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# SCHOLARLY BOOKS: WHAT, TO WHOM AND WHY

*James J. White\**

A consideration of the role that the books reviewed in this edition will play in the future of American legal thought has led me to speculate about the transmission of ideas into acts and about the role of books in that transmission. In certain arenas, tracing an idea from its origins to its ultimate application is straightforward. For example, the evolution of Germany's Schlieffen plan for invading France can be traced with little difficulty from the circumstances responsible for its birth, through years of refinement, to its eventual application in World War I.<sup>1</sup> The development and acceptance of a medical innovation such as a new drug or type of treatment provides another useful illustration. One can easily reach back to an innovation's origins in basic scientific research and development and trace its progress through applied research, clinical investigation and gradual acceptance by practitioners.<sup>2</sup>

In contrast, the progress from idea to act in the law is obscure and difficult to trace.<sup>3</sup> It is often impossible even to reach agreement whether a

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1. See generally M. KITCHEN, A MILITARY HISTORY OF GERMANY 171-75, 192-95 (1975) (explaining the instigative circumstances, development, nature and results of the Schlieffen plan).

2. For instance, a potential innovation in the treatment of gallstones had its beginning in research concerning the dissolution of grease soap. This basic research was first applied to the general study of the detergent effects of human bile. Subsequent clinical investigation has confirmed that individuals afflicted with the most common sort of gallstones have bile with less than normal detergent properties. The result of this work is possible treatment for some gallstones by feeding patients bile salts to dissolve the stones. The treatment's safety and efficacy must be further documented, but if the outcome is satisfactory, practitioners will have a choice of treating patients with gallstones medically rather than surgically. See Ingelfinger, *Spreading the Medical Word*, in THE HORIZONS OF HEALTH 380 (H. Wechsler, J. Gurin & G. Cahill, Jr. eds. 1977).

When such choices are presented to practitioners, the acceptance of a medical innovation is far from random. A mid-sixties case study of four midwestern cities revealed a definite pattern in the medical community's acceptance of a new drug as measured by prescription of the drug in appropriate circumstances. While several channels of influence preceded a physician's adoption of a new drug, social intermediaries such as a pharmaceutical company representative or colleague had far greater influence than impersonal media such as medical journals. The drug was first cautiously adopted by "innovator" doctors who had either read about the drug in medical journals or heard about it from the pharmaceutical company's detail man. Doctors acquainted personally, and especially professionally, with the "innovator" doctor soon followed in using the drug in their practices. Over time, the drug became an important part of every doctor's prescription repertoire. See J. COLEMAN, E. KATZ & H. MENZEL, MEDICAL INNOVATION (1966). See also Dannatt, *Primary sources of information*, in USE OF MEDICAL LITERATURE 15 (2d ed. L. Morton 1977).

3. One rare exception is Justice Roger Traynor's extensive incorporation of Dean William Prosser's ideas throughout his opinions and particularly in the application of strict liability for defective products, attributable to the close personal relationship between Prosser and Traynor. See G. WHITE, TORT LAW IN AMERICA 179 (1980). The most notable instance of Tray-

given act by the legislature or the courts is stimulated by or is a manifestation of any particular idea. Our court's "reasons" as often obfuscate the origin of an idea as illuminate it. In part our difficulty is undoubtedly the result of the law's suppression of change. In contrast to medicine and many other endeavors, the law neither welcomes nor graciously accepts change. Rather, in the interest of preserving certainty in the regulation of men's affairs, the law resists all appearance of change. Thus courts often disguise their modifications of judicial doctrines and sometimes even go so far as to deny that any change has occurred.

Despite this difficulty in tracing the course of idea to act, one must concede that the principal purpose of any legal writing is to influence behavior, ultimately to change the behavior of lawyers, judges or the population at large. There are many lesser goals, such as enriching the author in money or status, but it is my hypothesis that all serious legal writing aims to change behavior. If one accepts that hypothesis, he confronts a challenge upon examining the sort of books reviewed in this volume. They are not books that will alter the drafting of a contract or a prospectus. They are not even books that will change the behavior of a lawyer at trial or in negotiation. In the several pages that follow I wish to examine the hypothesis and raise some questions about how the ideas expressed in *these* books might influence behavior. I will also compare books in general as an instrument for that purpose with some other modern devices.

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nor's application of Prosser's theory of strict liability for defective products is his concurrence in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). In *Escola*, a waitress was injured when a soda bottle exploded in her hand while she was carrying it. Despite the fact that the defendant showed it made regular inspections of the bottling process, the California Supreme Court held for the plaintiff; Traynor concurred separately. In his concurrence Traynor argued that liability should be placed wherever it would most effectively reduce hazards to life and health from defective products reaching the market. Traynor concluded that the manufacturer should be held liable because it could distribute the risk of injury among the public as a cost of doing business. Prosser had stated in his 1941 treatise that morally and practically the producer should be held liable because he was best able to distribute the risk to the general public through prices and insurance. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 689 (1st ed. 1941). In addition, Traynor, like Prosser, was sensitive to the difficulties faced by a consumer in proving negligence existed, even with the aid of *res ipsa loquitur*. Compare 24 Cal. 2d at 462, 150 P.2d at 441, with W. PROSSER, *supra*. Other parallels can be found in Traynor's rejection of an extended warranty theory as a basis for holding manufacturers liable to consumers, 24 Cal. 2d at 465-67, 150 P.2d at 442-43, and in his limiting of strict liability to injuries from "normal and proper use," 24 Cal. 2d at 468, 150 P.2d at 444; Prosser had defined the scope of strict liability in precisely the same manner. W. PROSSER, *supra*, at 689-92. Finally, Traynor borrowed heavily from Prosser in citation of authority. See G. WHITE, *supra*, at 197-200 (1980).

Another related example might be the conversion of other justices on the California Supreme Court to Traynor's strict liability approach following emphasis by Prosser and other scholars of a supposed trend in the courts toward extending imposition of strict liability to manufacturers of defective products. See G. WHITE, *supra*, at 202.

In commenting upon the significance of Traynor's use of Prosser's idea, G. Edward White has written:

It was one thing for Prosser to collect authorities, marshal reasons, and argue for strict liability in the abstract; another for Traynor to show, through an impressive synthesis of case law and academic writing, the apparently obvious advantages of strict liability treatment for defective products. Traynor's *Escola* opinion came at a time when strict liability theory was in an embryonic state; he gave it a model for practical application.

G. WHITE, *supra*, at 200 (1980).

At the outset one must ask, who reads these books? If they are never read, they can have no influence (except, of course, on the author). If they are read only by a small and uninfluential audience, they will have a correspondingly small and uninfluential impact. Surely the books reviewed here will have quite different audiences. A few will sink without a trace like rocks cast in a pond, never to be read or to be rejected by the few who read them. Others will float briefly like the leaves of a tree, to be considered by a small audience before they too sink from sight. A few will be like messages put in a bottle, to float for years in obscurity until they are discovered by an audience of significant size and power.

Limited generalizations are possible concerning the audience for these books. The first is that few of them will ever be read by lawyers in their professional roles. Perhaps the law was once a learned profession; it will have difficulty laying claim to that title now. It is hard to visualize the trial lawyer home from a long day of depositions or court appearances sitting down to read Alan Watson's book, *The Making of the Civil Law*. It is laughable to conceive of Paul Newman (in *The Verdict*) or Jerome Carlin's *Lawyers On Their Own* curling up with a copy of Posner or Dworkin. That is not to say that no lawyer will ever read any of the books here reviewed, only that lawyers are not the audience for which these books are intended. These are not books peddled by the West salesmen; they are not books that offer any immediate reward in money or success; they are not books that will be read by lawyers.

It is hardly more likely legislators or judges will read them. Legislators, particularly at the state level but also at the federal level, are notorious for their lack of interest in the long term or in deeper matters.<sup>4</sup> Even the bright and able ones, such as the late Hubert Humphrey, are noted for learning

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4. In recent years being a state legislator has changed from an avocation to a vocation. Ironically, the professionalization of state legislatures may even have exacerbated the problem by increasing the importance of reelection. Where once the defeated amateur could easily return to his private occupation, doing better financially than before his legislative stint, today's professional state legislator has severed or neglected such ties. Frequently the state legislator views his office as merely a stepping stone to a higher position. Even if he has more "static" ambitions, the state legislator is too beholden to potentially fickle constituents to be interested in the long-term consequences of his activities. Finally, even "amateur" legislators find they lack the time and resources to achieve altruistic objectives of making "good public policy." See generally H. INGRAM, N. LANEY & J. MCCAIN, A POLICY APPROACH TO POLITICAL REPRESENTATION 44-49 (1980); W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS 9, 17-18, 26-33, 155-56 (5th ed. 1981); A. ROSENTHAL, LEGISLATIVE LIFE: PEOPLE, PROCESSES AND PERFORMANCE IN THE STATES 38-61, 280, 340-45 (1981); Lockard, *The State Legislator*, in STATE LEGISLATURES IN AMERICAN POLITICS 98 (A. Heard ed. 1966).

Over the past decade or so, it has also become clear that a predominant goal of any Senator or Congressman is reelection and the concomitant enhancement of power and status within Congress. To ensure reelection, an overwhelming amount of time must be spent servicing specific constituent requests and guarding district interests. Even if a Senator or Congressman occasionally finds time to pursue broader policy aims, he remains conscious that his activities must be readily explainable to the electorate. While recent findings hint at a possible increase in voluntary retirement from Congress, at present it is not possible to discern the magnitude or ramifications of such an increase. See generally R. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 137-57 (1978); R. JONES & P. WOLL, THE PRIVATE WORLD OF CONGRESS 7-14 (1979); W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS 26-31, 109-10 (5th ed. 1981); D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); Cooper & West, *Voluntary Retirement, Incumbency and the Modern House*, 96 POL. SCI. Q. 279 (1981).

things by listening, not by reading. So surely legislators are not an audience for these books.

Will judges, persons more judicious and reflective than the typical lawyer, read these books? That too seems unlikely. While our judges enjoy respect and status not accorded other members of the bar, there is no reason to believe they are brighter or necessarily more reflective than the average lawyer. At the upper reaches where one might expect to find the most able of our judges, we hear that they are swamped with work; they are in exactly the same position as the lawyer who has little time for reflection simply because he has a series of pressing deadlines. At the trial level one suspects that the judges are chosen in part as reward for their political involvement and that they seek those offices because of a dissatisfaction with or a lack of capacity for law practice. But that dissatisfaction does not mean necessarily that they are a more reflective or a more obvious audience for these books.

If neither the lawyers, the legislators, nor the judges read these books, then who does? Though it is impossible to know their numbers, one can identify a series of likely readers. The first are academics with law degrees. In the university these persons call themselves "lawyers" only to distinguish themselves from philosophers or psychologists. They are teachers of law, not practitioners of it. Many of them find their orientation not toward the bar but toward the university; they surely are a natural audience for these books. Another audience will be academics who are not lawyers but are teachers of philosophy, political science or economics. Finally, the largest audience for these books are the intellectuals not employed by universities. A fair share will be lawyers, but they will be neither more nor less attracted to the books because they are lawyers than if they were businessmen, research physicists or housewives.

If one is forced to concede that only one out of fifty thousand lawyers and perhaps one out of one thousand law teachers might read any given book on our list, must he not then abandon the idea that such books will ever have an influence on anyone's acts? Must he not concede that many of these books will sink without a trace? Those are questions which authors rarely address, but they are important.

To put the political influence of these books in perspective, let us first consider some of the ways in which ideas have recently been translated into action in the law schools and in society at large. Three examples come to mind. First is the Ford Foundation funded effort to stimulate the growth of clinical legal education. This effort was directed by the Council on Legal Education for Professional Responsibility (CLEPR), a Ford spin off.<sup>5</sup> CLEPR conducted a series of conferences and stimulated discussion in journals about legal education. It also funded pilot programs at various schools.<sup>6</sup> The result of those efforts has been the establishment of clinical

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5. See Pincus, *The President's Report*, in CLINICAL EDUCATION FOR LAW STUDENTS 27-28 (1980). See also Counsel on Legal Education for Professional Responsibility, Inc. [CLEPR] Newsletter (Jan. 1969), reprinted in CLEPR NEWSLETTERS 1969-1972, at 1.

6. See also Pincus, *supra* note 5; CLEPR, LAW SCHOOL TEACHING CLINICS (1977). See generally CLEPR NEWSLETTERS (1969-present) (descriptions and discussions of various CLEPR programs).

education courses at nearly every law school in the country.<sup>7</sup> While some courses existed prior to the CLEPR effort, and doubtless others would have grown without CLEPR, it is improbable that clinical education would have enjoyed the kind of growth that it has without CLEPR's money. Moreover, given the prospect of declining law school enrollment and the relatively high cost of clinical education programs, any spontaneous movement of that kind might well have been nipped in the bud if CLEPR had not been there to bring it to full bloom prior to the shortage of money and students.

A more apt illustration is the operation of the Olin Foundation through Henry Manne's Summer Economics Institute for Law Professors. Manne commenced that effort at the University of Rochester in 1971.<sup>8</sup> Since that time the publication in legal periodicals dealing with economics has expanded exponentially. Today one rarely picks up a leading journal without an article on antitrust law, contract damages, or tort that relies heavily on economic theory and analysis. I would suggest that there is a connection between the Manne-Olin effort and this flowering of economic understanding in the law school world.<sup>9</sup> Here then are two cases where persons with adequate resources, the Ford Foundation and the Olin Foundation, were able to purchase a place, in one case in the curriculum and in the other case in the literature of legal academe.

A quite different example of the translation of ideas into action can be found in the application of "supply side" economics to the national economy. The striking thing about supply side economics is that it has no long standing or well-recognized academic base. Its chief proponent, Professor Laffer, does not have the highly respected academic following that a Milton Friedman enjoys, and there is widespread skepticism about its merits.<sup>10</sup> Nevertheless, through the election of persons receptive to their ideas, particularly Congressman Kemp, Senator Roth, and President Reagan, and through the appointment of persons who are also committed to the supply

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7. See Pincus, *supra* note 5, at xi. See also Bogomolny, *Prefatory Remarks, Clinical Legal Education and the Legal Profession*, 29 CLEV. ST. L. REV. 345 (1980).

8. Manne now teaches at Emory University Law School, and the institutes are conducted at the Emory University Law and Economics Center.

9. A comparison of the work of some Summer Economics Institute participants preceding and following their attendance at the Institute reflects this transition. Compare, e.g., Brodley, *Oligopoly Power Under the Sherman and Clayton Acts — From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285 (1967); Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and A Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965), and Sweet & Sweet, *Architectural Cost Predictions: A Legal and Institutional Analysis*, 56 CALIF. L. REV. 996 (1968), with Brodley, *The Possibilities and Limits of Decision Theory in Antitrust: A Response to Professor Horowitz*, 52 IND. L.J. 735 (1977); Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1 (1977); Ratner, *Choice of Law: Interest Analysis and Cost Contribution*, 47 S. CAL. L. REV. 817 (1974), and Sweet, *Site Architects and Construction Workers: Brothers and Keepers or Strangers?*, 28 EMORY L.J. 291 (1979).

Recognizing that it has not touched the seat of power, Manne's Law and Economics Center at Emory University also presents similar courses for federal judges and doubtless would do the same for lawyers if it had an adequate means to identify the lawyers who are most likely to influence court and other decisionmakers.

10. See Blustein, *Supply Side Theories Became Federal Policy With Unusual Speed*, Wall St. J., Oct. 8, 1981, at 1, col. 6; Merry & Bacon, *Supply-Side Economics and How It Grew From a Theory to a Presidential Program*, Wall St. J., Feb. 18, 1981, at 48, col. 1.

side ideology,<sup>11</sup> we see the translation of an idea into action in short order. One supposes throughout history this process is the most direct and immediate method of translation of ideas into action, namely to convince the king of the merit of a particular idea so that the king will implement it.

Returning to our books, can one trace a similar development of idea to application? Because so few are to read these books and because an insignificant number of readers are front-line actors, does it mean that they will have no effect? Surely that is too strong. Ideas given to law teachers are passed on in some form to their students. These students will ultimately become the judges, lawyers and legislators who will be the front-line actors. Surely an occasional idea is transmitted from the book to the teacher to the student who uses it as a judge or legislator. Conceivably some of the ideas are transmitted through volumes like this. Most of us read more reviews than books, and it is possible that ideas faithfully reported by the reviewer will have an impact.<sup>12</sup> Of course one needs only the right reviewer to give currency to his ideas. For example, if the review happens to take the form of an opinion in the Supreme Court, the impact is likely to be more immediate, obvious and direct as others adopt the ideas explained in the opinion. Thus one need not find a wide audience if he finds the right audience and if its members can present his ideas to a larger number.

Yet when all has been said that can be said on behalf of scholarly books, I am uneasy. I feel considerable skepticism about arguments suggesting that they have a significant impact. It would be a fascinating empirical exercise to trace a few of the ideas expressed in the books here reviewed into the courts and legislatures, or through the hands of reviewers into the hands of lawyers and then into their briefs and the opinions written by courts. Tracing an idea in that form is probably impossible until the passage of time has allowed the dust that swirls around such transmissions to settle. Such an idea can take many forms, be articulated in many ways and undergo subtle changes of expression and even of content with the perspective gained from passage of time. For those reasons one is likely to be able to trace the tracks of an idea only when it is extraordinary and overpowering. Therefore we must content ourselves with a null hypothesis: no one can prove that the ideas expressed in these infrequently read books have no significant impact. Yet my doubt persists. If the transmission of these ideas is only fragmentary, is passed through a long and distorting chain going

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11. Professor Laffer's ideas captured the imagination of then *Wall Street Journal* editorial writer Jude Wanniski who set out to persuade Washington policymakers to incorporate Laffer's ideas in their economic planning. His articles stimulated Rep. Jack Kemp's thinking about tax cuts, culminating in Kemp's coauthorship of the 1977 Kemp-Roth bill to cut individual income taxes over three years. During this period, Wanniski's articles also caught the interest of Mr. Reagan and his advisers. As a result Mr. Laffer was invited to explain his theories to Mr. Reagan who was then looking for an issue to use in his 1976 race against President Ford. While Reagan did not formally endorse tax cuts in his 1976 campaign, he did do so in 1980. Following his election, Reagan appointed such supply siders as David Stockman as OMB Director, Donald Regan as Secretary of the Treasury, Norman Ture as Undersecretary of the Treasury for Tax Policy, and Paul Craig Roberts as Assistant Treasury Secretary for Economic Policy. See Blustein, *supra* note 10.

12. Obviously one way a reviewer has an impact is on other writers who will ultimately write things in the form of statutes or other more readily available writings.

from reader to teacher to student to actor, it is equally plausible that the ideas will have no ultimate impact.

Perhaps if we are honest, we must content ourselves with justifying books on lesser grounds. A good book raises the author's status in the law school universe. Increased status likely brings offers of employment from other schools and thus increases one's salary. Moreover writing books is both painful and joyful. To think carefully and intensely about a problem, even if it is a problem of no interest to anyone else, and to write carefully and clearly about it, is its own reward. That too should not be overlooked. Finally, perhaps we can take refuge in the idea that books are a poor man's way of spreading ideas. The rich, the Ford and Olin Foundations, have more direct access to those in power. The clever, Mr. Laffer *et al.*, get their way through the political process. We of lesser resources must content ourselves with writing books. While the audience for such books may be small and of limited power, authoring is not "capital intensive"; it is something that each of us can do.

If I reveal a skepticism about the value of scholarly writing in the legal profession it is because I intend to. I am skeptical both about the truth of the reasons we give for writing such books and about assertions of their ultimate impact upon society. Without being cynical one can ask that an author view his work with appropriate skepticism. If the only consequence of publication is the increase of the author's status in the eyes of other law teachers, then we are not different from the members of a society for the preservation of ancient automobiles, who periodically parade their best specimens before each other to see whose Pierce Arrow is in the best condition, whose 1938 Mercedes is most carefully restored. On the other hand my skepticism may merely reflect a troglodyte mentality insensitive to the native beauty of ideas.