

BOOK REVIEW

TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY. By G. Edward White. New York: Oxford University Press, 1980. Pp. xvi, 283. \$19.95.

*Reviewed by Jeffrey O'Connell**

For anyone with intellectual tastes and an interest in tort law, G. Edward White's *Tort Law in America: An Intellectual History* is a fascinating book. Professor White combines a lucid style with a stunning command of legal and other scholarship as he traces the influence of that scholarship on tort law in the United States. The book's ultimate effect, however, is ironic. It traces the intellectual effort to hammer out tort law—so much elegant thought by so many people—but does not sufficiently come to grips with the disaster that tort law was and is and may well continue to be, especially in the area of personal injuries.

Professor White starts his chronology, appropriately enough, by noting that religion, as “a major source of . . . communal values,”¹ influenced the common law of torts. For example, a nineteenth-century decision by the Michigan Supreme Court denied recovery for accidental death because “[t]o the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting”²

By the mid-nineteenth century “[t]he role of religion as a unifying force among American intellectuals was considerably diminished”³ In the place of religion as the touchstone of thought came thought itself, in the form of conceptualism—the scientific ordering of knowledge. That ordering led to the subdivision of tort liability into

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THE FOLLOWING CITATION WILL BE USED IN THIS BOOK REVIEW:

G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980), hereinafter cited as TORT LAW IN AMERICA.

1. TORT LAW IN AMERICA 5.
2. *Hyatt v. Adams*, 16 Mich. 179, 191 (1867).
3. TORT LAW IN AMERICA 5.

three categories: absolute liability, intentional torts, and negligence.⁴ Negligence quickly assumed an overwhelmingly dominant position:⁵ "torts was, in short, virtually synonymous with negligence."⁶

The rise of science, with its passion for classification, was intertwined with the rise of specialization and professionalism. This rise in turn generated "the production of massive conceptualist treatises"⁷ on torts, among other subjects, and the replacement of legal apprenticeship with law school. All of this led to rigorous attempts to organize rules of tort law in an orderly, predictable manner, with an increasing refinement of principles. Concomitantly, in the late nineteenth century these principles reinforced a reluctance to shift the burden of loss in negligence cases from the injured to the injurer.⁸

Early in the twentieth century came the rise of legal realism, which, in its better-known phase, was concerned not so much with how legal rules are derived as with their effect—whether and how they are followed in practice.⁹ "Most of the 'real' rules of law were not reflected in cases but in patterns of behavior: business practices, the activities of criminals, the performance of legislative and administrative officials."¹⁰ Realists believed that general abstractions are suspect, that empirical observation is the key to understanding law, and that contemporary influences are paramount. Realists thus objected to the proposition, so dear to conceptualists, that a case represents a broad legal principle.¹¹ Instead, they said, it is just one case, often with little or no legal meaning beyond its own context.¹² Rather than classifying rules as good or bad, the later realists saw all rules as illusory. They viewed law as typically the result of a battle of interests—with one interest prevailing over the other. "The legal rules affecting water companies were different from those affecting railroads or coal miners. It was fruitless to generalize beyond the immediacy of the case and the clash of interests that it posed."¹³

In rejecting quests for universal principles, in seeing the world in a continuing state of confusing flux, in deeming "contemporary relevance" to be the key to understanding cases, and even more in rejecting

4. *Id.* 13.

5. *See id.* 18.

6. *Id.* 19.

7. *Id.* 34.

8. *Id.* 62.

9. *Id.* 71.

10. *Id.* 72.

11. *Id.* 73.

12. *Id.*

13. *Id.* 82.

moral principles as guideposts, the realists came to be seen as advocating chaos over order, irrationality over rationality, and random data over theory. Indeed, one could not easily reconcile a rule of law with a world of no rules, no doctrines, no generalized abstractions. If indeed realism recognized no moral values, on what basis could realists prefer the democratic American system over the totalitarian Nazi system?¹⁴

At this point realists retreated to a position which made "rationality" the unifying principle in American law. Reason rather than fiat controlled—exemplified by the requirement that judges render public decisions, by the separation of powers, and ultimately by elections themselves. But if government officials, including judges, were as likely to be irrational as rational, how would it be possible to maintain confidence in law or government?¹⁵

Realists also believed that one understands a legal decision by asking what social or economic function it serves—that is, what societal interest is thereby preferred. But can one know in advance how a given judge or legislator or administrator would balance conflicting interests? Realists originally believed that one could, by detailed studies of the behavior of judges and other law makers, make such predictions, but such efforts came to nought.¹⁶

The solution, such as it was, was the emergence after World War II of "consensus jurisprudence," consisting of agreement concerning basic American values such as pluralism, interdependence, and humanitarian policymaking (an ironic policy, as Professor White points out, for a profession devoted to advocacy).¹⁷ There was, however, precious little consensus in tort law: witness the battle between Charles Gregory, Albert Ehrenzweig, and Fleming James on the one hand, who advocated that the role of negligence be drastically reduced in personal injury tort law,¹⁸ and the many on the other hand who opposed (and still oppose) such a move.¹⁹

The primary consequence for tort law was a revival of interest in doctrine. Doctrinal analysis was once again seen as "a source of rationality, predictability and continuity in tort law and other common law

14. *Id.* 140.

15. *Id.* 141.

16. *Id.* 142-43.

17. *Id.* 145.

18. See C. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1936); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); Note [Ehrenzweig], *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palgraf Case*, 8 U. CHI. L. REV. 729 (1941).

19. See, e.g., Blum & Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964).

subjects.”²⁰ The primary dispute about doctrine was “whether tort law best functioned primarily as an instrument for admonishing currently undesirable civil conduct or whether tort law ought primarily to be a means for compensating injured people.”²¹ The emergence of liability insurance was a key element in the debate and in the development of tort law—especially in personal injury cases. Here the fundamental tension in tort law between the inconsistent admonitory and compensatory functions prominently reasserted itself: the more tort law focused on wrongdoing by the defendant as a precondition to compensation or focused on a wrongdoing by the plaintiff as a bar to recovery, the less often were injured parties compensated.²²

The pivotal figure in creating what consensus there was and in trying to bridge the gap between the many different views on tort law, argues White, was William Prosser. His enormously popular hornbook and his many law review articles served as intermediaries between those who wanted to retain negligence as the keystone to tort law and those who wished to abandon it. He believed that tort doctrine could adequately deal with accident law by accretion.²³ Professor White, however, remains unconvinced by Prosser. He observes the chaos stemming from Prosser’s central role in the development of the last clear chance rule:

Taken as predictive rules the classifications led to absurdities, as Prosser himself recognized: “the driver who looks carefully and discovers the danger, and is then slow in applying his brakes, may be liable, while the one who does not look at all, or who has no effective brakes to apply, may not.”²⁴

Even the development of strict liability for malfunctioning products—a development that Prosser fostered—has resulted in relatively little change in the law of torts, given the plaintiff’s need to prove a defect in

20. TORT LAW IN AMERICA 146.

21. *Id.* 147.

22. This battle developed primarily between those who wished to stretch tort doctrine to provide more compensation and those less inclined to do so. *See, e.g.,* Cooperrider, Book Review, 56 U. MICH. L. REV. 1291 (1958).

In identifying those who opposed an overt compensation purpose for tort law, Professor White states that “no Harvard or Pennsylvania professor, in the years from 1945 to 1970, advocated” emphasizing the compensatory function of torts. White specifically names Robert Keeton of Harvard and Clarence Morris of Pennsylvania, among others. TORT LAW IN AMERICA 153. Yet between 1964 and the early 1970s Robert Keeton was the chief advocate of the no-fault compensatory function of tort law, joined by Clarence Morris and James Paul of the University of Pennsylvania.

23. TORT LAW IN AMERICA 155-57.

24. *Id.* 160 (quoting W. PROSSER, LAW OF TORTS § 66, at 433 (4th ed. 1971)).

the product, and the many available defenses, such as misuse.²⁵ White basically believes that Prosser's work is a reversion to doctrinal analysis and classification as a means of developing the law. The *Restatement of Torts*, for which Prosser was the reporter for many years, is in the opinion of the realists, as White and others have shown, a return to nineteenth-century conceptualism.²⁶

In addition to examining Prosser, Professor White focuses on two judges who have greatly influenced the law of torts: Benjamin Cardozo of New York and Roger Traynor of California. Surprisingly, White thinks, both these men did rather poorly when dealing with negligence. "Tort law, as dominated by the negligence principle, revealed itself to Cardozo . . . as an amorphous, evolving mass, its status as a moral force ambiguous and ephemeral."²⁷ In addition, Professor White very trenchantly exposes Cardozo's inconsistency in his two most famous cases—*MacPherson v. Buick Motor Co.*²⁸ and *Palsgraf v. Long Island Railroad*²⁹—both involving negligence.

The theory of negligence chartered by Cardozo from *MacPherson* to *Palsgraf*. . . doubled back on itself. In *MacPherson* Cardozo extracted negligence from a relational context (contract) and identified it with a universal duty of care, subject to vague limitations. In *Palsgraf* he recast negligence in a relational context. The chief limitation on the negligence principle became, once again, its context. A civil obligation to take care not to injure one's neighbor was not limited to certain statuses or occupations, but its existence was nonetheless dependent on the relationship between the prospective obligor and the person he or she had injured. Within a span of twelve years the negligence principle had, theoretically, been dramatically expanded and potentially dramatically limited by the same judge.³⁰

Professor White criticizes Justice Traynor for Traynor's uninspired treatment of negligence cases—unlike any of the imaginative approaches he took in developing strict liability in products liability cases. Whereas Justice Traynor's activist and innovative opinions in *Escola v. Coca-Cola Bottling Co.*³¹ and *Greenman v. Yuba Power Products*³² recast thinking about an entire area of tort law, Professor White finds Traynor's negligence opinions relatively traditional—"far more cau-

25. See R. KEETON, VENTURING TO DO JUSTICE 108 (1969); J. O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES 13-16 (1975).

26. TORT LAW IN AMERICA 81-83, 154-55. See also Arnold, *Leon Green—An Appreciation*, 43 ILL. L. REV. 1, 3 (1948).

27. TORT LAW IN AMERICA 136.

28. 217 N.Y. 382, 111 N.E. 1050 (1916).

29. 248 N.Y. 339, 162 N.E. 99 (1928).

30. TORT LAW IN AMERICA 127.

31. 24 Cal. 2d 453, 461, 150 P. 2d 436, 440 (1944) (Traynor, J., concurring).

32. 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1962).

tious and doctrinaire."³³

Perhaps the reason that White finds the two most prominent judges of torts cases to be inadequate is that the negligence criterion itself is inadequate. Prosser liked to speak of torts as consisting of exercises in "social engineering."³⁴ But only a Rube Goldberg would have concocted this incredibly expensive, dilatory, wasteful, dangerous tool.³⁵

Turning from the past to the present and the future, White next examines what he terms neoconceptualism—the key feature of which is its "relentless preoccupation with abstract theory."³⁶ He states:

Rather than applying an approved general methodology to a particular area of law, as the "typical" article of the 1950s did, legal scholars of the 1970s often seek to apply an unorthodox methodology to a broad area of legal relationships. Their claim is that this application can produce fresh perspectives, which may ultimately lead to a new theory of a field of law. Their interest seems less in tracing the theory through its particularized applications than in stimulating others to consider the perspectives of the theory itself.³⁷

This perspective is stunningly different from that of the realists, "whose proponents ultimately seemed interested in narrower and more penetrating analyses of individual cases. By contrast, an inquiry into the unarticulated premises of tort law leads one away from case analysis to the realm of social theory."³⁸

In particular, White discusses the works of Richard Posner, Guido Calabresi, George Fletcher, and Richard Epstein. He finds that all their attempts to enunciate comprehensive approaches to tort law are flawed because each approach requires overly complex criteria and new variables that might be even more cumbersome than the present criteria for negligence.³⁹ For example, White distrusts the comprehensive application of economic theory to the tort system urged by Posner and Calabresi.⁴⁰

33. TORT LAW IN AMERICA 190.

34. *Id.* 157. See W. PROSSER, LAW OF TORTS 17 (1st ed. 1941).

35. For a description critical of the tort system in operation in auto accidents, see J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 1-93 (1971); J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND: TEACHING MATERIALS ON COMPENSATION FOR ACCIDENTS AND AILMENTS IN MODERN SOCIETY 99-221 (1975). For a description criticizing the operation of the tort system in products liability and medical malpractice cases, see J. O'CONNELL, *supra* note 25, at 12-28, 29-47.

36. TORT LAW IN AMERICA 212.

37. *Id.*

38. *Id.* 218.

39. *Id.* 229-30.

40. *Id.* 230.

After thus describing his frustrations with the various intellectual theories about tort law, Professor White proceeds to predict where tort law is headed. Routine unintentional injury, he says, should be entirely removed from the tort system by a no-fault compensation system like those established for industrial and auto-related injuries.⁴¹ But Professor White is wary of using no-fault compensation for more serious cases because he "cannot reconcile no-fault as a comprehensive principle with [his] interest in using tort law as a device for censure and punishment."⁴² Earlier in the book, however, White acknowledges the well-established view among tort scholars that "[w]ith the addition of liability insurance tort law had become primarily a compensation system designed to distribute the cost of injuries throughout society efficiently and fairly; [under this view, tort law] should no longer be regarded principally as a system designed to deter and punish blameworthy conduct."⁴³

As to torts for which censure may be desirable, White resists any urge to posit comprehensive principles:

It may be that the momentum of neoconceptualism is sufficiently advanced that the short-term future of tort law will necessarily be associated with the formulation and refinement of some comprehensive theory of liability, whose role in twentieth-century history may be analogous to that of the negligence principle in its years of dominance. A theme of this book has been the power of ideas as causative agents, and I should not want to minimize the potential capacity of neoconceptualism to reshape the subject of torts. But if it is not too late, I should like to resist such a tendency.⁴⁴

Basically, White believes that the law of torts is too diffused to be governed by any one unifying concept. He closes by noting that despite all scholarly efforts, the field of torts remains perplexing, disorderly, and inconsistent: "[T]he recurrent urge among scholars and judges to make tort law comprehensible, and the recurrent capacity of the subject to retain its incomprehensibility, is symbolic of a more basic interaction between law and human behavior in American society."⁴⁵

I come away from Professor White's superb book discouraged. My own estimate is that personal injury cases make up eighty-five to ninety percent of tort cases. Is it inevitable, as Professor White asserts,

41. *Id.* 235. For a discussion of the difficulties in doing so for other than auto accidents, see J. O'CONNELL, *supra* note 25, at 70-96; J. O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* 181-85 (1979). But for discussions of the means of doing so despite the difficulties, see *id.* 186-227.

42. *TORT LAW IN AMERICA* 239.

43. *Id.* 149-50.

44. *Id.* 233.

45. *Id.* 243.

that tort law, especially that which applies to personal injury, will remain the dreadful mess it is? If our grandfathers—with far less actuarial data to go on—could scrap tort law seventy years ago for the bulk of accidents then happening (namely industrial accidents) in favor of a comprehensive system of workers' compensation, can it be beyond the capacity of this generation to do so for other accidents, including non-routine ones?

Significantly, nowhere in Professor White's book does he discuss workers' compensation. While no one would pretend that workers' compensation is perfect, no sane person would abolish it and return to the tort system for industrial accidents.⁴⁶ This is not to accuse Professor White of advocating the repeal of workers' compensation. Rather, it is to emphasize that he—like many torts scholars—completely ignores it. Nevertheless, workers' compensation presented an early test to the conflicting functions of accident law—compensation and admonition. Professor Jeremiah Smith of the Harvard Law School predicted in 1914, when the adoption of workers' compensation law was being debated, that “in the end, one or the other of the . . . theories is likely to prevail [I]t seems safe to say that the basic principles of [workers' compensation law and the common law of torts] are irreconcilable. They cannot both be wholly right, or both wholly wrong.”⁴⁷

Of course, Smith has been proved wrong. Workers' compensation and the common law of torts not only have co-existed, but also have managed to ignore each other even after no-fault auto insurance was in effect in fifteen states. Why this inconsistent co-existence prevails is a fascinating question that Professor White indirectly answers.

A basic reason for turning to no-fault compensation and away from traditional negligence liability was and is the vast amount of unremedied injury in our society. The compensatory purpose of tort law

46. A 1972 study by the National Commission on State Workmen's Compensation Laws strongly criticized the way workers' compensation operates, but went on to state that “we have discussed the implications of abolishing workmen's compensation and reverting to the negligence suits, a remedy abandoned some 50 years ago. This option is still inferior to workmen's compensation” NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 25 (1972). The report characterized tort liability suits as “a drawn-out, costly, and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases.” *Id.* 45. It is true that workers' compensation benefits are occasionally and haphazardly supplemented by third-party tort claims against, for example, a supplier of machinery to an employer. A better system of compensation is that now being proposed in Congress: to increase workers' compensation benefits in return for making those benefits the sole remedy for injured employees. O'Connell, *An Immediate Solution to Some Products Liability Problems: Workers' Compensation as a Sole Remedy for Employees with an Employer's Remedy Against Third Parties*, 1976 INS. L.J. 683.

47. Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 344, 363, 368 (1914).

has long competed with tort's admonitory function. No-fault, more strongly directed toward compensation, competes with a weaker admonitory function (weaker because recoveries in most tort actions are now being paid out of a vast pool of impersonal insurance). Professor White's own words, applicable to the first battle—between the compensatory and the admonitory function of torts—apply equally to the fault versus no-fault dispute.

The compensatory features of tort law came to be seen as significant . . . once American society came to be perceived of as an interdependent entity whose members were responsible for one another. If the lives of injured persons affected the lives of others, so that injuries were a social "problem," then compensating people for injuries became a paramount policy goal. The tort system was one existing compensation device; it had the virtue of having survived over time and of allegedly conditioning compensation on proof of blameworthiness; it was "there" to be made into a more effective compensation system through liability insurance and other techniques for spreading and shifting the costs of injuries.⁴⁸

Indeed, the tort system is still "there" to be made into a more effective compensation device through various no-fault systems.

On the other hand, Professor White says he is "not unhappy with the current 'chaotic' state of tort law," because he finds "such chaos an antidote to the tendency of conceptualist thought to elevate scholars to positions of undue prominence."⁴⁹ White expresses his fascination with "the capacity of law in America to resist serving as an orderly system," and one hears his resigned sigh that "[s]o long as tort law, or any other area of law, deals with human problems and is made and enforced by humans it will embody dissonances and absurdities"⁵⁰

But can we afford these incongruities given the current inadequacies of personal injury law in the United States? The inefficiency of tort law in personal injury cases, as it pays quixotic benefits in a disorderly way, is a grave social cost borne primarily by the tort victim.⁵¹ There is considerable evidence, however, that a well-drafted no-fault law does

48. TORT LAW IN AMERICA 232. See also Cooperrider, Book Review, 22 WAYNE L. REV. 189, 194-95 (1975).

49. TORT LAW IN AMERICA 243.

50. *Id.*

51. Professor Patrick Atiyah of Oxford, a leading British torts scholar, recently made this point:

[T]he problem . . . [centers] around those accident victims who currently receive no tort recovery.

. . . .

in fact abate the evils of the tort system in personal injury cases.⁵²

Yet Professor White's scholarly, lucid book, with its prediction of the continuance of the "absurdities" of tort law, is difficult to dismiss, for White is so bright he just may be right.

. . . [T]he tendency is usually to help more of these people, and to do so more generously as time goes on. . . . Are we going to help these people, by expansion of tort law, or by expanding no-fault compensation programs?

It may be said that we can do both, and no doubt this is true up to a point. Nevertheless, given the huge administrative costs of the tort system, and the extraordinary generosity of its pain and suffering awards, it must be recognized that every expansion of tort law uses resources totally out of proportion to the numbers assisted by that expansion. Looking again at [British] figures . . . we find that some 175 million pounds in administrative costs and some 130 million pounds in pain and suffering awards are used in the process of compensating pecuniary losses strictly worth 65 or 70 million pounds. If we could find a no-fault compensation system with an administrative cost ratio not exceeding 10 percent of pay-outs—by no means an unreasonable ambition—and if we were willing to contemplate the elimination of compensation for pain and suffering, we could thus probably compensate, without additional cost *four* accident victims for every *one* compensated today. . . . If we were willing to include ceilings and thresholds as well, there is no doubt that we could quite easily afford to compensate a significant proportion of the pecuniary losses suffered by perhaps six or seven or eight accident victims for every one protected by the tort system.

. . . The times may be unpropitious but I will venture the prophesy [*sic*] that in fifty years time people will look back with some horror on tort law as a means of compensation which survived too long.

Atiyah, *No Fault Compensation: A Question That Will Not Go Away*, 54 TULANE L. REV. 271, 290-93 (1980).

Another British study indicating the counterproductive effect of a tort system on the attitudes of accident victims is Lloyd-Bostock, *Common Sense Morality and Accident Compensation*, 1980 INS. L.J. 331. The results of this study appear to apply throughout the common law world, including the United States. For American studies tending to confirm the Lloyd-Bostock results, see A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ, & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* ch. 8 (1964); SURVEY RESEARCH CENTER, INSTITUTE FOR SOCIAL RESEARCH, UNIVERSITY OF MICHIGAN, *PUBLIC ATTITUDES TOWARD AUTO INSURANCE*, (1970); O'Connell & Wilson, *Public Opinion on No-Fault Auto Insurance: A Survey of the Surveys*, 1970 U. ILL. L.F. 307.

52. O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, 56 NEB. L. REV. 23 (1977); O'Connell & Beck, *An Update of the Surveys on the Operation of No-Fault Auto Laws*, 1979 INS. L.J. 129.