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OF
AMERICAN LEGAL THOUGHT

G. EDWARD WHITE

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THE BOBBS-MERRILL COMPANY, INC.
PUBLISHERS
INDIANAPOLIS • NEW YORK • CHARLOTTESVILLE, VIRGINIA

Library of Congress Catalog Card Number: 78-59082

ISBN 0-672-83417-0

For John F. Davis
in memory of Valre T. Davis

ACKNOWLEDGMENTS

This book is unusual in that it did not originate with the author, but with others who persuaded me to group some of my essays and to issue them as a unit. I assume, as the persuaders have argued, that a number of readers may not have had access to the essays before; and I hope that those persons may find something of value in them.

I am indebted, as I have been on several previous occasions, to my friends and colleagues William H. Harbaugh, Charles W. McCurdy, and J. Harvie Wilkinson, III. I am also grateful for the interest in the book of Charles Huxsaw and Ward Sims of Michie/Bobbs-Merrill, and for the editorial help of Frances Warren and Richard Thiele.

My family, Susan Davis White, Alexandra V. White, and Elisabeth McC. D. White, provides the emotional base from which my work emanates. That I admire and respect John F. Davis and shall miss Valre T. Davis is vouchsafed in the dedication. George L. White and Frances McC. White are a continuing source of pride for me.

Charlottesville
August, 1978

FOREWORD

"There is absolutely no point in setting up a separate category of legal writing (or law teaching) to be known as 'legal history,' " Yale Law School's Professor Grant Gilmore wrote (p. 146) in his recent, interesting and lively *The Ages of American Law* (1977). Too late, Professor Gilmore, Legal History exists. Gilmore's own *Ages* attests to its presence, and the compiler of *Patterns in American Legal Thought,* Professor G. Edward White of the University of Virginia Law School, agrees.

Legal historians' sophisticated, vigorous, and useful inquiries into the history of American law, including legal thought and concepts, currently exhibit a broad-swinging relevance and sparkle that, ten or fifteen years ago, hardly seemed likely to develop. Indeed, it seems clear that, to paraphrase a recent ex-President of the United States, soon no one will be able justifiably to "kick American Legal History around" any more. To be "kicked around", in the sense of not being considered a respectable area for research and teaching was the fate and condition of American Legal History for a very long time.

Two decades ago, Daniel J. Boorstin, now the Librarian of Congress, characterized American Legal History as a "dark continent." He speculated gloomily that it would remain dim for at least half a century. In 1962 New York University Law Professor John Reid noted unhappily that editors of the nation's major legal periodicals refused to allot review space to what soon became recognized as one of the decade's — indeed, the century's — most important Legal History analyses, James Willard Hurst's *Law and Social Process in United States History* (1960). Reid complained further that when the American Society for Legal History, the only professional association of law-focused historians and history-centered lawyers, wished to honor preeminent legal scholar Roscoe Pound, it could not find a volume of essays in legal History worthy to present to him. White in 1973 echoed this dour refrain noting that "an outstanding characteristic of American

legal history in the twentieth century has been the relative absence of scholarship."

Nevertheless, the condition and practice of Legal History and Legal Studies have drastically improved. The three factors primarily responsible — the tenacity of legal historians, the outpouring of their research in quality publications, and the fruition of their calls for curricular reform — are the themes of this Foreword.

The first theme is a tribute to White and other scholars of History and Law who kept the Legal History faith. Even though the scholarly quality of legal history was largely unrecognized, these stubborn, dedicated practitioners continued in their almost defunct speciality. The problems they encountered were legion. With the exception of the decisions and personalities of the United States Supreme Court, other historians studiously ignored the law and its institutions. Simultaneously, the presentist bias of legal training seemed to belittle the importance of history to lawyers.

A further impediment was the division between law and history that had grown up on campuses nationwide. This chasm separated even the small number of law school faculty interested in history from History Department colleagues concerned with the law; general university libraries (and library budgets) from law libraries, to the detriment of both; courses in Constitutional History from political science courses in high court decisional Constitutional Law. Legal History rarely found welcome in any academic departments — History, Law or Political Science — where logic would place it; legal historians were rarely welcomed if they strayed outside their department of formal affiliation.

Happily, reports of Legal History's final or total demise proved to be exaggerated, and the separations are diminishing. In large part resuscitation occurred and is occurring because legal historians, including some premature mourners, worked diligently in terms of research, writing and innovative inter-disciplinary law-history curricula development. Had these busy lawyers and historians merely complained about the need for Legal History

research and curriculum innovation, odds are that their peers would have continued indifferent to Legal History or, at best, maintained their view of it as an immature or senile sub-discipline, worthy only of dilettantes' attention. Instead, their achievements transformed complaints into programs and concerns into scholarly adventures.

The second theme is, then, the praiseworthy body of major books, essays, and articles in Legal History, broadly defined, that in the last decade and a half have enriched the field. This outpouring of talent, research skills and persistence, and blessedly often, high literary quality, would score well on any qualitative scale.

As examples of the volume and the quality, in 1971, *Perspectives in American History,* the annual compendium publication of Harvard's Charles Warren Center for Studies in American History, dedicated that issue to the theme "Law in American History." Two years later, Bernard Schwartz' *Law in America: A History* and Lawrence M. Friedman's *A History of American Law* came into print. Both books attended to the law as a profession, to legal education, and to public policy effects on the law as well as the law's impacts on society. In short, as White notes in his review of Friedman's book that forms the first essay in *Patterns,* American Legal History was moving toward healthy maturity.

Interest in the history of the American legal profession and of legal thought proved to be durable; the scholarship, impressive. The bicentennial year was graced by Maxwell Bloomfield's *American Lawyers in a Changing Society, 1776-1876* and Jerold S. Auerbach's *Unequal Justice: Lawyers and Social Change in Modern America.* As noted earlier, Grant Gilmore's *Ages of American Law* appeared in 1977, and journals were sensitive to the merits, and failings, of this concise, effective and iconoclastic consideration of its complex subject. James Willard Hurst's 1960 book could not find law review space; Hurst's 1977 *Law and Social Order in the United States* faced no such bland rejection. And Morton Keller's *Affairs of State: Public Life in Late Nineteenth Century America* takes public law history to frontiers of social and

institutional analysis that a de Tocqueville, Bryce, or Beard would have recognized and applauded.

These able, literate, and informative considerations received impressive reinforcement in White's 1976 book, *The American Judicial Tradition: Profiles of Leading American Judges.* In harmony with present broad ideas of what constitutes Legal History, White's *American Judicial Tradition* attends to "the judicial function and property rights" in the chapter on Kent, Story, and Shaw; to state judges as well as national; to judges' concepts of freedom in addition to their decisions and opinions in civil liberties cases.

White has exhibited similar concerns in his periodical scholarship from 1971 to 1977. His "Evolution of Reasoned Elaboration" and "From Sociological Jurisprudence to Realism", both appearing in *Patterns,* are effective arguments in favor of the need to know the historical contexts of significant judicial decisions and opinions. The peril in ignoring context — history — is that the several approaches toward the appellate judicial function, including the twentieth century's "Realism" and "Reasoned Elaboration," are unlikely to be understandable save as slogans, without gauges supplied by Legal History.

White's essays on Oliver W. Holmes, Jr. and Louis Brandeis, in *Patterns,* speak again to this essential point. In addition to the biographical insights he offers on the men, White illuminates also the judicial, legislative and administrative interventions designed to cope with modern enterpreneurships. How we allot decisional power between courts and administrative agencies is a delicate and highly significant question. Of comparable significance is one of White's subjects in the area of civil rights and liberties. White (with J. H. Wilkinson) in "Constitutional Protection for Personal Lifestyles," also in *Patterns,* attends, as few commentators have, to intimate discordances-become-constitutional issues, such as hair and/or dress codes, homosexual relationships, and other "unconventional" lifestyles touched by state laws, but imperfectly accommodated by constitutional law.

Legal History scholars have also analyzed technical aspects of substantive law. In this arena the impressive *oeuvre* of Lawrence

M. Friedman requires special note. Friedman's 1965 *Contract Law in America: A Social and Economic Case Study* was succeeded by his *History of American Law* and by a pride of scholarly periodical articles (in both law and history journals), on legal culture and social development and on the history of law reform, tenement house legislation, testamentary instruments and industrial accidents. White's "Intellectual Origins of Torts in America," reprinted in *Patterns,* Bruce Ackerman's *Private Property and the Constitution* (1977), and William B. Scott's *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (1977) are other examples of this increasingly engaging arena of Legal History. Furthermore Morton Horwitz's *The Transformation of American Law, 1780-1860* (1977) received this year's Bancroft Prize, a preeminent mark of professional historians' esteem. What a contrast to 1960! Legal History may not yet have come fully of age. But it has clearly come a very long way.

The third theme in which White's *Patterns of American Legal Thought* is likely to play a prominent role — is curricular innovation and the supply of derivative teaching materials. Increasingly across the academic nation, historians are enriching undergraduate Constitutional History courses with Legal History content, History Departments are offering separate Legal History courses, and full-fleshed interdisciplinary Legal Studies efforts are coming into being. The Legal Studies programs are not designed as pre-law curricula. The philosophical, pedagogical justification of the non-prelaw stress in Legal Studies curricula is that, in Legal History, a viable humanistic-social science discipline exists that is not merely a pre-professional skill accumulation. In short, the scholarly literature of Legal Studies, including Legal History, is more than merely adequate or respectable on its own terms.

On the graduate level, in addition to orthodox MA/PhD offerings in Legal History, several impressive interdisciplinary joint programs have developed recently involving a Humanities and/or Social Science discipline and Law. These joint programs lead commonly to JD degrees, and a Humanities or Social Science advanced degree (MA or PhD) in Anthropology, Economics,

History, Management, Philosophy, Political Science, or Sociology. There are great rewards to be won from such joint graduate programs. Done well, they can enrich the law student and widen greatly the horizons of the non-lawyer participant. The weights, wear, and strains involved in the conception and administration of these joint programs are not light or minor. But the benefits to persons, institutions, and scholarship are worth the costs.

One of the most difficult tasks in creating a viable under-graduate or graduate interdisciplinary Legal Studies program has proved to be the absence of appropriate classroom teaching materials. Until recently there were virtually no courses in Legal History or Legal Studies. Law publishers paid no attention to non-Law parts of campuses. Unsurprisingly, non-Law publishers did not invest funds for preparation of texts or compendia, in the absence of a buying public represented by Legal History-Legal Studies courses.

This hesitation is lessening. The American Bar Association has created a Commission on Undergraduate Education in Law and the Humanities. The primary initial goal of this most promising office is to encourage development of appropriate curricular materials. What is important, and exciting, is that Legal History and Legal Studies courses should, in a reasonably quick pace, enjoy unprecedentedly rich teaching materials; these courses are already enjoying substantial enrollments.

Scholars and publishers are also demonstrating an interest in producing new books suitable for class use. Wythe Holt's 1976 compendium, *Essays in Nineteenth-Century Legal History* (Greenwood) led the way. It is a useful assembly of articles of diverse authorship, drawn from both Law and History journals. These essays attended to historical dimensions of four major arenas of Legal History: schools of Legal History thought, substantive and procedural law, constitutional issues, and the legal profession. An interesting and iconoclastic introductory essay by Professor Holt, "Now and Then: The Uncertain State of Nineteenth-Century American Legal History," offers ideas and insights on the people, institutions, and prospects involved in the included research and writing.

Another, larger compendium of articles of diverse authorship, assembled by Lawrence M. Friedman and Harry N. Scheiber, *American Law and the Constitutional Order: Historical Essays* came into print in 1978. Unlike the Holt compendium, it covers all of American history, not only the nineteenth century. The Friedman-Scheiber volume's author roster is a Who's Who among eminent practitioners in Law and History; the articles are proved founts of ideas and correctives.

It may be, however, that both the Holt and the Friedman-Scheiber compendia will prove to be too ambitious in the number of themes embraced, too costly for students, and, by reason of multiple contributors, too uneven in literary style, pace, and emphases, for continuing use as classroom textbooks. By contrast, White's *Patterns of American Legal Thought* is a compilation in which all the constituent articles are by one author, the compiler. After an introductory thematic section, White's three themes on major schools of Legal History scholarship, aspects of judicial and jurisprudential history, including administrative agencies, and constitutional law history, are examined in ten article reprints.

Patterns offers to the swiftly-growing Legal History and Legal Studies audiences these splendid articles plus connective analytical headnotes by White. The articles were conceived and composed during the years that White conducted the research for, and wrote, *The American Judicial Tradition;* years when he also participated vigorously in developing the University of Virginia's eminent interdisciplinary Law and History programs. White has therefore brought to *Patterns* the insights that original research sometimes provides, the experience that classroom utilization of original research too infrequently allows, and, blessedly, the humility and good humor that permit him to applaud Gilmore's view (p. 11 in *Ages*): "In Heaven there will be no law, and the lion will lie down with the lamb . . . In Hell there will be nothing but law, and due process will be meticulously observed."

To return to the comment with which this Foreword began—"There is absolutely no point in setting up a separate category of

legal writing (or law teaching) to be known as 'legal history' " — I repeat my conviction. Gilmore is not only too late, but incorrect. Legal History exists because some historians are incurably law-minded and some lawyers and judges are history-minded. The fact that all legal materials were created in the past, as Gilmore noted, has not, with rare exceptions, imbued jurisprudents with the historian's sense of disciplinary limitations. White's *Patterns of American Legal Thought* adds a necessary dimension, the recreation of thought about significant legal subjects.

Harold M. Hyman
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Houston, Texas

May 1, 1978

INTRODUCTION

The essays reprinted in this volume represent nearly a decade's work in legal history, jurisprudence, and constitutional law, and I appreciate the opportunity to gather them together under one roof. It is one thing to have portions of one's scholarship assembled, however, and another thing to explain its unities and continuities. It is pleasant to imagine that one's work has an overarching purpose, and with the advantage of hindsight I have been able to identify what seem to me to be some controlling themes. But I confess that to some extent my decisions to explore one or another area of scholarship have not been fully conscious. I have written about subjects and topics that seemed important to me at the time; in retrospect, several still do, although I would not now agree with everything I have said.

Three themes in the history of American legal thought are touched upon in this book. One is the importance of the community of legal scholars in shaping the course of substantive law. I have found that throughout most of American legal history the tacit convictions of groups of scholars have exercised a powerful influence on the direction of scholarly research, and the directions taken by legal scholarship have in turn influenced the doctrinal content of American law. My thinking about the nature and significance of scholarly writing has altered somewhat over the years spanned by this volume, but my conviction remains that legal scholarship is a fertile, though underemphasized, source of insights about the history of law in America.

A second theme of the essays is the significance of the judiciary in American jurisprudence. Edwin Patterson, nearly forty years ago, argued that in "the American view" judges are perceived of as "the center of the juristic universe," * and I am inclined to agree. To say that judges have occupied a prominent place in the history of American legal thought is not to minimize the contributions of other entities, such as groups of scholars or legislatures or

* Edwin W. Patterson, *Cardozo's Philosophy of Law,* 88 U. PA. L. REV. 71, 87 (1939).

administrative agencies. It is rather to suggest that Americans have regularly regarded judges as significant oracles, shapers or makers of law, and have cloaked them with the special sort of heroism or villany we reserve for officials who are thought to be capable of affecting all our lives.

Finally, these essays stress the importance for American legal thought of a Constitution with a large accompanying body of interpreted case law. From a comparative perspective, the American Constitution gives our jurisprudence a distinctive character. No other nation has had a history of competing and complementary spheres of law similar to that of the United States. Since the origins of the Constitution one sphere of law, constitutional law, has been designated as "supreme," but its boundaries have never been fixed. Other nonconstitutional spheres of law, such as "common" (judge-made) law, legislative law, executive and administrative law, and even the unofficial "laws" of private groups have coexisted with constitutional law, and the capacity of any of these nonconstitutional spheres to become constitutionalized has varied dramatically with time. The presence of a Constitution as a nebulous but "fundamental" source of law has thus significantly affected the course of American legal thought.

The structure of this volume reflects its thematic emphasis. The first chapter of essays presents a brief overview of each of the themes subsequently discussed. Chapters Two, Three, and Four then explore, in more detail, various patterns of American legal thought. Chapter Two focuses on scholarly writing; Chapter Three on the judiciary; and Chapter Four on constitutional law.

The patterns and themes discussed in this volume should not be regarded as defining the major features of American legal thought. Willard Hurst, the most influential legal historian of his generation, called in 1960 for research on "legislative, executive, and administrative processes"; and on "law's operational significance for the institution of the market." * While Hurst and

* Willard Hurst, *The Law in United States History,* 104 PROC. AMER. PHIL. SOC. 518, 523 (1960).

others ** have shown that ideas about the formulation of policy and the distribution of power and economic resources have affected American legal thought, this volume does not stress such themes. Its emphasis is in part a product of my own scholarly interests. I also seek, however, to suggest that American legal thought has been derived from some sources that cannot easily be linked to the legislative session or the economic marketplace. Understanding the history of American legal thought requires, in my view, appreciating its social, intellectual, economic, and political dimensions; and if those of us writing in legal history and jurisprudence are temperamentally or philosophically inclined to emphasize different dimensions, so much the better.

** *See especially* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

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