties to the litigation.[12] Evidently the distinction for White between "public" and "private" law is not affected by whether the law was made by courts or by legislatures or by whether the law is rooted in legal obligations created by private conduct or by public intervention.

More than just individual terms remain obscure in White's work. Whole sentences are incomprehensible. No one, except perhaps Professor White, could tell us what it means to say that tort law's "integrity, and its amorphousness as well, can be linked to the place of injury in American life."[13] Nor has White told us anything by saying that "[r]ealism profoundly altered the intellectual foundations of twentieth-century tort law,

9. *See* pp. 215-30.
10. Pp. xvi, 164.
11. *See, e.g.*, pp. 113, 150, 178-79, 208-09, 218, 231-32.
12. P. 149.
13. P. xvi.

but did not fundamentally change its conceptual apparatus."[14]

White's lack of precision sometimes leads to apparent contradiction. For example, White writes that Judge Andrews' opinion in *Palsgraf*[15] "was explicitly an exercise in interest-balancing," but in the very next paragraph he asserts that Andrews' opinion failed to concede that "the process of resolution was explicitly one of interest-balancing."[16]

Imprecision and lack of clarity mar the organization of the book as well. White covers the four basic periods of tort theory in five chapters. Chapters one and two are given to conceptualism; chapter three addresses realism; chapter five describes Prosser and consensus thought; chapter seven deals with neoconceptualism. Into this sensible progression White has inserted two extensive and apparently unrelated discussions, one of Cardozo (chapter four) and one of Traynor (chapter six), neither of whom White fits into his four-part framework. White emphasizes Cardozo's ability to cloak innovation in traditional language, but he neither shows nor argues that Cardozo shared any realist views, such as a contempt for general principles. Similarly, although White maintains that Traynor relied on Prosser's work (as well as that of other scholars) in certain areas, he makes no attempt to show that Traynor strove to categorize and synthesize, as the scholars of his period allegedly were wont to do.

## III

The problems with this book, however, go beyond carelessness and imprecision. White has set forth an interesting chronology of prominent thinkers' ideas about torts, but he has said very little about why one torts doctrine gave way to another, why different generations of scholars sought different ends through tort law, or why different scholars have held different views about the best methods of achieving the same ends.

White tries to explain the evolution of torts thinking by drawing parallels between developments in the field of torts and contemporaneous developments in the American intellectual community at large. And, to be sure, he succeeds in relating the broader intellectual currents during each of his four periods to some aspects of what was going on in torts. He illustrates, for example, how torts casebooks in the realist period began to reach beyond the opinions of appellate judges to the growing and varied body of social science literature that legal scholars were beginning to tap.

Despite his successes, however, White cannot fully explain the particular substance of torts doctrine during any of his four periods by referring only to the more general intellectual climate of the day. White describes

14. P. 64.
15. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
16. Pp. 99-100.

the essential characteristic of nineteenth century conceptualist thought, for instance, as the displacement of unifying forces such as religion and natural law by universal, "scientific" principles. This general view of conceptualism does explain why torts thinkers sought to develop *some* universal principles of liability in the late nineteenth century. But it does nothing to explain why they settled upon the *particular* negligence principle that White identifies as the main development in tort doctrine during the conceptualist period. A universal principle of strict liability or liability based on intent would have been just as unifying as the negligence principle.

White himself recognizes that the emergence of the negligence principle cannot be explained solely in light of the general intellectual currents prevalent during the period, so he endeavors to supplement his explanation by asserting that conceptualists sought to admonish wrongdoers. That assertion adds a significant element to the explanation, for it provides a goal for torts in the late nineteenth century that can be linked with the negligence doctrine: Tort actions were to be used to discover and to punish wrongdoers, and negligence turned on some notion of fault. But the explanation remains incomplete, for the origins of the stated objective —to admonish wrongdoers— are themselves unexplained. White simply asserts the prominence of that objective, as if it suddenly appeared in the intellectual rubble left by the collapse of natural law. White's purported explanation of the change in torts ideas thus becomes something of a tautology: Torts thinkers sponsored the negligence principle with its requirement of fault because they wished to admonish bad conduct; we know they wished to punish such conduct because they said so in adopting the negligence standard.[17]

White's explanation of substantive torts development during the realist period suffers from similar shortcomings. White explains that the realists' preference for individualized, *ad hoc* judgments over universal principles, together with their emphasis on broad social welfare concerns, led to what he calls "interest balancing." These general notions do not, however, explain any of the three basic doctrinal shifts during this period: alteration of the basic negligence doctrine from one based on the breach of a duty owed by the defendant to the whole world to one based on the breach of a duty owed only to specified individuals within some "foreseeable" range of danger from the defendant's actions, expansion of strict liability, and the advent of the tort of intentional infliction of emotional distress.

At first look, one might suppose that the transformation of negligence

17. White probably overstates the single-mindedness of the architects of nineteenth-century tort law in stressing the admonition function. Conceptualist doctrine also made the plaintiff's contributory negligence and assumption of risk absolute bars to recovery, even though neither defense furthers the goal of admonishing defendants' blameworthy conduct.

from breach of a universal duty to breach of a particular duty might be explained by reference to the realists' general preference for *ad hoc* interest balancing. A closer examination, however, shows that White would not explain the development in this way, for he views the conceptualists' notion of negligence as just as fact-specific and non-universal as the realists'. Whereas the realists examined the particular facts of each negligence case in order to determine whether the defendant owed a duty to the plaintiff, the conceptualists undertook a similarly detailed and individualized analysis under the rubric of "proximate cause." Moreover, White does not even try to show that torts thinkers' beginning to examine the scope of defendants' duty was tied to concern for the social welfare of plaintiffs. In short, although there may have been very good reasons for the shift from proximate cause to duty, none can be gleaned from White's description of the transition from conceptualism to realism.

Nor can White explain the realists' shift from negligence to strict liability solely in terms of their balancing the interests of individual litigants. To be sure, strict liability in the twentieth century brought with it an increased awareness of the social-welfare implications of tort law as liability came to turn on the relationship between classes of plaintiffs and defendants instead of the blameworthiness of individual defendants' conduct. But this express consideration of the parties' status did not require a doctrine of strict liability. Moreover, the supposed thirst of the realists for *ad hoc* judgments seems to be at odds with the broad, universal rules of liability that evolved. Whereas negligence under the realists—and even under the conceptualists—made liability in individual cases turn on a host of factual determinations, strict liability balanced society's interests in vast classes of litigants, in effect deciding individual liability in a wide range of cases by a single, universal judgment.

As with negligence in the conceptualist period, therefore, White finds it necessary to explain the development of strict liability during the realist period as reflecting in part an overriding goal for tort law. For the realists, that goal was compensating tort victims. Unfortunately, the compensation objective, like the admonition goal that White ascribes to the conceptualists, seems neither to bear any particular relation to the broader intellectual notions of the period that White describes nor even to be at the core of contemporaneous thinking about torts in general. Two of the substantive developments that White associates with realism—the development of the tort of intentional infliction of emotional distress and the transformation of questions of proximate cause into questions of the scope of the duty owed—have little if anything to do with compensation.

## IV

White's chronology thus appears rather arbitrary—a sequence of doctrinal events, some more or less plausibly related to others but none shown to be a necessary or inevitable successor to that which preceded it. The incompleteness of the analysis appears, in hindsight at least, to be the inevitable consequence of White's deliberate choice to exclude from consideration other forces for change that might help explain the complex evolution of legal doctrine.[18]

White has chosen virtually to ignore the impact of economic or social events on ideas. He entirely overlooks basic historical transformations that surely must have affected tort law, both by giving rise to new circumstances in which old legal doctrines were to be tested and by suggesting new purposes and interests to be served by the law. White is silent, for example, about the possibility that strict liability for defective products became more widespread as a result of profound changes in commercial relationships, with consumers increasingly purchasing goods that passed through a number of steps in the distributional chain. Similarly, although White acknowledges that the advent of liability insurance made compensation for injury less burdensome, he asserts without explanation or justification that it was merely a symptom, and not a cause, of the fundamental shift of tort doctrine away from the function of admonishing defendants' blameworthy conduct and toward the function of compensating injured plaintiffs.

White does hint at the effects on tort law of two historical events: America's industrialization and its war with Nazi Germany. He minimizes the importance of industrialization, however, by saying that it was important for torts only in the "limited sense" that it increased the number of torts cases involving strangers and thus led to the "intellectual response" of imposing a duty of care independent of pre-existing relations.[19] And although White refers to American intellectuals' reaction to Nazi Germany as a motivation for their search for moral absolutes, he makes no attempt to link that search to any substantive development in tort doctrine after World War II.

White not only ignores the social and economic context in which ideas evolved, but also refuses to take seriously the substance of torts ideas themselves. It is the substance of the ideas—the doctrines and the ways they are articulated—that determines how they are perceived and that embodies the vocabulary with which they are discussed and changed. As with ideas or paradigms in other fields, a particular legal doctrine or theory

18. *See* p. xii.
19. P. 16.

may fall out of favor, even if there has been no change in the surrounding intellectual climate, simply because it comes to be seen as inadequate to serve the purposes for which it was intended.[20] Yet White takes no account of the success or failure of any doctrine because he refuses to take seriously the substance of the torts doctrines that he examines.

White's treatment of *Palsgraf*[21] is illustrative. In order to fit the "theoretical confrontation"[22] between Cardozo and Andrews into his conceptual framework, White extracts from Cardozo's opinion a concern with the relationship between the plaintiff and the defendant, supposedly a significant departure from dissenting Judge Andrews' and the conceptualists' focus on the defendant and the blameworthiness of his conduct. Thus, says White, *Palsgraf* signaled a new era of "interest-balancing in discrete cases."[23] White attributes this evolution in negligence doctrine to the change in general intellectual fashion from conceptualism to realism.

White's analysis disregards the substance of what both Cardozo and Andrews said they were doing in *Palsgraf*. Indeed, White dismisses as merely "some ironies of the case" the facts that Cardozo's opinion was the more rigidly doctrinal of the two and that Andrews' opinion "was explicitly an exercise in interest balancing."[24]

White would likely have had more success piecing all this together had he begun by focusing on the particular problem posed by the case. The problem was whether the negligent defendant was to be held liable for the remote and unforeseeable injuries suffered by the plaintiff. As White acknowledges, both Cardozo and Andrews found that the conceptualist doctrines of negligence and causation did not provide adequate guidance for determining whether the defendant should be held liable.[25] The catalyst to the new doctrine articulated in *Palsgraf* thus appears to have been the failure of prior doctrine; the broader intellectual trends of the realist era are neither necessary nor sufficient to explain the change.

The inadequacy of particular doctrines or theories to serve their intended purposes in resolving new disputes is especially likely to serve as an impetus for evolution in the common law. Judicial lawmaking is, after all, generally thought to be subject to special procedural and methodological constraints. Judges, it is widely believed, should make only "principled" decisions based on "reasoned elaboration" from prior decisions and

20. *Cf.* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 66-76 (1962) (attributing Copernican, Newtonian (chemical), and Einsteinian revolutions, not to any new discovery, but rather to "a pronounced failure in the normal problem-solving activity").

21. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

22. P. 101.

23. P. 107.

24. Pp. 98-99.

25. P. 101.

the doctrines they embrace; a variety of legal principles, often encapsulated in notions of *stare decisis*, are intended to curb the imagination and whim of judges by restricting their decisionmaking authority. The development of the common law gains legitimacy through a dialectic between ideas and decisions. One might expect, therefore, that the doctrinal formulations of earlier common law decisions would be subject to rigorous examination in the course of principled decisionmaking and reasoned elaboration and that a doctrine would be abandoned when that examination disclosed inadequacies.

Yet White goes out of his way to reject any such special view of the judicial function or the evolution of the common law. In discussing Justice Traynor, for example, White says that what makes him a "man of 'his time,' as distinguished from 'ours,' is his belief that the 'primary internal characteristic of the judicial process' was that it was 'rational.' "[26] Indeed, White goes so far as to suggest that Traynor was disingenuous when he professed to believe that judicial decisionmaking is uniquely rational and objective:

> Rationality can be reduced to current notions of plausibility; it does not seem to be a timeless construct that is simply "there" to be grasped and articulated. So unless one regards Traynor as naive—a trait that his career belies—one is inclined to conclude that his exaltation of objectivity and rationality was a version of homage to the prevailing canons of his time.[27]

Although White pays lip service to what he calls the "symbiotic" relationship between judges and scholars,[28] he has not examined the impact of precedent on scholarship. To White, ideas are "causative agents" that influence doctrine,[29] but data, in the form of doctrine, can have little influence on ideas.

Despite his failure to attribute doctrinal change to any doctrine's substantive inadequacy and his general disavowal of anything unique in the principled, evolutionary method of common law decisionmaking, White stops short of saying that there is no qualitative difference between judicial and legislative torts doctrines. Thus, although he defines tort law to encompass all law "concerned with civil wrongs not arising from contracts,"[30] White focuses almost entirely on the common law development of torts and ignores legislative incursions into the field in areas such as the

26. P. 209.
27. P. 189.
28. Pp. 115, 215.
29. P. 233.
30. P. xi.

environment, occupational safety, workmen's compensation, antitrust, and securities. The apparent justification for these omissions is a tacit concession that judicial decisionmaking in torts is distinctive enough to merit extended analysis without regard to major legislative developments. But White's methodology and his skepticism of the "rationality" of judicial decisionmaking allow no such distinction between judicial and legislative decisionmaking that might justify exclusion of the latter from his study. White's approach to the evolution of legal thought should be able to explain legislative as well as judicial developments. Thus, because White has made no effort to analyze the evolution of ideas about legislation, he has missed an important opportunity to test his theories; more serious, his silence leaves whole areas of tort law unexplained and casts doubt on the significance of his sweeping notions about the relationships between intellectual currents and changes in legal doctrine.

## V

The key to White's failure to explain why torts ideas changed may lie in his views about who did the changing. At the outset of his book, White assumes that he can study torts thinking and doctrines simply by exploring the work of a few individuals at what he calls "elite" institutions. Because White offers no reason or justification for his premise, one might suppose that he believes that institutions become "elite" when they contain individuals who are leaders in their various fields and who generate ideas, theories, and doctrines that persuade others and thereby become prominent. But White's thinking appears to be something altogether different. For White, the influence of those associated with elite institutions stems, not from their ability to persuade through reason and analysis, but from the identity and status of the institution itself. Ideas become widely shared simply because they happen to be fashionable at elite institutions; only the right credential—institutional affiliation—is needed to give force to an idea.

The depth of White's cynicism about the significance of ideas in and of themselves appears without camouflage at both the beginning and the end of his book. In his introduction, White asserts that his approach to intellectual history "resembles that of the sociologist of knowledge" who views the influence of leading scholars' ideas "as a sociological phenomenon, linked not to the inherent soundness of the ideas but to the institutional context in which they have appeared."[31] And at the end of his book, White summarizes his view of 120 years of tort law, concluding that "nothing about the subject matter . . . compels one organization of the

31. P. xiii.

field or another."[32] Thus, according to White, the development of the negligence theory during the last century "was fortuitous in the sense that negligence was congenial to a distinctive intellectual attitude of the late nineteenth century,"[33] and the later "emergence of tort law as a compensation system was . . . largely fortuitous."[34]

White's intellectual apostasy explains much that is otherwise puzzling about his book. It is understandable that one who believes that the development of substantive torts doctrine has been "fortuitous" will see no point in examining those doctrines closely in order to explain how and why they have changed. Indeed, according to White, one cannot give any further explanation of the prominence of, say, Professor Bohlen's torts work in the first part of this century beyond observing that he held a prestigious post on the faculty at the Harvard Law School. To go further, to talk about the nature of commercial relationships in America or the opacity of the notion of proximate cause, is to obscure, not explain.

Appreciating White's cynicism about the nature and effect of ideas also explains his peculiar (and paradoxical) distrust of legal scholarship. White condemns neoconceptualism in part because he fears that its prominence will give scholars too much power. He fears that those who articulate appealing concepts will "be functioning as law makers" and that their concepts will be adopted by judges and legislatures, have the force of law, and thereby have an impact on society. Yet, White complains, law professors are not accountable to the people—not even as accountable as appointed judges, who at least are recognized as having a profound effect on society and therefore are subject to close public scrutiny. Thus, White concludes, neoconceptualism should be opposed because it threatens to confer too much power on an irresponsible elite.[35]

But professors are not "lawmakers" in the same sense as judges: Judges can make law by the stroke of a pen; they have power because they have authority. Academics, by contrast, have influence measured only by the force of their ideas. If those ideas persuade judges, lawyers, and other scholars, then professors will have influence on doctrine; if their ideas are unpersuasive, then the academics are powerless.

White has no confidence in the power of reason to ferret out bad ideas, to recognize that positive analyses as such have no normative significance, or to determine when normative analyses are not related to the factual premises on which sound legal doctrine must be based. Instead, White's unexplained assumption that the ideas of professors at elite institutions

32. P. 233.
33. P. 231.
34. P. 232.
35. *See* pp. 240-43.

dominate the profession turns out to be a fear that affiliation with elite institutions and the capacity to articulate plausible ideas give professors unbridled power that must be checked. White proposes to provide this check, not through intellectual scrutiny by the public, judges, or lawyers, but rather by assaulting the intellectual citadel itself.

White's fear of those who speak for elite institutions seems greatly exaggerated. His own chronology of torts thinkers belies his assertion that it is enough, in order to understand ideas about torts, to examine the theories of persons affiliated with specified elite institutions. Indeed, even White has found it necessary to study and recognize the prominence of persons—notably Prosser and Green—who were not affiliated with any of the institutions that White would evidently deem to be elite.

More important, however, is the inadequacy of institutional affiliation—whatever institutions are included—as an explanation of the prevalence of certain ideas. Affiliation with elite institutions cannot itself determine prominence of thought because elite institutions do not speak with one voice. White himself has identified four different scholars prominent in the 1970s, each of whom has a different view of tort law that cannot be reconciled with those of the others. Two of these scholars, Calabresi and Posner, emphasize efficiency objectives; the other two, Epstein and Fletcher, stress the admonition function of tort law. Epstein and Posner both teach at the University of Chicago, and all four presumably share what White regards as a sufficient nexus with elite institutions to be included in his survey. Yet White is unable to tell us which if any of their theories will have the greatest impact on torts doctrine or torts thinking during the neoconceptualist period.

In order to explain ideas, one must take ideas seriously and analyze their substance, the context in which they arose, and the process that gave them life. Some ideas are more sound than others; some, better than others, meet the needs that brought them forth. Because White has not taken ideas about torts seriously, because he has treated ideas and doctrine as little more than artifacts of contemporary fashion, he has been unable to explain why they have evolved as they have. It is White's intellectual nihilism that, in the end, has doomed his analysis to failure and so limited the value of his study.