BOOK REVIEW


Essentially a collection of previously published law review articles (plus one book review), this volume constitutes a valuable and stimulating compendium of writings in American legal history and jurisprudence by an important legal scholar. Written over the past eight or nine years, the articles are (after an appropriate introduction) arranged under three broad headings, namely, "Scholarly Thought," "The Judiciary," and "Constitutional Law." The three headings represent to White three sources of, and influences upon American legal thought (and jurisprudence) that have been overlooked by recent legal historians, particularly followers of J. Willard Hurst and the "Wisconsin School," who, claims White, have emphasized economic issues and trends as the primary source and explanation of American legal development, while deemphasizing ideological themes. White attempts to restore a balance. His criticism is reminiscent of that levelled against Charles A. Beard's famous Economic Interpretation of the Constitution of the United States.

White's style and the construction of the book may at first put some readers off. This would be unfortunate. The author is not attempting to lay out a tightly knit system where all the parts are interconnected in a grand and elaborate superstructure. The essays are rather loosely connected and while they fit into a very broad scheme of legal history, each essay deals with a more or less unique problem and stands on its own merits. In a sense, each essay is an historical monograph. The overall impression one is left with after completing the volume, however, is that of a set of unifying themes where legal historians can roam freely and find much fruitful work to do in the future. White's style might be broadly described as empirical, not in the sense that he uses statistics or masses of quantified data — there isn't any — but in the sense that he undertakes to describe and explore intellectual trends (be they school of thought, the views of a particular justice, or a constitutional doc-
trine) and their effect on American legal history and jurisprudence largely without attempting to evaluate or criticize. White alludes to this dichotomy in his essay on *The Appellate Opinion as Historical Source Material* where he points out that:

A perusal of law reviews and historical journals shows that articles in the former generally take the form of argumentative propositions on an aspect of public policy, with the author's empirical findings used in support of this argument, whereas articles in the latter are rarely argumentative in the same sense. Historians seem to be searching for some kind of objective reality in the past, piling information on top of previous information in an attempt to get closer to the truth. Their arguments are directed at previous generalizations made by their predecessors on the basis of too limited or faulty evidence; their "revision" of these generalizations is presented as part of a continuing professional search for what "really" happened. This stance is in contrast, by and large, to that of legal scholars, who are interested not so much in what happened or is happening as in what should have happened or should happen.¹

Yet White is not solely an historian. He purports to be attempting to contribute to jurisprudence as well and in so doing, he employs the traditional American pragmatic, tentative, relatively value free approach that he also describes so beautifully. Holmes' dictum that, "a page of history is worth a volume of logic," is entirely applicable to this work.

In two of the earlier essays included under the heading of "Scholarly Thought," White assumes that schools of American jurisprudential thought emerged in response to particular political, economic and social conditions. These schools, in turn, influenced the path of the law. In a third essay, *The Intellectual Origins of Torts in America*, White explicitly abandons the simpler causal model in favor of a more complex dialectical and at the same time tentative notion of the interaction among values, ideas and social conditions which "cause" events in the history of the law. While the *Torts* essay is important in our understanding of the development of law, the two earlier essays are perhaps more currently relevant because they detail the passage from early scientism, through so-

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ciological jurisprudence, thence to legal realism, reasoned elaboration and the difficulty of squaring the latter with the activism of the Warren Court years. Unfortunately, the author does not bring us up to the “born again” post-Vietnam years of the mid and late seventies. Nevertheless, the pattern of development is as follows:

Holmes (and Langdell?) — emphasis on natural sciences — progressivism;
Pound — social sciences — progressivism sociological jurisprudence;
Hutcheson, Llewellyn and Frank — cynical twenties, depression, New Deal — Behavioral Sciences — legal realism;
Reasoned Elaborationists — post World War II reaction to “positivism,” need for a moral justification for cold war, conservative;
Clash of Reasoned Elaboration theories with demands of minorities met by Warren Court.

If the above sketch of topics fully developed by White looks interesting, the reader will especially enjoy these two essays. They are a must for law students. While White emphasizes the historical source of the differences among these schools of thought, most law students would, I think, recognize that what is taught in law schools today largely reflects an amalgam of the views of the above schools.

White’s treatment of the development from one school to another does tend to focus on the commonly perceived weakness with which these “pragmatic” schools of jurisprudence have always had to contend — the role, function of, and source of value judgments. Pound’s “social engineering” theories encompassed the necessity that judges keep in mind “the common values held in priority by a society at a point in time . . .” He insisted that judicial decision making was continually influenced by current moral, political, and social ideas and that judges should legitimize their decisions by demonstrating how they reflected common moral values rather than merely their own idiosyncracies. The legal realists placed greater stress on judicial subjectivism, institutional (efficient) decision making, evaluation of law in terms of its effects, and in Llewellyn’s term, the “temporary divorce of Is and Ought for purposes of study.”

2. Id. at 113.
3. Id. at 114.
4. Id. at 129.
Charged with being morally relativistic, a chief concern of the realists was what might be called the "labeling" of the value component in judicial decision making. According to White, World War II, and later the cold war, caused many to conclude that the realistic school was dangerously similar in its concepts to the philosophies governing the totalitarian states. In a 1945 ABA Journal essay by Ben Palmer entitled *Hobbes, Holmes and Hitler*, this extreme view was popularized. The scholarly reaction occurred in the development of the reasoned elaboration school of jurisprudence. Henry Hart set forth the major departure from realism by concluding that:

> [G]iven adequate time and discussion, the thinking of judges about particular cases, perhaps initially a product of their idiosyncratic presuppositions, could mature into something more synonymous with "reason," a suprapersonal construct. This view freed the judiciary from the Realist prison of inevitable human bias. It assumed that for every judicial problem there was ultimately a "reasonable" solution — reasonable in terms of the value preferences of American society at a particular point in time. This solution could be reached, despite human frailties, if judges would take the time and effort to discuss openly their views of cases, compare them with the views of their colleagues, and articulate as fully as possible the general areas of ultimate concordance.5

White contends that this new "school" fostered institutional conservatism, professional craftsmanship, and a professional elitist attitude that advocated caution where the Warren Court saw the need for innovation and for reaching "right" results that were perhaps beyond the majoritarian moral consensus of the time. The Court therefore served as a creator of values, as well as an interpreter, and White regards the process as a dialectical one between court and society. Nevertheless, he concludes that such an activist view can be reconciled with the basic tenets of the reasoned elaborationists.

In the last few years (since White's two articles appeared) American jurisprudence would seem to have made a sharp departure from the schools of pragmatism that White so ably describes. John Rawl's *A Theory of Justice* and Robert Nozick's *Anarchy, State and Utopia* have resulted in "schools of thought" which posit fixed and certain

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5. *Id.* at 145-46.
value judgments against which concrete decisions may be measured. Rawls recreates a highly structured Kantian system underpinned by a clever "state of nature" analysis (the "original position"). Nozick, in recalling and regularizing our deeply ingrained libertarian tradition has by his extremism become the intellectual's Barry Goldwater. Both would seem to represent a trend toward intellectual absolutism and toward sleepy moral certitude. These trends are alarming. Professor White's historical methodologies, either his causal analysis or the more complex approach he suggests in the Tort chapter might prove quite helpful in understanding these latest trends. They may well be merely symptomatic of broader and more troublesome problems lying below the surface of American society.

My colleague, Professor Cornelius Murphy, in his recent book, Modern Legal Philosophy, amply demonstrates that highly structured abstract systems of jurisprudence, like those of Kelsen and Del Vecchio, have been important, if not terribly influential in this country until Rawls. Murphy posits a fundamental tension between experiential and abstract thought related to modern tendencies to separate jurisprudence from other branches of learning (though for the various pragmatic schools certainly not from something thought of as the scientific method). Murphy discusses the Lasswell-McDougal "policy science" method of jurisprudence (the New Haven school) not touched upon by White, and demonstrates, I think, that the method attempts (unsuccessfully in Murphy's view) to resolve the problem of value judgments through extensive reliance on detailed empirical study of a problem (presumably including economic evaluation and cost-benefit analysis). In a sense, knowledge becomes virtue, or almost, anyway. The Lasswell-McDougal school seems to me to be closely parallel to the continuous feedback model of decision making outlined by Karl Deutsch in his Nerves of Government. Be that as it may, what seems apparent today is that the pragmatic schools have not dealt effectively with the problem of value judgments. It is important to understand why, historically, they have not, as well as to urge that the problem be explored much more fully than hitherto. If it is true that humanitarianism and progress in western society over the last four centuries have occurred because of the emergence of a scientific, skeptical,

tentative mode of thought, those value related factors must be reexamined.

One recurring theme that struck me about White’s essays, although it is never brought directly to center stage, is the extent to which we are governed (no pun intended) by the individual knowledge, soundness or integrity of the judge or administrator. Much of our procedures, structures and laws serve to protect us from inadequate decision makers, yet it is amazing how much our system and its theories ultimately depend upon good decision makers. Frankfurter stressed the self-imposed limitations upon judges.7 Much of his theory of judicial restraint in dealing with administrative agencies was premised upon notions concerning the growth of a highly trained, elite, professional bureaucracy8 which he shared with the Progressives.9 The Realists stressed the behavioralist role of judicial subjectivism and intuition — the “hunch” of Justice Hutcheson. The Reasoned Elaborationists attempted to control this newly discovered individualism by requiring that the judge state reasons for his decision and that the reasons transcend his own biases.10 The place of value judgments in the mind set of an individual judge or administrator, however, has not been sufficiently explored. While Professor Murphy’s reintroduction of the scholastic notion of prudence raises numerous objections, his suggestion at least raises many of the right questions. And historical enlightenment is necessary to explain why the question of judicial intuition, or interpretation of unique facts in Frank’s analyses, have been more often avoided, or thought necessary of close control, rather than being directly faced. White’s essay on Brandeis crystalizes the problem.

Under the heading of “The Judiciary,” White includes two essays to illustrate the role played by individual judges on American law in a way that complements his The American Judicial Tradition. The first essay, The Rise and Fall of Justice Holmes is a delightful piece on the way different decades in American thought viewed Holmes. White, in his conclusion, is most struck by Holmes’ “cranky negativism.” “It is Holmes’ articulated refusal to take pride in being human that marks him as one of the least ‘heroic’ of American’s heroes.”11

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7. See White, supra note 1, at 58.
9. See White, supra note 1, at 104.
10. Id. at 160.
11. Id. at 226.
The second essay, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis* details Brandeis' role in, and the historical cases behind his setting up the "allocation calculus," still the starting point in administrative law in this country — the problem of determining the relationship of the courts with the agencies, *i.e.*, allocating power of functions between the two. Brandeis established the notion that the agencies and courts were in partnership, with the courts being the senior partners. Brandeis favored greater court scrutiny where individual rights were at stake rather than where only economic rights were involved. His approach was flexible. So far, nothing exceptional. But it is the very end of the essay, discussing Brandeis' current legacy, that is exceptionally enlightening. White contrasts the views on reasoned elaboration of Kenneth Culp Davis with those of Louis Jaffe. He recognizes that Davis views reasoned elaboration as essentially a procedural device and is therefore a departure from Brandeis' partnership model. Jaffe, on the other hand regards the requirement of stating reasons as essential if the courts are to properly supervise and see carried out the policy choices of the legislature (however broadly stated). For Jaffe:

An important question which must be faced on judicial review, then, is whether the courts agree with that judgment or whether, because of the importance of the interests affected or rights invaded by agency decision-making, they would prefer that they themselves make an assessment and offer a solution. Jaffe, a former Brandeis clerk, appears interested in retaining and refining portions of the Brandeisian model.12

The demise of the non-delegation doctrine leaves, apparently, only the above two models as ways to permit the courts to check agency "discretion."13 White predicts that the Davis model will prevail. Removing the courts from the policy questions (determining whether the reasons the agency advances are "good"), and concentrating upon procedure, *i.e.*, whether reasons are stated, has serious dangers, however. We are in an era where many people in our society believe that agencies have been "captured" and that bureaucracy...

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12. *Id.* at 28.
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has run amuck. Agencies learn to get around annoying procedures (witness the growth of agency expertise in drafting Environmental Impact Statements). *Vermont Yankee v. NRDC* ⁴ seems to close the door on judicial innovations in requiring additional procedures, at least in the context of hybrid-rule making. A return to the Brandeis-Jaffe model may therefore be the only way that the courts can perform any realistic role in checking the agencies. This necessitates, however, re-examining the way courts make value and policy judgments which inevitably arise if they are to have a substantive role to play with respect to agency policy making. White may therefore be wrong in predicting the demise of the Brandeis model (especially in light of *Vermont Yankee*), but this essay should be read by serious students of administrative law.

Under White’s third heading, “Constitutional Law,” he argues that the Constitution itself has had a special effect on American legal thought, and he includes two essays. The first proposes that communication between the Supreme Court and the public is not as simple or one-sided as some may think. The second, argues that “lifestyle choices” deserve the status of constitutional rights, even though their importance in American society has only been perceived recently. Both are stimulating and would seem to require careful attention from constitutional scholars. While neither White nor myself claim to have taught or written in the constitutional area, I am much more hesitant that he is to offer opinions in the area (and the reasons in both instances are probably good ones). The book as a whole is thought provoking, thoroughly enjoyable and deserves the study of both legal historians and students of jurisprudence.

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