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PATTERNS OF AMERICAN LEGAL THOUGHT. By *G. Edward White*. Indianapolis: Bobbs-Merrill Publishing Co. 1978. Pp. xix, 384. $14.50.

During the past decade Professor G. Edward White has been among the most industrious tillers of the legal history vineyard. In *Patterns of American Legal Thought* he has gathered ten of his essays and organized them into thematic areas. The effort may seem presumptuous — publishing collected essays is an activity usually reserved for senior scholars — but the explosion of interest in legal history is so recent that White has achieved a measure of seniority at a relatively young age. Although the collection may not be necessary, it is convenient; several of the articles have been widely used and will now be more readily available. Moreover, the collection interestingly demonstrates the approach and growth of one scholar and raises (but does not answer) significant issues for legal historiography and, ultimately, for the legal system itself.

The essays in *Patterns* are organized to develop three themes in American law and legal history: (1) the importance of scholarly thought in shaping the course of substantive law; (2) the preeminent position of the judiciary; and (3) the significance of the Constitution and its exegesis by the Supreme Court. The themes represent White's research interests but do not pretend to define the scope of American legal history. Indeed, White seeks to compensate for what he sees as the dominance of economic and pluralist explanations of American law (pp. 16-17), just as those approaches sought to compensate for the almost exclusive study of the Supreme Court and aspects of technical doctrine. The limitation of scope is admirable, of course, though it makes this a more difficult book to review. Nevertheless, implicit in White's approach are propositions about historical causation and legal process. After reviewing briefly White's three themes I identify and comment on the most important of these propositions and describe an alternative set of propositions that I find more satisfying.

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I. THE PATTERNS

A. *Scholarly Thought*

White's principal field of interest is the intellectual history of American law. Three essays in *Patterns* explore the role of scholarly thought in two areas — twentieth century jurisprudence and the rise of tort law in the nineteenth century. As White acknowledges in his introduction, his conceptual approach changed between his earlier writings on the twentieth century and his current work on the origins of torts. White's earlier approach described a direct causal link between social phenomena and schools of jurisprudence, while his more recent work concedes the "extraordinarily complex and difficult to characterize" link between events and ideas (p. 97).

In two major essays originally published in the *Virginia Law Review*,[1] White traces the development of schools of American jurisprudence in the twentieth century and explores that development's origins in political phenomena. The dialectical evolution of schools of jurisprudence is a familiar tale today, in part because of White's work. The rigid, syllogistic analysis known as Mechanical Jurisprudence dominated legal thought at the end of the nineteenth century. Roscoe Pound elevated Holmes's critique of that school to the status of a new jurisprudential movement, which he dubbed "Sociological Jurisprudence" in 1907. Sociological Jurisprudence moved legal study away from pure technical analysis by incorporating the insights of the social sciences. By the time the move was firmly underway, however, the social sciences had shifted into new areas, notably behavioral studies. The legal scholars who adopted the new approach mounted an attack on Sociological Jurisprudence and created a new dominant school: American Legal Realism. By World War II, in turn, the moral relativism of Realism was itself a point of weakness, and a renewed emphasis on affirming underlying values and institutional competence gave rise to Process Jurisprudence,[2] which would itself prove inadequate under the extraordinary pressures of the 1960s and the activism of the Warren Court.

According to White's account, the principal impetuses for the rise and fall of the successive jurisprudential movements lay outside the legal system, in political movements and events and in trends among American intellectuals. For example, Pound's Sociological Jurisprudence reflected two social hypotheses of Progressivism: the need for continuity in change and the utility of law in explicating shared so-

1. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 297 (1973).

2. In this essay White deals primarily with Reasoned Elaboration, a school of Supreme Court criticism which is "a particular canon" of Process Jurisprudence. G. WHITE, THE AMERICAN JUDICIAL TRADITION 404 n.2 (1976).

cial values. As the optimism of the Progressive movement faded in the 1920s and the attention of Progressive social scientists shifted to the study of the human and national psyches, Sociological Jurisprudence was challenged by Realism, a school reflective of the newer way of perceiving reality. White describes the social phenomena as directly generating approaches to social theory, including approaches to legal theory.

White's later essay on the origins of torts[3] presents a more complex picture of the interaction between social practice and law. As the traditional view has it, the law of negligence developed to deal with accident litigation in a newly industrialized economy without unduly burdening emergent industry.[4] White regards the rise of the new type of accident as crucial, but only as grist for the intellectual mill of legal thinkers coincident with other developments in law and social thought.

Injury as a product of industrialization changed the typical tort case from one between persons in a close relation to each other to one between strangers. Suits between strangers encouraged a shift in the basis of liability from a specific unperformed duty to violation of a generalized standard of care. Violating such a standard of care was called negligence and became the basis for the tort cause of action.

But courts did not develop and adopt the negligence principle merely in response to the novelty of suits between strangers. Courts and scholars were attempting to develop broad principles of law for two other reasons. The first was internal; the demise of the writ system required not only procedural change but also a fundamental reorientation of legal thinking. While the writ system existed, it provided the law's conceptual basis; with its collapse, a new intellectual foundation, based on principles of substantive doctrine, had to be found. Negligence offered an organizing principle for the law of private wrongs. The second impetus to doctrinal organization came from the larger intellectual climate. Victorian intellectuals, recognizing the socially disintegrative capacity of material progress, strove to articulate general scientific principles with which to order the chaotic social universe. Legal scholars joined in the effort within their area of expertise, and two of those most taken with the conceptualist approach, Holmes and Nicholas St.John Green, made major contributions to the development of torts as a unified field.

White's methodological emphasis in recounting the rise of tort

3. White, *The Intellectual Origins of Torts in America*, 88 YALE L.J. 671 (1977) (p. 163). This article has been supplemented by a later article, White, *The Impact of Legal Science on Tort Law*, 1880-1910, 78 COLUM. L. REV. 213 (1978), and apparently both have been superseded by White's new book on the subject, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980), which I have not considered for the purpose of this review.

4. *E.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 261-64, 409-17 (1973).

law differs from his approach in discussing twentieth century jurisprudence, which he saw as a reflection of political and social events. In describing the rise of tort law, White portrays a much more complicated causal relation. Social and economic events provide the raw material for the legal system, but the raw material is shaped by intellectual conditions of the time. Describing the historical process becomes more difficult when a simple chain of causation is abandoned. In attempting to resolve the problem of causation in legal history White first emphasizes scholarly thought. He then proceeds to consider the preeminent position of the judiciary and the significance of constitutional principles.

B. *The Judiciary*

The two essays in White's chapter on the judiciary and the introductory chapter's essay on judicial opinions as historical sources are suggestive, but they lack the thematic unity of the chapter on legal scholarship. Each essay presents a different facet of the judicial role. In "The Rise and Fall of Justice Holmes,"[5] an essay closely related to the materials on scholarly thought, White describes the changes in intellectual and popular regard for the venerable Justice. In the essay on Brandeis's influences on administrative law,[6] White deals more directly with the extent of judicial influence on American law and raises again the problem of historical causation. His essay on judicial opinions[7] summarizes his general thoughts on the judicial role and its position in the model of causation. Since White has written extensively on "the American judicial tradition" in his book of that name,[8] *Patterns* cannot adequately express White's views on the judiciary without duplicating his other work. These three essays merely underscore his "conviction that significant contributions to American legal thought have been made by holders of judgeships, particularly at the appellate levels" (p. 193). That prosaic belief hardly seems worth the space devoted to it, but the essays are interesting nevertheless.

Justice Holmes is perhaps the outstanding figure in American legal history. White examines the public and professional regard for Holmes as Boston Brahmin, as ideologue, and as judicial stylist, from his emergence as a preeminent thinker with the publication of *The Common Law* in 1881 to the present. The essay is only in minor part about Holmes, drawing the familiar complex, somewhat pa-

5. 39 U. CHI. L. REV. 51 (1971) (p. 194).

6. White, *Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis*, 1974 DUKE L.J. 195.

7. White, *The Appellate Opinion as Historical Source Material*, 1 J. INTERDIS. HIST. 491 (1971) (p. 74).

8. THE AMERICAN JUDICIAL TRADITION, *supra* note 2.

thetic picture of intellectual radical turned proto-nihilist.[9] It is also only incidentally about the judiciary; Holmes achieved his importance because he served in important judicial positions, but by itself that is hardly a point of great significance. The essay mostly complements White's work on twentieth century jurisprudence, describing the changing perception of Holmes by successive groups of intellectuals. It conveys a general impression similar to that left from the essays on scholarly thought: that political and social events shape intellectual paradigms, and those paradigms then organize social and historical reality for their adherents. Thus each successive school found in Holmes the positive or negative characteristics that best confirmed its belief structure.

Justice Brandeis receives more direct treatment in the essay discussing the influence of his opinions in shaping the field of administrative law. The article adds to White's methodological calculus the role important judges play in shaping the law. By the time of Brandeis's appointment to the Supreme Court in 1916, a comprehensive scheme of governmental regulation of industrial and financial activity had been put in place, but there remained to be developed a body of law that would define the limits of agency power and the role of legislative delegation and judicial supervision. White suggests that Brandeis directed administrative law toward the allocative approach, which emphasizes the distribution of power between agencies and courts, rather than the approach of the creators of the administrative system, which emphasized the issues of delegation and national uniformity.

In terms of historical causation, White perceives Brandeis as acting in an authoritative but scholarly role. Brandeis did not, by strength of conviction or logic, single-handedly shape the development of administrative law. His legal views, growing out of his political orientation, became persuasive to his Supreme Court colleagues and others in large part because of the evolving contemporary experience with administrative bodies. By historical coincidence Brandeis was in a position of authority when his analysis was regarded as helpful in deciding issues arising out of a new reality. So the judge's role, like the scholar's, is to present a perceptual framework in which to organize social experience, though at times the judge may be more successful in doing so because of the greater authority of his opinions.[10]

White's essay on judicial opinions as historical sources pictures

9. *See* G. GILMORE, THE AGES OF AMERICAN LAW 48-50 (1977).

10. The perceptual framework is important but not determinative. Political, economic, and social phenomena were primarily responsible for the rise of the administrative state; judicial opinions had only a limited effect on the governmental response to these phenomena. *See* notes 25-31 *infra* and accompanying text.

judges as subject to institutional and role constraints but able to express their political and social inclinations. Thus he suggests a historical method that first identifies a judicial ratiocinative style common to a period and then correlates the style and its social assumptions with modes of discourse in other disciplines, values of political and social movements, and prevailing cultural attitudes. White illustrates the method with *MacPherson v. Buick Motor Co.*[11] Justice Cardozo's opinion in *MacPherson* reflected the Progressive ideal of social reform with institutional continuity; the opinion changed the law of manufacturers' liability by purporting to reconcile, not overrule, precedents. Again, White describes legal thought as mirroring social and intellectual trends within the limits of the judicial office.[12]

C. *The Constitution*

White's chapter on the judiciary is less thematically coherent than his chapter on scholarly thought; the final chapter, on the Constitution, is less coherent still. The chapter consists of two articles, neither of which fulfills the Introduction's promise to discuss how the presence of a written fundamental law has distinguished the character of American law. The first essay,[13] a review of Richard Kluger's *Simple Justice*,[14] discusses the interaction between the Supreme Court and its publics, at least attempting to examine the complexity of legal process. The second piece, "Constitutional Protection for Personal Lifestyles"[15] (with J. Harvie Wilkinson, III), is a traditional, nonhistorical case analysis that seems to have been included simply to fill out the volume. It no more lends itself to historical discussion than any other representative of its genre.[16]

Together the two essays speak little about the significance of a written constitution. They do, however, remind us of familiar points about the Supreme Court's social role in proclaiming constitutional law. Let me summarize three points:

(1) The public perceives three divergent roles of the Supreme Court: The Court as "nine people," as "a branch of government," and as "the supreme law of the land" (p. 292). To maintain the validity of the higher roles and thereby to avoid the charge of arbitrari-

11. 217 N.Y. 382 (1916).

12. The interaction of institutional constraints and social ideology in shaping judicial decisions is emphasized by White in THE AMERICAN JUDICIAL TRADITION, *supra* note 2.

13. White, *The Supreme Court's Public and the Public's Supreme Court*, 52 VA. Q. REV. 370 (1976) (p. 290).

14. R. KLUGER, SIMPLE JUSTICE (1975).

15. 62 CORNELL L. REV. 563 (1977) (p. 308).

16. For an analysis of the genre, see Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307 (1979).

ness, the Court must establish its legitimacy as a governing institution through the appearance of institutional continuity. To accomplish this, the Court primarily relies on adherence, real or professed, to a system of stare decisis and on appeals to fundamental values. The tension between roles is most acute when the Court overrules a precedent (as in *Brown v. Board of Education*[17]) or when it renders a decision not based on a specific constitutional protection (as in many of the "lifestyle" decisions.[18])

(2) Decisions of the Court both shape and are shaped by contemporary social values. The causal chain is very complicated. By selecting the cases it hears and decides, and by choosing to express its opinions in those cases broadly or narrowly, the Court has some control over the extent of its influence on social values. But the Court cannot render decisions that stray too far from widely held values; White and Wilkinson note that this fact limits the Court's power to protect individual freedom of lifestyle. Still, the Court's decisions may, as in *Brown*, lead public opinion and encourage certain values.

(3) The Supreme Court has three publics: the profession, the informed public, and the laity. In writing opinions (or attacking opinions in dissent) Justices must speak at different levels to reach different publics. With rare exceptions, of which *Brown* may be the most exceptional, Supreme Court decisions do not penetrate deeply into the public consciousness. When one does, the lay public and much of the informed public are probably aware only of the results and not the reasoning in the opinion. Thus the Court can play only a limited role in developing social values.

II. Ideas and the Problem of Causation

Patterns is not a book that needed to be published. As an anthology, it cannot provide a unified discussion of important aspects of American law; indeed, two of its three thematic chapters do no more than suggest the contours of their basic themes. Nevertheless, the work has an underlying motif; the problem of causation in legal history and, especially, ideas as causal or caused factors. This motif guides White's quest for an alternative to the dominant characterization of legal study as the study of the "law's operational significance for the institution of the market."[19] The effort to penetrate the problem of causation is important, for the problem is necessarily essential to any explanation of history. And White is not alone among historians in urging renewed attention to the role of ideas in the causal

17. 347 U.S. 483 (1954).

18. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

19. *See* p. xviii (citing Hurst, *The Law in United States History*, 104 Proc. Am. Phil. Soc. 518, 523 (1960)).

chain; a large number of scholars arrayed all along the political spectrum have increasingly emphasized the importance of the legal system's intellectual aspects for resolving historical and contemporary problems.

Patterns presents three aspects of the role of ideas: the significance of nonauthoritative intellectual leaders, the significance of judges, and the significance of a unique body of justices responsible for interpreting a set of universal principles. The underlying issue is where each of these groups fits in the causal nexus that involves economic, political, and social forces; the public, elite groups, and the legal profession; and schools and principles of legal thought and aspects of technical legal doctrine. A growing body of literature explicitly addresses this issue, and it is implicitly explored in every major piece of writing on legal history and the legal system. This is not the place for a comprehensive survey of the various approaches to the issue. I think it would be helpful, however, to discuss some general approaches to the issue, to locate White's thinking within those approaches, to suggest some of the implications of each approach, and finally to comment on the validity of each approach and, therefore, on the contribution of *Patterns*.

We can identify two schools of thought on the causal position of ideas.[20] Adherents of the orthodox approach to law and legal history[21] regard ideas as primary in legal causation. Accordingly, scholars and judges, as the developers of legal ideas, are the key to legal causation. In this view, social reality is important only in providing the material that the legal system will shape. Historically this idealist school has taken two basic forms, one concerning itself only with autonomous, professional legal activity and the other emphasizing the functional role of law in shaping social behavior.

The second approach to the causal role of ideas contrasts strongly with functionalist idealism. If law is interrelated with social practice, then perhaps social practice is prior to law and not vice versa. Then legal form and content would largely reflect external forces in society, the origins of legal ideas could be identified outside the legal system, and the actions of scholars and judges would have little independent significance. A common form of this perspective is economic determinism, the belief that economic forces are directly

20. *See* Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOCY. REV. 9 (1975); Tushnet, *Perspectives on the Development of American Law: A Critical Review of Lawrence Friedman's "A History of American Law"* 1977 WIS. L. REV. 81; Gordon, *Some Thoughts on Legal Form and Social Practice in American Legal Historiography* (unpublished paper presented at the Second National Meeting, Conference on Critical Legal Studies, Nov. 11, 1978); Holt, *Morton Horwitz and the Transformation of American Legal History* (1979) (unpublished manuscript on file with the *Michigan Law Review*).

21. *See* Gordon, *supra* note 20; Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

correlated to legal practice. Economic determinism has a liberal variant, pluralist determinism, and a radical variant, quaintly called vulgar instrumental Marxism.

This description of idealism and determinism, two major approaches to the role of ideas in legal history, encompasses crudely but not too inaccurately much of the typical work in the discipline until the recent resurgence of activity. Presently the discipline is characterized by a diversity of fresh approaches to the issue of historical causation. The older traditions continue to thrive, but the work most important to the present discussion responds to the determinist mode in two quite different directions. One response is a sophisticated, qualified idealism that restores ideas to a major but not exclusive causal position; White is the leading member of this school. A second response, a radical approach derived largely from modern Marxist thinking, studies ideas, ideology, and consciousness in a materialist posture. By contrasting these two approaches, I hope to make clear my critique of White's work in light of my sympathy for the second approach.

White emphasizes two moving forces of legal history: institutional and doctrinal beliefs of the legal system, and larger cultural attitudes and movements in social thought. Institutional norms constrain the judge's authority, for example, by requiring judges to follow approved techniques such as formally rational decisionmaking and adherence to precedent. Judges filter these role constraints through their own social and political inclinations, which by and large reflect the social values generated by dominant intellectual patterns. Thus judicial law results from the interaction between ideas embodied in the legal system and ideas embodied in the culture.

An example may be helpful. White rejects the traditional hypothesis that the development of tort law "must be laid at the door of the industrial revolution";[22] he favors a theory that internal and external intellectual forces raised a new system of law. In White's view, the new group of cases was mere context; the true causal forces were, internally, the necessity for a doctrinal recasting following the collapse of tort law's prior organizing principle (writ pleading) and, externally, the scientific, conceptual impulse among legal scholars that typified the reigning intellectual class.

I consider it important that White, perhaps *prima inter pares*, has drawn our attention again to the intellectual history of the law as a counterweight to the once prevalent pluralist determinism. However, because we still are in the early stages of the enterprise, criticism of White's theories is essential. Indeed, White invites such criticism:

22. L. FRIEDMAN, *supra* note 4, at 409. The traditional hypothesis has been criticized on other grounds. *See* Tushnet, *supra* note 20, at 89-91.

> It seems to me that the relationship between dominant ideas or values and "significant" events in the history of a profession is extraordinarily complex and difficult to characterize. Events cannot categorically be said to skew perceptions of events. Much more work and thought needs to be done, in my judgment, before a theory of the interaction of ideas and events in the history of American legal thought can be proposed. [p. 97.]

I believe that White's questions are important ones, but the method by which he seeks the answers is unpromising.

White conveys an impression of social conditions as catalysts and ideas as powerful, quasi-independent forces moving in history. His is not a simple idealism, but it is, I think, idealism of some sort. Take again his conclusions in his two principal areas of study. White sees American tort law rising out of scientific conceptualism and the collapse of the writ system as those two forces converged in cases presented by the new industrial system, cases between strangers. But move back a step. What caused the collapse of the writ system, and what caused the emergence of conceptualism as a dominant intellectual force? White rejects the view that the writ system met its demise because of dissatisfaction with its obscure technicalities and because of the developing codification movement. He suggests instead that a social event, the enlargement of legal concerns in the expanding economy, spurred the dissatisfaction, for as writ pleading became more flexible and more complex, it also became less useful to lawyers as an intellectual organizing device.[23] Thus, like Ptolemaic astronomy, its complexity contributed to its rejection. In the mid-nineteenth century, complexity and an emphasis on discrete rather than general solutions were especially offensive to the movement toward scientism.

Where did that movement originate? Here White leaves us somewhat at sea. In the early part of the century, he tells us, American intellectuals held both synthetic and atomistic views of law and society, manifested in their acceptance of religious beliefs as an integrating force and in their awareness of the value of individual autonomy. After 1850, however, those beliefs were eroded by the recognition of the disintegrative and alienating power of material progress and the apparent irrelevance of earlier religious beliefs. But White explains the emergence of the Victorian ethos no further.

I suppose a principal reason for White's failure to explore the problem fully is the natural limit of the inquiry. Law review editors and readers would probably rebel — and rightly so — at an extended discussion of the origins of Victorianism in an article on tort law. Accordingly, White follows the accepted scholarly practice of

23. *Cf.* W. NELSON, AMERICANIZATION OF THE COMMON LAW 69-87 (1975).

incorporation by footnote (p. 168 n.19). But for our purposes the analysis must be extended to explicate its theoretical underpinings.

Before attempting that explication, let me state the second example. White describes Sociological Jurisprudence's attack on Mechanical Jurisprudence as the legal front in Progressivism's war on the intellectual and political beliefs of the late nineteenth century. Further on in the story, as the morality and optimism of Progressivism faded in the 1920s, the social sciences and then legal "science" shifted their attention, leading to the rise of American Legal Realism. Thus again we are pressed back to explaining the rise and decline of Progressivism.

These examples share an emphasis on intellectual processes in interpreting social phenomena. This is, of course, the essence of intellectual history. Given the sketchiness of the description, we can speculate that White is here using one of two possible causal theories. The first is a determinist mode in which, for example, the chaos of an expanding economy leads inexorably to an intellectual attempt to organize the chaos according to scientific principles. Yet neither White nor many others in the field would be likely to accept that approach. In the second, an idealist mode, ideas and congeries of belief are largely autonomous from social forces. Industrial capitalism does not produce Victorian conceptualism but creates a social environment to be understood by intellectuals. In attempting to understand the environment, they exercise independent powers of reason to revise or replace prior modes of thought. But how would an idealist say that a particular new intellectual *zeitgeist* is finally selected? If we reject determinism, two explanations remain. One is that people through reasoning evolve answers that are increasingly "correct." As a new situation is presented, they refine earlier ideas and beliefs, and their knowledge becomes more sophisticated. This position once dominated legal history and is still widely held. But given the complexity of historical experience I reject it, as I think White would, as inadequate. The other explanation is that the process is very complicated and subtle — perhaps incapable of accurate definition. At a theoretical level that may very well be true,[24] but we should not abandon all attempts at understanding just because total understanding is beyond our reach. Further insight can be gained by contrasting the idealist mode in general with another popular style of explanation, materialism.

There is a crucial but often distorted difference between materialism, the mode of analysis unique to Marxism, and economic determinism, which has liberal as well as radical variants.[25] Unlike economic determinism, materialism acknowledges the influence of

24. *See* R. UNGER, LAW IN MODERN SOCIETY 8-23, 245-62 (1976).

25. In the following discussion I make extensive use of Holt, *supra* note 20; Tushnet, *supra*

intelligence and belief on history. Yet unlike idealism, materialism asserts the centrality of economic and social forces in history.

According to the materialist view of history, people seek to fulfill their needs, primary among which are physical needs, by interacting with others and developing technology. Collective activity, however, is not always harmonious; it sometimes leads to conflict over the use and control of the technologically available means of fulfillment ("means of production"). The relationship of these conflicts to the means of production generates social relations ("modes of production") in which those in control of the means of production naturally prefer to press their advantage at the expense of the subordinate group. The members of the oppressed class, in turn, seek to fulfill their needs by escaping their oppression. To forestall this possibility, the controlling group promotes ideas and beliefs that disguise and justify its position ("ideology"). The false ideology appears true as an integrated explanation of experience, because experience is profoundly shaped by the mode of production. Ideas, therefore, are not excluded from the materialist perception, but the dominance of particular ideas is explained by their service to the social relations of domination and subordination.[26]

We are thus presented with two sophisticated views of the role of ideas in history: qualified idealism and materialism. Both contrast with the simplistic views of classical idealism and determinism. Neither is susceptible to conclusive proof because of the inadequacies of historical evidence and historical method. Nevertheless, I would draw certain tentative conclusions, the most important of which is that neither can claim to offer a universal explanation. Too much time has been spent in recent years defining the relation of law and legal thought to social forces for us to avoid the conclusion that ideas have only limited autonomy. On the other hand, the diversity of intellectual experience and the existence of ideas obviously unrelated to the mode of production limits the position of materialism to at most primacy and not universality.

I think that the choice between explanatory models is essentially a political one. White's idealist model directs our attention to intellectual processes, to the work of scholars, and to autonomous ideas, leaving political and economic forces in the background. This model, like earlier idealist approaches, views law as rational activity. That view emphasizes the activities of academics, lawyers, and judges within the legal system, especially the intellectual aspects of

note 20; and Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPECTIVES 96 (1978).

26. In this necessarily brief summary I do not mean to emphasize a conscious, conspiratorial element in the production of ideology. *See* text at notes 30-31 *infra*.

their activity.[27] It implicitly holds out the promise of legal and social reform through the power of sweet reason. It deemphasizes the effects of the conceptual schemes and doctrines on the non-elite consumers of the legal system's products.

The materialist model, on the other hand, attacks quite directly questions of power, of truth, of human fulfillment, and of justice. History in this view is not a succession of interesting intellectual schema developing against a fuzzy background of social reform movements. Instead, it is characterized by an ongoing conflict of class against class. The legal system is seen as an arena in which the conflict is played out. Sometimes the conflict is obvious, as in a struggle over instrumental doctrinal rules. But a major contribution of the materialist approach is its insight into the origins and roles of aspects of legal thought that, on the surface, do not appear to be involved in the class struggle.

Structures of belief thus play a major role in the model, although not a primary role. Some of the most exciting current writing on law in the Marxist tradition stresses the hidden power of the intellectual constructs that originate in the class conflict. Such constructs should not be viewed either in isolation or merely in relation to amorphous social movements. They are intimately connected to fundamental issues of right raised by the materialist critique. Further, materialism considers not only the content of law — doctrines, principles, schools of jurisprudence — but also the legal form and legal order itself.

A first use of ideas in law is to build legitimacy for the social relations it protects.[28] Legal ideology can be used to justify the state of affairs in society to the dominated and to the dominating. Hegemony is maintained not by force alone but also by inducing acceptance of values and institutions that appear to support an unequal distribution of power. Ideology will reduce dissatisfaction, or at least overt resistance, to the extent that it penetrates the lower class consciousness. The most likely penetration is of general principles, such as the neutrality of the legal system, rather than specific rules of law. For the dominating class, and especially for lawyers serving the interests of that class, legal ideology can reduce the cognitive dissonance that arises from participating in a process whose results are manifestly inconsistent with basic moral values.[29]

Not only substantive legal principles but also the legal form generates ideology.[30] Under capitalism the legal form is homologous to

27. The choice of the idealist model is also in this way self-justificatory.

28. *See* Holt, *supra* note 20; Tushnet, *supra* note 20; Tushnet, *supra* note 25.

29. *See* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

30. Balbus, *Commodity Form and Legal Form*, 11 L. & SOCY. REV. 571 (1977).

the commodity form. The commodity form conceals the qualitative differences between the exchange values of two products and therefore the products' origins in human labor and the relations of capitalist and worker. Similarly, the legal form, the notion of impersonal equality before the law, conceals the qualitatively different nature of individuals who come before the law and the social relations that bring them there. Thus the capitalist legal order convincingly substitutes formal equality, liberty, and political community for the genuine, experiential forms of those values, thereby discouraging challenges to the existing social order. Autonomy of the legal system from direct pressure by political or economic interests does not imply neutrality: a deeper look at the role of ideology in legal history is necessary.

Delineating the connection between the mode of production and the ideology of the legal order is perhaps the most difficult task in developing a theory of causation. Because legal form and content are not always generated consciously by manipulative ruling-class ideologues, delineating the connection requires a legal phenomenology as part of legal history.[31] This approach considers people's attempt to interpret their material and social experience by developing integrated theoretical structures. The law's approach to problems reflects those attempts and structures. Because economic relations are the primary elements of this experience, law corresponds to those relations. Thus, consciousness shapes law, but in a sophisticated and attenuated fashion with the mode of production as a touchstone. While this approach resembles White's in its view of the relation of legal ideas to cultural values, it has the advantages of more emphasis on the nature of the causal link and a closer relation between law and social forces.

III. Conclusion

Professor White is to be commended for raising the issue of the role of ideas in the history of the American legal system. Given the ostensible devotion of the system to cerebration, the importance of intellectual processes is clear and the attention paid to them is deserved. Raising issues and resolving them are two different things, however. White's work is exceptional but ultimately unsatisfying. On intellectual grounds, it fails to consider fully the relation of legal ideas to social forces, and the place of ideas in the causal nexus of legal history. Such breadth and depth are too much to be demanded of any single scholar. On personal grounds, however, it fails to direct attention to issues of justice, the basic issues legal scholars must confront. On both grounds, in my judgment, further research will be

31. *See* Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 Minn. L. Rev. 601 (1977).

more fruitful if it considers the issues raised by the modern adherents of the Marxist tradition.