

## THE PROSSER NOTEBOOK: CLASSROOM AS BIOGRAPHY AND INTELLECTUAL HISTORY

Christopher J. Robinette\*

*When a former student offered to let me see his grandfather's Torts notebook, I was intrigued. The seventy-year-old black notebook has developed a patina, but is in remarkably good condition. The sides have a lightly textured surface. The spine, not damaged by cracks, has several small gold stripes running across it. The notebook belonged to a first-year law student named Leroy S. Merrifield during the 1938–39 academic year at the University of Minnesota Law School. Merrifield used it to record notes during his Torts class. His professor was William Prosser.*

*Because Prosser's papers likely have been destroyed, Merrifield's notebook offers a unique "behind the scenes" look at Prosser during a very significant period in his professional development. During 1938–39, Prosser was finishing a draft of the first edition of Prosser on Torts, the most influential treatise ever published on tort law. Furthermore, Prosser's article legitimizing intentional infliction of emotional distress as an independent tort appeared in the spring of 1939. In addition to insights into these particular projects, the notebook allows a better understanding of Prosser's place in the intellectual history of twentieth-century legal theory. Prosser's 1938–39 Torts class took place at the height of the realist influence in the academy. The notebook demonstrates Prosser's realism in the classroom, as well as his connection to the two major consequentialist torts rationales of the twentieth century: compensation and deterrence. In short,*

---

\* Associate Professor of Law, Widener University. B.A. 1993, College of William & Mary; J.D. 1996, University of Virginia School of Law. I thank my former student, Clarke Madden, for bringing me the notebook and allowing me to review it. I thank Professor Leroy Merrifield for allowing me to write about the notebook and patiently answering my questions. Thanks to William Benemann (Berkeley), Katherine Hedin (Minnesota), and Ed Sonnenberg (Widener) for their diligent research and helpful information from their respective libraries. I thank John Goldberg, Keith Hylton, Kathy Jones, Juliet Moringiello, Jeffrey O'Connell, Wes Oliver, Victor Schwartz, Brian Tamanaha, and participants in the Rutgers-Camden Faculty Colloquium and Widener Law Summer Scholarship Series for their perceptive ideas and assistance with specific issues. Ben Barros, Al Brophy, and Sheila Scheuerman contributed substantially to the structure of the Article. Widener University School of Law supported this Article with a research grant. Finally, I thank Diana Esposito, Kirsten Kutler, and Bryan Weisburd for excellent research assistance. Errors are mine alone.

*the notebook sheds light on both the origins and the content of one of the law's most influential thinkers.*

*This Article accomplishes three things. First, with no biography available on Prosser, the Article provides an account of his life, drawn heavily from archival research. Second, the Article presents new details of several of Prosser's seminal accomplishments. Third, the Article helps situate Prosser in the jurisprudential development of law in the twentieth century.*

#### TABLE OF CONTENTS

I.	Introduction.....	578
II.	The Life of William Prosser .....	582
III.	The Contents of the Notebook .....	586
	A. In the Beginning . . . . .	587
	B. Intentional Torts and Defenses.....	588
	C. Negligence .....	590
	D. Liability Without Fault .....	592
	E. Damages .....	592
IV.	The Notebook as Crystal Ball.....	593
	A. <i>Prosser on Torts</i> .....	595
	B. The Restatement.....	600
	C. Intentional Infliction of Emotional Distress.....	602
	D. Strict Products Liability .....	604
V.	The Notebook as Intellectual History .....	607
	A. Realism .....	610
	1. Realism in the Academy.....	610
	2. Realism in the Notebook.....	612
	B. Consequentialist Torts Rationales.....	615
	1. Compensation .....	615
	2. Law-and-Economics Deterrence .....	616
VI.	Conclusion.....	618
	Appendix: Prosser's Torts Quizzes and Examination 1938–39.....	620

#### I. INTRODUCTION

When a former student offered to let me see his grandfather's Torts notebook, I was intrigued. The seventy-year-old black notebook has developed a patina, but is in remarkably good condition. The sides have a lightly textured surface. The spine, not damaged by cracks, has several small gold stripes running across it. The notebook belonged to a first-year law student named Leroy S. Merrifield during the 1938–39 academic year at the University of Minnesota Law School.<sup>1</sup> Merrifield used it to record notes during his Torts class. His professor was William Prosser.

---

1. See *infra* note 38 and accompanying text for more about Leroy S. Merrifield.

William Lloyd Prosser is a giant of tort law: “Rarely in the history of American legal education has one author’s name been so clearly identified with his subject as the name of William L. Prosser is with the law of torts.”<sup>2</sup> In 1986, the *Washington Post* described Prosser as “a scholar and author who was to torts what Dr. Spock is to child care.”<sup>3</sup> When Prosser died in 1972, his colleagues heralded him as “a great Master of Torts.”<sup>4</sup> The Association for American Law Schools Torts and Compensation Section has named its annual award, based on scholarship, teaching, and service in torts and compensation systems, the “William L. Prosser Award.”<sup>5</sup>

The sources of his reputation are many. First, and foremost,<sup>6</sup> there is his treatise, *Prosser on Torts*.<sup>7</sup> “Prosser on Torts! It has a completed sound, a belonging sound, a natural sound, a sound to be remembered for years to come.”<sup>8</sup> One author used the book literally as an example of “secondary sources that are considered authoritative and influential.”<sup>9</sup> Second, Prosser was the Reporter for the *Restatement (Second) of Torts*,<sup>10</sup> which has been described as “increas[ing] in authority with every passing year,”<sup>11</sup> “very influential,”<sup>12</sup> “still influential,”<sup>13</sup> and even “the most influential of the American Law Institute’s volumes restating and reshaping American law.”<sup>14</sup> Third, he wrote a textbook<sup>15</sup> that has gone through eleven editions and, thirty-six years after his death, is still the market leader in a highly competitive area.<sup>16</sup>

2. Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts* (Fifth Edition) and the *Prosser Legacy*, 39 VAND. L. REV. 851, 852 (1986) (book review).

3. T.R. Reid, *The Liability Crisis: Litigation Loosens the Stiff Upper Lip*, WASH. POST, Feb. 24, 1986, at A1.

4. Laurence H. Eldredge, *William Lloyd Prosser*, 60 CAL. L. REV. 1245, 1251 (1972).

5. See, e.g., TORTS AND COMPENSATION SECTION NEWSLETTER (The Assoc. of Am. Law Schs., Washington, D.C.), Dec. 5, 2007, at 2, <http://www.aals.org/documents/sections/torts/torts.pdf>.

6. See Joyce, *supra* note 2, at 852–53 (“In many respects, and certainly in the minds of generations of lawyers who have studied from and employed it to their profit and amusement, the jewel in the crown remains Prosser’s *Handbook on the Law of Torts*.”).

7. There were four editions of *Prosser on Torts*, published in 1941, 1955, 1964, and 1972, as well as a fifth edition in 1984, *Prosser and Keeton on the Law of Torts*.

8. John W. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CAL. L. REV. 1255, 1255 (1972).

9. Paul Hellyer, *Assessing the Influence of Computer-Assisted Legal Research: A Study of California Supreme Court Opinions*, 97 LAW LIBR. J. 285, 292 (2005).

10. This task was completed by John W. Wade upon Prosser’s death.

11. Joyce, *supra* note 2, at 852.

12. Gregg D. Polsky & Stephen F. Befort, *Employment Discrimination Remedies and Tax Gross Ups*, 90 IOWA L. REV. 67, 111 (2004).

13. Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 779 n.199 (2004).

14. H. Alston Johnson, *So What Is a Ruminant, Anyway: Tales of Professor Wex S. Malone*, 56 LA. L. REV. 493, 493 (1996).

15. The first edition, published in 1952, was Young B. Smith and William L. Prosser’s *Cases and Materials on Torts*. The most-recent edition is *Prosser, Wade and Schwartz’s Cases and Materials on Torts*, published in 2005 and listing Victor E. Schwartz, Kathryn Kelly, and David F. Partlett as authors.

16. E-mail from Christopher Hart, Dir. of Sales and Account Mgmt., Found. Press, to author (June 27, 2008, 13:34:54 CST) (on file with author). The book is shipped annually to over 110 law schools.

Through this and other scholarship, he exerted a strong influence on the substantive development of multiple torts doctrines including products liability, privacy law, and the intentional infliction of emotional distress. In the products liability area, Prosser played a considerable role in the ultimate triumph of strict liability for products. Prosser's 1941 treatise called for strict liability in the products arena<sup>17</sup> three years prior to Justice Roger Traynor's concurrence in *Escola v. Coca-Cola Bottling Co.*<sup>18</sup> His 1960 article *The Assault Upon the Citadel*,<sup>19</sup> written as jurisdictions were on the cusp of adopting strict liability, has been called, by Professor G. Edward White, "a model of how legal scholarship can serve to further doctrinal change in a common law subject."<sup>20</sup> Additionally, in drafting the products liability sections of the *Restatement (Second) of Torts*, particularly section 402(A), Prosser legitimized strict products liability.<sup>21</sup>

In the area of privacy law, Prosser's scholarship established the division of a vague tort right of "privacy" into four distinct causes of action.<sup>22</sup> Prosser's 1960 article *Privacy*,<sup>23</sup> followed in a few years by the privacy provisions in the *Restatement (Second) of Torts*, "came to supplant Warren and Brandeis's work as the touchstone of privacy jurisprudence."<sup>24</sup> Finally, Prosser legitimized intentional infliction of emotional distress as an independent tort. Prosser's 1939 article on intentional infliction of mental suffering announced that courts had created a "new tort."<sup>25</sup> As Professor White notes, "Prosser's statement had an element of accuracy. But it was also unnecessarily modest. A major contribution to the 'creation' of the 'new tort' had been made by Prosser himself."<sup>26</sup>

Despite these accomplishments, no biography of Prosser exists.<sup>27</sup> One reason for the lack of a biography is the absence of Prosser's papers.

17. WILLIAM L. PROSSER, PROSSER ON TORTS 688–89 (1941).

18. 150 P.2d 436, 440 (Cal. 1944).

19. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

20. G. EDWARD WHITE, TORT LAW IN AMERICA 169 (2003).

21. Consider, for instance, Thomas C. Galligan, Jr.'s comment that "the influence of the Restatement (Second) of Torts section 402A was unprecedented in American law. No other single Restatement section (with the possible exception of Restatement of Contracts section 90 on promissory estoppel) has been more influential in the development of American law." Thomas C. Galligan, Jr., *A Primer on Cigarette Litigation Under the Restatement (Third) of Torts: Products Liability*, 27 SW. U. L. REV. 487, 498 (1998).

22. The four privacy torts are (1) intrusion upon the plaintiff's seclusion or solitude, (2) public disclosure of embarrassing private facts, (3) publicity that places the plaintiff in a false light in the public eye, and (4) appropriation for the defendant's advantage of the plaintiff's name and likeness. RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D, 652E, 652C (1976).

23. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

24. Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 223 (1999).

25. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939).

26. WHITE, *supra* note 20, at 102.

27. There are a number of biographies of law professors. See, e.g., EDWIN S. COHEN, A LAWYER'S LIFE: DEEP IN THE HEART OF TAXES (1994); ROLAND GRAY ET AL., JOHN CHIPMAN

A search of the National Union Catalog of Manuscript Collections at the Library of Congress did not reveal any institution holding Prosser's papers, although letters from Prosser to others appear in a few collections.<sup>28</sup> In addition, calls to the law libraries of the four schools at which Prosser was either a professor or dean<sup>29</sup> confirmed Prosser did not leave his papers to any of those institutions.<sup>30</sup>

William Benemann, the Archivist at the University of California, Berkeley (Boalt Hall) where Prosser was dean for thirteen years and taught for two more, has actively searched for Prosser's papers for years.<sup>31</sup> Benemann has heard a rumor that Prosser destroyed the papers.<sup>32</sup> That rumor is partially confirmed by Thomas Reynolds, the former Associate Director of the Law Library at Berkeley. According to Reynolds, Prosser had a "reasonable trove of personal papers, mainly in his office."<sup>33</sup> When Prosser left Berkeley for the University of California, Hastings College of Law in 1963, he took very little with him, except all the papers that pertained to his torts books.<sup>34</sup> According to Reynolds, "he certainly threw out some materials."<sup>35</sup> It is not known what became of the material pertaining to his torts books, presumably the hornbook and textbook. Despite the setbacks, Benemann is attempting to collect all the Prosser material he can for the archives at Berkeley.<sup>36</sup> In that vein, Richard S. Prosser, one of Prosser's sons, agreed to provide documents to Berkeley. Unfortunately, the only documents he was able to

---

GRAY (1917); HARVARD LAW SCHOOL, ALBERT MARTIN SACKS, 1920–1991 (1991); BETH HOLLENBERG, "FULL OF ZOOM": BARBARA NACHTRIEB ARMSTRONG, FIRST WOMAN PROFESSOR OF LAW (1997); EDWARD L. KIMBALL, FRANK J. REMINGTON: CONTRIBUTIONS TO CRIMINAL JUSTICE (1994); DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS (1980); PAUL SAYRE, THE LIFE OF ROSCOE POUND (1948); REGINALD HEBER SMITH, IN MEMORIAM SAMUEL WILLISTON, 1861–1963 (1963); DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW (1986); WILLIAM TWING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY (2005); YALE LAW SCHOOL & OGDEN FOUNDATION, HAROLD DWIGHT LASSWELL, 1902–1978 (1979); Guido Calabresi et al., *Tributes to Robert M. Cover*, 96 YALE L.J. 1699 (1987); Memorial Resolution, Stanford University, Joseph Walter Bingham, 1878–1973 (1974).

28. Search performed by Ed Sonnenberg, Reference/Government Documents Librarian at Widener University School of Law, on July 1, 2008. The American Law Institute Archives, which include papers from the *Restatement (Second) of Torts*, are located at the University of Pennsylvania's Biddle Law Library.

29. See *infra* Part II.

30. I am clearly not the first to seek Prosser's papers. See, e.g., Posting of Sharon J. Persons to <http://listproc.ucdavis.edu/archives/law-lib/law-lib.log0309/0357.html> (Sept. 19, 2003, 13:33 PDT).

31. Telephone Interview with William Benemann, Archivist, Univ. of Cal., Berkeley (Boalt Hall) (July 2, 2008) [hereinafter Benemann Telephone Interview]. The most recent disappointment occurred about a year ago, when an old storage room was cleared out. Unfortunately, Prosser's papers were not in the room. *Id.*

32. *Id.*

33. E-mail from William Benemann, Archivist, Univ. of Cal., Berkeley (Boalt Hall) to author (July 2, 2008, 12:46 PDT) (on file with author) (quoting correspondence with Thomas Reynolds).

34. *Id.*

35. *Id.*

36. A copy of the Merrifield's Torts notebook is available in the Berkeley archives and online at [http://sunsite2.berkeley.edu:8088/xdlb//prosser/ucb/mets/cubanc\\_67\\_1\\_00064213.xml](http://sunsite2.berkeley.edu:8088/xdlb//prosser/ucb/mets/cubanc_67_1_00064213.xml).

find were a series of letters from Prosser to his mother during the years 1948–1958.<sup>37</sup>

Given the absence of Prosser's papers, Merrifield's notebook offers a unique "behind-the-scenes" look at Prosser during a very significant period in his professional development. Of course, the notebook is not written by Prosser himself. This is an important caveat, and it limits the certainty with which conclusions can be drawn from the contents of the notebook. However, Merrifield was clearly a skilled note taker. Furthermore, Merrifield went on to become a legal academic, and indeed, to teach Torts, at George Washington University School of Law. Merrifield, who was the Lobingier Professor Emeritus of Jurisprudence and Comparative Law at George Washington, passed away at the age of ninety on September 19, 2008.<sup>38</sup> The notebook, therefore, provides us the thoughts of a legendary Torts professor, in the process of creating the most influential treatise on torts, as channeled by a student who would go on to be a Torts professor.

To put the contents of the notebook in context, Part II provides a brief outline of Prosser's life and accomplishments. Part III, a description of the structure of Prosser's two-semester Torts course, presents the contents of the notebook itself. Part IV connects the contents of the notebook to critical events in Prosser's life. I focus on four: writing *Prosser on Torts*, serving as Reporter for the *Restatement (Second) of Torts*, legitimizing intentional infliction of emotional distress as an independent tort, and his role in changing the standard in products cases from negligence to strict liability. Finally, Part V explains how the notebook allows a better understanding of Prosser's place in the intellectual history of twentieth-century legal theory. Prosser's 1938–39 Torts class took place at the height of realist influence in the academy. The notebook demonstrates Prosser's realism in the classroom, as well as his connection to the two major consequentialist torts rationales of the twentieth century: compensation and deterrence. The notebook sheds light on both the origins and content of one of the law's most influential thinkers.

## II. THE LIFE OF WILLIAM PROSSER

William Prosser was born on March 15, 1898 in New Albany, Indiana<sup>39</sup> to Charles Allen Prosser and Zerelda Ann Huckleby Prosser.<sup>40</sup>

---

37. Benemann Telephone Interview, *supra* note 31.

38. For a tribute to Professor Merrifield at the time of his retirement, see Jerome A. Barron, *A Tribute to Professors W. Thomas Mallison and Leroy S. Merrifield*, 55 GEO. WASH. L. REV. 179, 194–201 (1987).

39. Joyce, *supra* note 2, at 852 n.5.

40. Short Biographical Statement entitled "Copy" (on file in Prosser Biography File, University of Minnesota Archives and with author) [hereinafter Short Biographical Statement].

Prosser spent most of his childhood in Minnesota.<sup>41</sup> In 1918, he received a B.A. from Harvard University.<sup>42</sup> Prosser graduated from Harvard during World War I, and he immediately joined the Marines.<sup>43</sup> Prosser enlisted as a gunnery sergeant with the Aviation Detachment of the United States Marine Corps on July 18, 1918, and was commissioned as a second lieutenant on December 5, 1918.<sup>44</sup>

When the war ended, Prosser served as Secretary to the United States Commercial Attaché in Brussels, Belgium.<sup>45</sup> In 1921, he returned to the United States to attend Harvard Law School.<sup>46</sup> After just one year, however, Prosser left law school and took a job as an assistant sales manager for Russell-Miller Milling Co. in Minneapolis, a position he held from 1922 to 1926.<sup>47</sup> During his tenure at Russell-Miller, on September 19, 1925, Prosser married Eleanor Sewall.<sup>48</sup> The couple eventually had three sons: Reese T., Richard S., and Thomas L. Prosser.<sup>49</sup>

Prosser then returned to law school, this time attending the University of Minnesota Law School, where he earned his LL.B. in 1928.<sup>50</sup> While a student, Prosser was the Note Editor for Volume 12 of the *Minnesota Law Review*, and was elected to the Order of the Coif.<sup>51</sup> Shortly after graduation in 1928, Prosser was admitted to the Minnesota bar, and he joined the Minneapolis firm of Dorsey, Colman, Barker, Scott & Barber.<sup>52</sup> Within a year, Prosser was back at the University of Minnesota Law School as a part-time lecturer.<sup>53</sup> He was appointed an “Instructor in Law” on February 25, 1929 to fill in “[w]hen Professor Fletcher became ill”<sup>54</sup> at the rate of \$20 per lecture.<sup>55</sup> For the 1929–30 academic year, Prosser remained an “Instructor,” but received a fixed salary of \$1100.<sup>56</sup>

---

41. Press Release, Univ. of Cal. (System) Academic Senate, University of California: In Memoriam (July 1975), available at [http://content.cdlib.org/view?docId=hb9t1nb5rm&brand=calisphere&doc.view=entire\\_text](http://content.cdlib.org/view?docId=hb9t1nb5rm&brand=calisphere&doc.view=entire_text).

42. See Joyce, *supra* note 2, at 852 n.5.

43. *Id.*

44. William L. Prosser, Statement of Military and Naval Service (on file in Prosser Biography File, University of Minnesota Archives and with author).

45. Press Release, *supra* note 41, at 127.

46. *Remembering William Prosser*, FLETCHER FILES (Minn. Law Review Alumni Advisory Bd.), Fall 2007, at 2, [http://local.law.umn.edu/uploads/images/6620/Newsletter\\_Fall\\_2007.pdf](http://local.law.umn.edu/uploads/images/6620/Newsletter_Fall_2007.pdf).

47. Short Biographical Statement, *supra* note 40.

48. *Id.*

49. *Id.*

50. See Joyce, *supra* note 2, at 852 n.5.

51. See ROBERT A. STEIN, IN PURSUIT OF EXCELLENCE: A HISTORY OF THE UNIVERSITY OF MINNESOTA LAW SCHOOL 460 n.52 (1978).

52. See *id.*; Joyce, *supra* note 2, at 852 n.5. The firm is now Dorsey & Whitney LLP, with a Web site at <http://www.dorsey.com>.

53. See STEIN, *supra* note 51, at 460 n.52.

54. Dean Everett Fraser, 1930–31 Budget Explanatory Blue Sheet (on file in Prosser Biography File, University of Minnesota Archives and with author). Presumably, “Professor Fletcher” is Henry J. Fletcher, who played a role in founding the *Minnesota Law Review* in 1917. Fletcher was the *Law Review*’s first Editor-in-Chief. STEIN, *supra* note 51, at 63–65.

55. Prosser Faculty Record (on file in Prosser Biography File, University of Minnesota Archives and with author).

56. *Id.*

In 1930, Prosser was appointed Assistant Professor, and his academic career began in earnest.<sup>57</sup> As a faculty member, he served as Assistant Editor to the *Minnesota Law Review* from 1930 to 1936, and subsequently as Editor-in-Chief from 1936 to 1942.<sup>58</sup> After just three years, Prosser was promoted to the rank of full Professor.<sup>59</sup>

It appears that Prosser did not begin to teach Torts until the 1934–35 academic year.<sup>60</sup> At the start of his career, Prosser taught Sales, Damages, Insurance, Pleading, and Quasi-Contracts.<sup>61</sup> The law school bulletin does not list Prosser as teaching Torts until its 1934–36 edition.<sup>62</sup> Correspondingly, Prosser’s early scholarship focused on sales,<sup>63</sup> insurance contracts,<sup>64</sup> and a “mortgage moratorium” in Minnesota.<sup>65</sup> His first publications on torts were book reviews in the *Minnesota Law Review*.<sup>66</sup> Shortly after reviewing Fowler Harper’s *A Treatise on the Law of Torts*,<sup>67</sup> Prosser began to focus his scholarship on torts. In the next few years, he would write three articles on *res ipsa loquitur*,<sup>68</sup> an article on proximate cause,<sup>69</sup> and an article on joint and several liability.<sup>70</sup>

57. See STEIN, *supra* note 51, at 460 n.52; Joyce, *supra* note 2, at 852 n.5.

58. See STEIN, *supra* note 51, at 460 n.52.

59. Press Release, Univ. of Minn. News Serv., California Dean to Address ‘U’ Law Banquet Friday (Apr. 26, 1955) (on file in Prosser Biography File, University of Minnesota Archives and with author).

60. Given that Prosser began teaching as a substitute for Fletcher, this makes sense: Prosser inherited Fletcher’s course package.

61. E-mail from Katherine Hedin, Assoc. Dir., Univ. of Minn. Law Library to author (July 10, 2008, 11:55:21 EST) (on file with author) (describing law school bulletins for 1928–30, 1930–32, and 1932–34; his initial course package was consistent for his first four years of teaching, although in 1932–34, he taught Pleading instead of Quasi-Contracts).

62. *Id.*

63. William L. Prosser, *Open Price in Contracts for the Sale of Goods*, 16 MINN. L. REV. 733 (1932).

64. William L. Prosser, *Delay in Acting on an Application for Insurance*, 3 U. CHI. L. REV. 39 (1935); William L. Prosser, *Making of a Contract of Insurance in Minnesota*, 17 MINN. L. REV. 567 (1933).

65. William L. Prosser, *The Minnesota Mortgage Moratorium*, 7 S. CAL. L. REV. 353 (1934). Prosser also wrote short reviews of a number of works. See, e.g., William L. Prosser, Book Review, 15 MINN. L. REV. 617 (1931) (reviewing JAMES MONTGOMERY BECK, *MAY IT PLEASE THE COURT* (1930)); William L. Prosser, Book Review, 15 MINN. L. REV. 846 (1931) (reviewing HENRY ALAN JOHNSTON, *WHAT RIGHTS ARE LEFT* (1930)).

66. The first was a review of LEON GREEN, *JUDGE AND JURY* (1927). See William L. Prosser, Book Review, 16 MINN. L. REV. 222 (1932) [hereinafter Prosser, Green Book Review]. Green’s book was essentially about jurisprudence, using tort law as an example. See, e.g., Thurman W. Arnold, Book Review, 40 YALE L.J. 833, 833 (1931) (“[I]t is an exposition of the place which legal rules hold in the judicial process. Illustrations are chosen from the field of torts, but they might have been taken with equal success from any of the conventional departments of the law.”). The second was a review of a torts treatise, FOWLER VINCENT HARPER, *A TREATISE ON THE LAW OF TORTS* (1933). See William L. Prosser, Book Review, 19 MINN. L. REV. 257 (1935) [hereinafter Prosser, Harper Book Review].

67. See *supra* note 66.

68. William L. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936); William L. Prosser, *Res Ipsa Loquitur: Collisions of Carriers with Other Vehicles*, 30 ILL. L. REV. 980 (1936); William L. Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 S. CAL. L. REV. 459 (1937).

69. William L. Prosser, *The Minnesota Court on Proximate Cause*, 21 MINN. L. REV. 19 (1936).

70. William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413 (1937).



Prosser appears to have been highly sought-after as an academic. Prosser's personnel file is replete with references to expressions of interest from other law schools.<sup>71</sup> As early as 1933, Prosser was considered for the deanship at the University of Indiana.<sup>72</sup> By early 1937, Minnesota's dean wrote:

Mr. Prosser has attracted the attention of the law schools throughout the country. In addition to the Stanford offer, he has the assurance of an offer of the first vacancy at the University of California. Acting Dean Morgan of Harvard told me last month that he regarded him as one of the most promising young men in the profession.<sup>73</sup>

Other schools expressing interest in Prosser include the University of Pittsburgh,<sup>74</sup> the University of Missouri,<sup>75</sup> the University of Pennsylvania,<sup>76</sup> and the University of Minnesota (as a candidate for deanship).<sup>77</sup>

There was good reason for the interest. Prosser was producing influential scholarship. For example, in 1939, Prosser published an article on the intentional infliction of mental suffering<sup>78</sup> that is widely regarded as having cemented the status of a tort now actionable in every American jurisdiction.<sup>79</sup> And, of course, in 1941, Prosser published the first edition of his classic treatise, *Prosser on Torts*.<sup>80</sup>

In 1942, after the United States' entry into World War II, Prosser took a leave of absence from the University of Minnesota to serve as state counsel for Minnesota's Office of Price Administration.<sup>81</sup> A year later, Prosser returned to private practice, as a partner, with the same

71. *E.g.*, Letter from Everett Fraser, Dean, Univ. of Minn. Law School, to Lotus D. Coffman, President, Univ. of Minn. (Oct. 26, 1933) (on file in Prosser Personnel File, University of Minnesota Archives and with author). Minnesota made attempts to retain Prosser by increasing his salary, but these requests were often denied because of a rule against salary increases in effect for at least part of Prosser's tenure. *E.g.*, *id.*

72. *Id.*

73. Letter from Everett Fraser, Dean, Univ. of Minn. Law School, to Lotus D. Coffman, President, Univ. of Minn. (Jan. 26, 1937) (on file in Prosser Personnel File, University of Minnesota Archives and with author).

74. Letter from R. H. Fitzgerald, Provost, Univ. of Pittsburgh, to Lotus D. Coffman, President, Univ. of Minn. (Feb. 17, 1938) (on file in Prosser Personnel File, University of Minnesota Archives and with author). Pittsburgh was interested in Prosser as dean.

75. The University of Missouri expressed interest in Prosser as dean. Letter from Everett Fraser, Dean, Univ. of Minn. Law School (Apr. 20, 1940) (excerpt from letter submitting his 1940-41 budget) (on file in Prosser Personnel File, University of Minnesota Archives and with author).

76. Everett Fraser, Request for Change in Proposed Budget (1945-46) (on file in Prosser Personnel File, University of Minnesota Archives and with author).

77. Memorandum from W. T. Middlebrook to Mr. Morrill (Jan. 2, 1948) (on file in Prosser Personnel File, University of Minnesota Archives and with author).

78. Prosser, *supra* note 25.

79. *See, e.g.*, WHITE, *supra* note 20, at 102 (stating that Prosser made a "major contribution" to establishing the intentional infliction of emotional distress); John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 852-83 (2007) (demonstrating that intentional infliction of emotional distress is actionable in every American jurisdiction).

80. *See supra* note 7.

81. Excerpt from President's Report 1942-44 (on file in Prosser Personnel File, University of Minnesota Archives and with author).

firm he had served as an associate prior to entering law teaching.<sup>82</sup> In 1947, Prosser returned to legal academia to teach at Harvard Law School.<sup>83</sup> He was only at Harvard a year before he was appointed as dean at the University of California, Berkeley in 1948.<sup>84</sup>

Even while serving as Berkeley's dean, Prosser was a prolific scholar. He published the first edition of his textbook, *Cases and Materials on Torts*, in 1952.<sup>85</sup> Honored with the Thomas M. Cooley Lectureship, Prosser gave five lectures in February 1953 at the University of Michigan, which were later published as a book.<sup>86</sup> In 1955, Prosser was appointed by the American Law Institute as the Reporter for the *Restatement (Second) of Torts*.<sup>87</sup> In 1960, Prosser published extremely influential articles on products liability<sup>88</sup> and privacy.<sup>89</sup> A year later, Prosser stepped down as dean at Berkeley, but remained on faculty there.<sup>90</sup>

In 1963, upon reaching the mandatory retirement age of sixty-five, Prosser left Berkeley to move across the Bay to the University of California Hastings College of the Law and joined its "over-65 club."<sup>91</sup> In 1964, the American Law Institute adopted section 402(A) of the *Restatement (Second) of Torts*.<sup>92</sup> The first volumes of the Restatement were published in 1965. Five years later, in 1970, Prosser retired as the Reporter.<sup>93</sup> In the last years of his life, Prosser worked on completing one more edition of his classic treatise and his textbook.<sup>94</sup> In 1972, William Prosser died at the age of seventy-four.

### III. THE CONTENTS OF THE NOTEBOOK

The notebook allows us to see the legendary torts professor in the classroom: how he structured the course, which areas of tort law drew his attention, what depth of coverage particular subjects received, and what materials he used.<sup>95</sup>

---

82. See Joyce, *supra* note 2, at 852 n.5. He returned as a partner in the same year that future Supreme Court Justice Harry Blackmun was made a general partner. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 16–17 (2005).

83. See WHITE, *supra* note 20, at 156; Joyce, *supra* note 2, at 852 n.5.

84. See Joyce, *supra* note 2, at 852 n.5.

85. See *supra* note 15.

86. WILLIAM LLOYD PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* (1954).

87. Eldredge, *supra* note 4, at 1248–49. It is a role in which he was described as "awesomely revered." See Press Release, *supra* note 41.

88. Prosser, *supra* note 19.

89. Prosser, *supra* note 23.

90. Joyce, *supra* note 2, at 852 n.5.

91. *Id.*; Press Release, *supra* note 41.

92. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 513–14 (1985).

93. Wade, *supra* note 8, at 1259–61.

94. *Id.* at 1261.

95. Based on a reference to "Bohlen" as "casebook author," Leroy S. Merrifield, Notebook for Torts with William Prosser 2 (1938–39) [hereinafter Notebook], combined with textbook page numbers written after case names by Merrifield, see, e.g., *id.* at 2, 3, 5, it appears the textbook Prosser used for the class was FRANCIS H. BOHLEN, *CASES ON THE LAW OF TORTS* (3d ed. 1930).

A. *In the Beginning . . .*

On the first day of class,<sup>96</sup> Prosser began by defining “tort.” A tort “deals with *violation of a private legal right other than contract.*”<sup>97</sup> He then distinguished crimes and torts. Crimes “are wrongs against the state—for which the remedy is punishment—the government is the plaintiff.”<sup>98</sup> Torts, on the other hand, “are wrongs against an individual for which the remedy is damages paid to the injured one.”<sup>99</sup> Prosser added more points of contrast: “An act may be considered a violation of property rights, contract rights, or of the miscellaneous rights included under torts.”<sup>100</sup> Then Prosser waxed philosophical: “Much of the law of torts is not settled—it is ‘the battleground of social theories.’”<sup>101</sup>

Prosser next distinguished strict liability, negligence, and intentional torts, paying particular attention to the latter two. “Strict liability for damage without fault”<sup>102</sup> was described as “the old . . . rule—we have swung away from the rule to the rule that one is liable only if at fault.”<sup>103</sup> Prosser illustrated the trend away from strict liability by discussing *Weaver v. Ward*,<sup>104</sup> noting the defense of unavoidable accident, and *Brown v. Kendall*,<sup>105</sup> widely credited with establishing the modern default liability rule of negligence for accidental injury.<sup>106</sup>

---

96. On a historical note, the first day of class was September 30, 1938, the day the Munich Agreement was signed. This was the “appeasement” of Germany’s Chancellor, Adolf Hitler, by Britain’s Prime Minister, Neville Chamberlain, and French Premier Édouard Daladier. The Accords annexed Czechoslovakia’s Sudetenland to Germany in an attempt to avert war. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 414–21 (1960). Picking up on world events, Prosser used an analogy in class involving Hitler. On January 5, 1939, Prosser devoted the entire class to an explanation of the “Fall Exam.” Notebook, *supra* note 95, at 71. Question 1 was ambiguous as to whether the defendant engaged in negligent or intentional actions. After covering the negligence issues, Prosser turned to intent:

How about “intent”?—analogy to bomb being thrown into Hitler’s car case deliberate act from which serious consequences were sure to follow. Conduct so wanton, that jury may classify it as intent to injure B. Thus, A is liable also to C and D, because of doctrine of transfer of intent which came from criminal law.

*Id.* It appears Prosser is covering a “Quiz in Torts” that is dated December 17, 1938. He also gave a “Quiz in Torts” on March 24, 1939, and an “Examination in Torts” on June 6, 1939. All three appear in the Appendix.

97. Notebook, *supra* note 95, at 1.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* Prosser had used the phrase before in his book review of Fowler V. Harper’s *Treatise on the Law of Torts*, Prosser, Harper Book Review, *supra* note 66, at 257 (“Nothing is more trite than to say that the law of torts is a battlefield of social theory.”), and would use the same phrase in the first edition of his hornbook. PROSSER, *supra* note 17, at 15 (“Perhaps more than any other branch of the law, the law of torts is a battleground of social theory.”).

102. Notebook, *supra* note 95, at 2.

103. *Id.*

104. (1616) 80 Eng. Rep. 284 (K.B.); Notebook, *supra* note 95, at 2.

105. 60 Mass. (6 Cush.) 292 (1850); Notebook, *supra* note 95, at 3.

106. See, e.g., KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 52–53 (3d ed. 2007).

Fault was divided into “intent” and “negligence.”<sup>107</sup> In a chart, Merrifield noted that “wrongful intent”<sup>108</sup> involves “voluntary action-volition”<sup>109</sup> and “consequences intended,”<sup>110</sup> which is, in turn, divided into “what you *desire*”<sup>111</sup> and “what may be realized as a *substantially certain* consequence.”<sup>112</sup> By contrast, negligence was described as “not ordinary care,”<sup>113</sup> and, later, “consequences possible-risk.”<sup>114</sup> The distinction between negligence and intentional torts, in particular, was described as a “new set-up since 1880,”<sup>115</sup> and as a replacement for the forms of action (trespass and trespass on the case).<sup>116</sup>

### B. *Intentional Torts and Defenses*

By the third day of class,<sup>117</sup> Prosser focused on the intentional torts. Having already discussed “intent” in distinguishing negligence, Prosser covered battery.<sup>118</sup> One of the first cases Prosser discussed was *Vosburg v. Putney*,<sup>119</sup> the case sustaining a battery action for a “playful” kick between school children. In returning to a contrast he made on the first day of class, Prosser addressed whether “battery” was the same for purposes of both criminal and tort law. Prosser stated, “[c]riminal law is concerned with the guilty mind (*mens rea*) of D. In torts, we’re concerned with who shall pay for damages for an injury resulting from an act which is not socially acceptable. The hostile intent is not so necessary. No *Vosburg v. Putney* cases in criminal law.”<sup>120</sup>

Prosser then segued to assault,<sup>121</sup> using the case of *I de S et ux v. W de S*.<sup>122</sup> In that early assault case, a man attempted, but failed, to batter the plaintiff with a hatchet.<sup>123</sup> There was no physical harm to the plaintiff. Prosser asked why trifling damages should be awarded without an injury: “Courts at that time were primarily interested in keeping the peace—an assaulter was punished; incidentally-damages were given to the one assaulted.”<sup>124</sup> Next, Prosser covered “intentional infliction of mental

---

107. Notebook, *supra* note 95, at 3.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 4.

115. *Id.* at 5.

116. *Id.* at 4.

117. *Id.* at 4–5.

118. *Id.* at 5–10.

119. 50 N.W. 403 (Wis. 1891); Notebook, *supra* note 95, at 6.

120. Notebook, *supra* note 95, at 9.

121. *Id.* at 10–15.

122. Y.B. 22 Edw. 3, fol. 99, pl. 60 (1348); Notebook, *supra* note 95, at 10.

123. Y.B. 22 Edw. 3, fol. 99, pl. 60 (1348).

124. Notebook, *supra* note 95, at 10.

suffering,<sup>125</sup> then in its infancy.<sup>126</sup> He concluded intentional torts coverage with false imprisonment.<sup>127</sup>

Not surprisingly, after the intentional torts, Prosser covered the defenses thereto. He started with consent,<sup>128</sup> including the issue of how consent affects actions based on the then-criminal actions of seduction and abortion. During his coverage of seduction damages, Prosser compared American law with that of England. Prosser explained that damages were originally given to a woman's father in seduction cases for loss of her services: "[B]ut he must prove loss of actual services in England. In America, he was allowed to collect for all sorts of things besides loss of services—plus punitive damages."<sup>129</sup>

Prosser turned to self-defense,<sup>130</sup> using, among other cases, *Courvoisier v. Raymond*.<sup>131</sup> After discussing the late 1890's case of the mistaken shooting in self-defense, Prosser summarized the doctrine: "Interest of self-protection is socially important enough, so that liability is lifted for injuries inflicted by one reasonably defending himself, even mistakenly."<sup>132</sup> Next, he addressed the related area of defense of property.<sup>133</sup> Although years before the celebrated Iowa spring-gun case, *Katko v. Briney*,<sup>134</sup> the basic doctrine as taught by Prosser is identical.<sup>135</sup> Next came necessity,<sup>136</sup> taught with the two ships-caught-in-a-storm cases, *Ploof v. Putnam*,<sup>137</sup> and *Vincent v. Lake Erie Transportation Co.*<sup>138</sup> Prosser

125. *Id.* at 16–21.

126. For a full discussion of Prosser's classes on intentional infliction of mental suffering, see *infra* text accompanying notes 281–304.

127. Notebook, *supra* note 95, at 21–30.

128. *Id.* at 31–40. For a discussion on Prosser's coverage of consent, see *infra* text accompanying notes 246–61.

129. Notebook, *supra* note 95, at 37. Prosser frequently compared American law to law from other countries. Not surprisingly, the point of comparison he used most often was English law. In addition to seduction damages, Prosser used English law to compare joinder of defendants, *id.* at 130; causation, *id.* at 137; history of workers' compensation acts, *id.* at 207; assumption of risk, *id.* at 224; imputed negligence, *id.* at 236, 238; strict liability, *id.* at 245, 249, 252; and defamation, *id.* at 275. However, he also compared American law with that of Canada. Regarding joint and several liability, Prosser noted that "[f]our Canadian provinces require P to collect from all tortfeasors in their share." *Id.* at 132. Regarding contributory negligence, Prosser noted that Quebec "split[s] the damages." *Id.* at 227. Not content to use Quebec as an example of comparative negligence, Prosser also piled on with "continental law," "Puerto Rico," and the "Philippines." *Id.* He also cited Germany in discussing the history of workers' compensation acts. *Id.* at 207. For a modern defense of the use of comparative materials on damages in a first-year Torts course, see Anthony J. Sebok, *Using Comparative Torts Materials to Teach First-Year Torts*, 57 J. LEGAL EDUC. 562 (2007).

130. Notebook, *supra* note 95, at 41–45.

131. 47 P. 284 (Colo. 1896); Notebook, *supra* note 95, at 43.

132. Notebook, *supra* note 95, at 43.

133. *Id.* at 45–50.

134. 183 N.W.2d 657 (Iowa 1971).

135. "You can use reasonable force to prevent or terminate injury to either chattel or land . . . D is not privileged to use force sufficient to cause death or serious bodily harm to protect his mere property. . . . One cannot do by mechanical device, indirectly, what he cannot do directly." Notebook, *supra* note 95, at 45–46, 49.

136. *Id.* at 50–52.

137. 71 A. 188 (Vt. 1908); Notebook, *supra* note 95, at 50.

138. 124 N.W. 221 (Minn. 1910); Notebook, *supra* note 95, at 51.

rounded out defenses to intentional torts with “right of recapture of personal property,”<sup>139</sup> for which the rule was: “If property was wrongfully (by force or by fraud) taken from D, he may use reasonable force to recapture it, provided he acts promptly (continuously)—in fresh pursuit.”<sup>140</sup>

### C. Negligence

At that point in the semester, on November 22, 1938, Prosser took up negligence.<sup>141</sup> According to Prosser, negligence is, “[c]onduct which is not intended to invade another’s interest but which is a departure from the standard of conduct required by law—associated with carelessness but it does not necessarily mean this.”<sup>142</sup> He started by covering duty;<sup>143</sup> to do so, he opened with *Palsgraf v. Long Island R.R.*<sup>144</sup> (then only a decade old). Prosser spent six classes on duty, covering familiar cases such as *Heaven v. Pender*,<sup>145</sup> *Wagner v. International Railroad*,<sup>146</sup> *Winterbottom v. Wright*,<sup>147</sup> and *Moch Co. v. Rensselaer Water Co.*<sup>148</sup> He also included a subsection on “Manufacturer’s Liability,” in which he covered the case that eliminated the privity of contract defense in products suits, *MacPherson v. Buick Motor Co.*<sup>149</sup>

Prosser then worked his way through standard of conduct,<sup>150</sup> including discussions of the objective nature of the reasonableness standard,<sup>151</sup> the role of custom,<sup>152</sup> and the related railroad-crossing cases of *B. & O. Railroad Co. v. Goodman*<sup>153</sup> and *Pokora v. Wabash Railway Co.*<sup>154</sup> Finally, Prosser discussed breach in terms very similar to the economic analysis that has become prevalent in modern tort theory.<sup>155</sup>

Next, Prosser transitioned to negligence per se,<sup>156</sup> using the familiar case of *Martin v. Herzog*,<sup>157</sup> and res ipsa loquitur,<sup>158</sup> using the famous case

139. Notebook, *supra* note 95, at 52–53.

140. *Id.* at 53.

141. *Id.* at 54.

142. *Id.*

143. *Id.* at 56.

144. 162 N.E. 99 (N.Y. 1928). For his summary of the case, see *infra* text accompanying notes 388–96.

145. (1883) 11 Q.B.D. 503; Notebook, *supra* note 95, at 55.

146. 133 N.E. 437 (N.Y. 1921); Notebook, *supra* note 95, at 63.

147. (1842) 152 Eng. Rep. 402 (Exch.); Notebook, *supra* note 95, at 76.

148. 159 N.E. 896 (N.Y. 1928); Notebook, *supra* note 95, at 76.

149. 111 N.E. 1050 (N.Y. 1916); Notebook, *supra* note 95, at 83. For Prosser’s coverage of this subsection, see *infra* text accompanying notes 309–26.

150. Notebook, *supra* note 95, at 86.

151. *Id.* at 87–94.

152. *Id.* at 95–96.

153. 275 U.S. 66 (1927); Notebook, *supra* note 95, at 99.

154. 292 U.S. 98 (1934); Notebook, *supra* note 95, at 100.

155. See *infra* text accompanying notes 426–43.

156. Notebook, *supra* note 95, at 104.

157. 126 N.E. 814 (N.Y. 1920); Notebook, *supra* note 95, at 110.

158. Notebook, *supra* note 95, at 113.

of the barrel falling from the window of a flour shop, *Byrne v. Boadle*.<sup>159</sup> By this point, it was early February 1939, and Prosser covered causation over the course of a month.<sup>160</sup> Prosser taught that the concept of causation includes cause-in-fact and proximate cause.<sup>161</sup> Proximate cause is “a matter of policy.”<sup>162</sup> In summing up causation, Prosser noted, “[y]ou never can tell what is in the mind of a court when they talk about proximate cause.”<sup>163</sup> The problem is courts could be talking about several things: “causation in fact,” “duty to unforeseeable plaintiff,” “unforeseeable consequences” (taught through, among other cases, *In re Polemis*<sup>164</sup>), “intervening forces,” and “apportionment of damages.”<sup>165</sup>

Reflecting his interest in compensation for nonphysical injuries, Prosser spent a day on liability for mental disturbance.<sup>166</sup> Offering a look at the evolution toward negligent infliction of emotional distress and the “zone of danger” tests, Prosser stated: “The tendency is away from the impact theory. Now-a bare majority of courts allowing recovery for fright and its consequences without impact.”<sup>167</sup> Prosser concluded negligence with units on the duty of owners and occupiers of land,<sup>168</sup> in which he taught the traditional common-law status categories,<sup>169</sup> and the now-antiquated duty of employer to employees.<sup>170</sup>

Next came the defenses to negligence.<sup>171</sup> First, assumption of risk,<sup>172</sup> of which Prosser said: “The criticism of assumption of risk has been caused by the refusal of the court to recognize the economic pressure on a workman to assume risk or quit. He does not have much of a choice.”<sup>173</sup> Second, contributory negligence,<sup>174</sup> taught via *Butterfield v. Forrester*,<sup>175</sup> which was capable of creating “obvious injustice.”<sup>176</sup> Prosser also taught the major exception to contributory negligence, last clear chance, based on *Davies v. Mann*.<sup>177</sup> Prosser discussed the categories of last clear chance that were to appear in his treatise,<sup>178</sup> but his conclusion

---

159. (1863) 159 Eng. Rep. 299 (Exch.); Notebook, *supra* note 95, at 114.

160. Notebook, *supra* note 95, at 125.

161. *See, e.g., id.* at 126.

162. *Id.* at 136.

163. *Id.* at 168.

164. (1921) 3 K.B. 560; Notebook, *supra* note 95, at 138, 168.

165. Notebook, *supra* note 95, at 168–69.

166. *Id.* at 170.

167. *Id.* at 172.

168. *Id.* at 177.

169. The degree of care owed by the landholder to the plaintiff was based on whether the plaintiff was an invitee, licensee, or trespasser. *See, e.g.,* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 933 (1981).

170. Notebook, *supra* note 95, at 205.

171. *Id.* at 219.

172. *Id.* at 221.

173. *Id.* at 224.

174. *Id.* at 225.

175. (1809) 103 Eng. Rep. 926 (K.B.); Notebook, *supra* note 95, at 225.

176. Notebook, *supra* note 95, at 228–29.

177. (1842) 152 Eng. Rep. 588 (Exch.); Notebook, *supra* note 95, at 228.

178. *See* PROSSER, *supra* note 17, at 408–16.

was stark: “Every possible holding can be found in various jurisdictions in various situations. It is a hell of a mess.”<sup>179</sup> Prosser ended the entire topic of negligence with imputed negligence.<sup>180</sup> By this point, it was May 13, 1939.<sup>181</sup>

#### D. *Liability Without Fault*

Prosser transitioned to liability without fault,<sup>182</sup> principally covering *Rylands v. Fletcher*<sup>183</sup> and trespass to land.<sup>184</sup> He concluded the course by covering deceit,<sup>185</sup> which we would likely label “fraud,” and defamation,<sup>186</sup> then, of course, prior to being constitutionalized.

#### E. *Damages*

Prosser’s syllabus did not appear to include planned coverage of damages. Instead, Prosser went into what seems a digression on damages between “assault” and “intentional infliction of mental suffering.”<sup>187</sup> Damages were divided into “nominal,” “compensatory,” and “punitive.”<sup>188</sup> Nominal damages were described as a “trifling sum—usually 6 cents to a dollar.”<sup>189</sup> Such small amounts should be awarded because

[i]f rights are not enforced—are not acted upon over a long period of time—the right may be considered to have been surrendered. (This applies in cases of trespass on land) a record is thus made of P’s objections to D’s acts, and the courts upholding of the objection as a legal right.<sup>190</sup>

Because of the recent attention to punitive damages<sup>191</sup> and the fact that Prosser was ambivalent about them in the first edition of his horn-

179. Notebook, *supra* note 95, at 231.

180. *Id.* at 236.

181. *Id.* at 240.

182. *Id.* at 245.

183. (1866) 1 L.R. Exch. 265, *aff’d*, (1868) 3 L.R.E. & I. App. 330 (H.L.).

184. Notebook, *supra* note 95, at 245.

185. *Id.* at 257.

186. *Id.* at 274.

187. *Id.* at 14–15.

188. *Id.*

189. *Id.* at 14.

190. *Id.*

191. See, e.g., Philip Morris v. Williams, 549 U.S. 346 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392 (2008); Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117, 125 (2003); Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263 (2008); John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT’L L. 507, 510 (2007); Keith N. Hylton, *Reflections on Remedies and Philip Morris v. Williams*, 27 REV. LITIG. 9 (2007); Michael L. Rustad, *The Supreme Court and Me: Trapped in Time with Punitive Damages*, 17 WIDENER L.J. 783 (2008); Sheila B. Scheurman, *Two Worlds Collide: How the Supreme Court’s Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880 (2008); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007); Catherine M. Sharkey, *Punitive Damages as Societal Damages*,



book,<sup>192</sup> Merrifield's notes of Prosser's comments are intriguing. Punitive damages are "to make an example of him to others not to do it again."<sup>193</sup> Punitive damages are then described as "anomalous,"<sup>194</sup> with the word "unreasonable" written above,<sup>195</sup> "because this is the province of criminal punishment—and he can be tried for the same act in a criminal action."<sup>196</sup> Prosser added, "Too much discretion is left to jury on amount of punitive damages."<sup>197</sup> At that point, Prosser shifted:

The argument for punitive damages is that it gives an incentive to P to bring his minor abuses and outrages to court and to keep that sort of abuses under control . . . . These minor outrages would otherwise not get to court because prosecuting attorneys are too busy or too poor to bring criminal actions."<sup>198</sup>

If Merrifield recorded Prosser's thoughts accurately, Prosser appears more negative toward punitive damages at this point than in the first edition of his hornbook. He flatly stated that too much discretion is left with the jury, and distanced himself from the argument in favor of punitive damages ("The argument for punitive damages is that . . ."). In addition, Merrifield inserted the word "unreasonable" over the word "anomalous." If this is gloss provided by Prosser, then clearly he did not favor punitive damages at this point.

#### IV. THE NOTEBOOK AS CRYSTAL BALL

Prosser was clearly conscious of "trends" in tort law. Professor George Priest described Prosser as "a scholar who possessed an acute sensitivity to budding legal trends."<sup>199</sup> He did this most often in the products liability area.<sup>200</sup> For instance, in the first edition of *Prosser on Torts*, he said that strict liability would "be the law of the future" for products litigation, and "the end of the next quarter of a century will find the principle generally accepted."<sup>201</sup> In his 1960 article *The Assault Upon*

---

113 YALE L.J. 347 (2003); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005); Symposium, *Punitive Damages, Due Process, and Deterrence: The Debate After Phillip Morris v. Williams*, 2 CHARLESTON L. REV. i (2008).

192. In essence, he stated that some people condemn punitive damages and listed the reasons therefor; then he stated that some people defend punitive damages and listed those reasons therefor. He did not take a position, but concluded, "At any rate, it is an established part of our legal system, and there is no indication of any tendency to abandon it." PROSSER, *supra* note 17, at 13.

193. Notebook, *supra* note 95, at 14.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 15.

199. Priest, *supra* note 92, at 516. Priest did not mean this as a compliment. Whether Prosser cynically manipulated the law is beyond the scope of this Article, but he clearly thought in terms of which way the law was (or should be) heading.

200. For an interesting discussion of Prosser's predictions in the products area, see WHITE, *supra* note 20, at 168–70.

201. *Id.* at 169 (citing PROSSER, *supra* note 17, at 692).

*the Citadel*,<sup>202</sup> Prosser's predictions continued. At that point, courts accepting strict liability without privity of contract limited that doctrine to food.<sup>203</sup> But Prosser found seven cases in a two-year period that he claimed "have thrown the limitation to food into the ash pile."<sup>204</sup> Prosser labeled this a "[t]rend," and stated that there need be "no prophet to foresee that there will be other decisions in the next few years, and that the storming of the inner citadel is already in full cry."<sup>205</sup>

Prosser prognosticated in the classroom as well as in his scholarship. On January 7, 1939, Prosser was covering the misfeasance/nonfeasance distinction in duty analysis. Prosser noted, "Present tendency is to abandon the dubious distinction between misfeasance and nonfeasance."<sup>206</sup> Under a heading entitled "New basis," Prosser stated several principles.<sup>207</sup> One of these was: "Where D makes contract for his own economic gain, (usual case) he should be liable for injuries to TP which result either from his nonfeasance or his misfeasance."<sup>208</sup> Next, Merrifield wrote, "Prosser predicts that *Moch Case* will not be law 50 years hence."<sup>209</sup> On May 13, 1939, while covering liability without fault, Prosser made a prediction about trespass to land: "[S]trict liability for trespass to land is on the way out."<sup>210</sup>

The notebook itself foreshadows Prosser's future. It is rife with connections to projects or accomplishments that the future held for Prosser. Although more are evident,<sup>211</sup> I will focus on four: *Prosser on*

202. Prosser, *supra* note 19.

203. *Id.* at 1110.

204. WHITE, *supra* note 20, at 169 (citing Prosser, *supra* note 19, at 1112).

205. *Id.* (citing Prosser, *supra* note 19, at 1113-14).

206. Notebook, *supra* note 95, at 78-79.

207. *Id.* at 79.

208. *Id.* I read "TP" as "third party."

209. *Id.* Prosser is referring to *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928), which held that a defendant that made a contract for economic gain was not liable to a third party for injury that resulted from a defendant's nonfeasance. Indeed, *Moch* has been substantially undermined. Several courts in other jurisdictions have declined to follow it. See *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1105, 1114 n.6 (Fla. 2005); *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1188 (Fla. 2003); *Weinberg v. Dinger*, 524 A.2d 366, 371 (N.J. Super. Ct. App. Div. 1987); see also *Doyle v. S. Pittsburgh Water Co.*, 199 A.2d 875, 882 (Pa. 1964). Furthermore, New York courts have repeatedly distinguished *Moch*. See *Espinal v. Melville Snow Contractors, Inc.*, 773 N.E.2d 485, 489 (N.Y. 2002); *Palka v. Servicemaster Mgmt. Servs. Corp.*, 634 N.E.2d 189, 194 (N.Y. 1994); *Koch v. Consol. Edison Co. of N.Y., Inc.*, 468 N.E.2d 1, 7 (N.Y. 1984); *Hall v. Consol. Edison Corp.*, 428 N.Y.S.2d 837, 839 (1980). Prosser himself played a role. See *RESTATEMENT (SECOND) OF TORTS* § 324(A) (1965).

210. Notebook, *supra* note 95, at 248. Prosser did not fare as well on this prediction. Trespass is still widely regarded as based in strict liability. See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1136-37 n.20 (2001); Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1089 (2006). For another example of Prosser's focus on a "trend," see *infra* text accompanying note 387 ("Present trend to extend privilege to all cases where the social and moral point of view of the community regards it as necessary and desirable.").

211. For instance, a brief glance at the Table of Contents of the first edition of Prosser's textbook, *supra* note 15, reveals a structure very similar to that he used in the Notebook. See *supra* notes 95-199 and accompanying text.

*Torts*, the Restatement, intentional infliction of emotional distress, and strict products liability.

#### A. Prosser on Torts

In reading Prosser's early scholarship, one suspects the origins of *Prosser on Torts* lay in the many short book reviews Prosser wrote at the beginning of his career.<sup>212</sup> Before and during the 1938–39 academic year, Prosser reviewed treatises on domestic relations,<sup>213</sup> sales,<sup>214</sup> pleading,<sup>215</sup> torts,<sup>216</sup> damages,<sup>217</sup> and negligence.<sup>218</sup> His comments during the course of reviewing those treatises make it clear both that he had read many other treatises as points of comparison and that he was a student of the genre. For instance, in his first treatise review in 1932,<sup>219</sup> he compared the domestic relations treatise under review with another treatise:

The author of this hornbook acknowledges that “much use has been made of the hornbook on the same subject written by the late Walter C. Tiffany and twice revised by Roger W. Cooley.” The indebtedness is extensive. The general plan of the book is the same, and changes and additions have been more in the way of painstaking research and numerous citations to recent decisions and legal periodicals than in discussion of the principles, or contribution of new theory.<sup>220</sup>

Prosser went on to mention his expectations of treatises generally:

Perhaps the writer expects too much of a hornbook, which does not purport to be a disquisition. The exhaustive table of cases indicates that Professor Madden has done a good job, of the kind that he set out to do. Undoubtedly this is a useful book for any attorney interested in domestic relations.<sup>221</sup>

---

212. *E.g.*, *supra* notes 65–66. Prosser wrote a number of such reviews throughout his early years in the academy. Book reviews at that time ranged from one to three pages, were not given a title, and were only signed at the end of the review. *E.g.*, William L. Prosser, Book Review, 26 MINN. L. REV. 292 (1941) (reviewing JOHN ALLISON DUNCAN, *THE STRANGEST CASES ON RECORD* (1940)). As a result, searching for them is difficult, and these old reviews are rarely cited today. This is particularly unfortunate in Prosser's case because the reviews contain important clues to his scholarly development.

213. William L. Prosser, Book Review, 16 MINN. L. REV. 881 (1932) (reviewing JOSEPH W. MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* (1931)).

214. William L. Prosser, Book Review, 17 MINN. L. REV. 349 (1933) (reviewing LAWRENCE VOLD, *HANDBOOK OF THE LAW OF SALES* (1931)).

215. William L. Prosser, Book Review, 17 MINN. L. REV. 830 (1933) (reviewing PERCIVAL W. VIESSELMAN, *PHILLIPS ON CODE PLEADING* (1932)).

216. Prosser, Harper Book Review, *supra* note 66.

217. William L. Prosser, Book Review, 30 ILL. L. REV. 816 (1936) (reviewing CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* (1935)).

218. William L. Prosser, Book Review, 52 HARV. L. REV. 342 (1938) (reviewing J. CHARLESWORTH, *NEGLIGENCE* (1938)).

219. Prosser, *supra* note 213.

220. *Id.* at 881.

221. *Id.*

In his next treatise review,<sup>222</sup> Prosser compared the sales treatise being reviewed with “Williston’s famous treatise”<sup>223</sup> throughout the body of the review. He then closed by comparing it with treatises on other topics entirely:

This is the only short text which serves a real purpose in the literature of sales. It compares well with such distinguished work as Clark on Code Pleading, and is worthy of being ranked with Vance on Insurance, which in 1930 set a new high mark for the Hornbook Series.<sup>224</sup>

In his third treatise review, on pleading,<sup>225</sup> Prosser continued to display an encyclopedic knowledge of treatises. The review began: “The first edition of Phillips on Code Pleading was a rather obscure treatise, published in 1896, which has some local reputation in the vicinity of Ohio, where the fame of Judge Phillips still lingers. It was distinctly a second-rate affair, not to be ranked with Pomeroy or Bliss . . . .”<sup>226</sup>

After this review, Prosser, for the first time, began teaching Torts in the fall of 1934.<sup>227</sup> In January 1935, Prosser reviewed Fowler Harper’s treatise on torts.<sup>228</sup> As before, this review contains both ruminations on how to write a treatise and comparisons with other works on the subject. Prosser, extending the analogy that torts is a “battlefield of social theory,”<sup>229</sup> stated that one can cover a war from afar, discussing the moves of both sides, or as a war correspondent attached to one army only.<sup>230</sup> In essence, he stated that one could write an objective or a partisan treatise. Prosser then favorably compared Harper’s treatise to other works on torts: “[I]t is still much the best thing yet written on the law of torts.”<sup>231</sup> Prosser closed the review on an optimistic note: “[I]f we have many more such books, we shall improve the law.”<sup>232</sup>

The next Prosser treatise review, on damages,<sup>233</sup> appeared in February 1936. Prosser’s enthusiasm for treatises as a genre remained evident. Prosser began by noting that the field of damages has needed a new treatise for many years to replace that of Theodore Sedgwick (the last edition of which appeared in 1912).<sup>234</sup> He closed thus: “Perhaps it is not altogether out of place to comment upon the recent excellence of the Hornbook Series. Clark on Code Pleading, Vance on Insurance, Vold on

222. Prosser, *supra* note 214.

223. *Id.* at 349. He refers to SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (1909).

224. Prosser, *supra* note 214, at 350.

225. Prosser, *supra* note 215.

226. *Id.* at 830.

227. See *supra* notes 60–62 and accompanying text.

228. Prosser, Harper Book Review, *supra* note 66, at 257.

229. *Id.*

230. *Id.*

231. *Id.* at 259.

232. *Id.*

233. Prosser, *supra* note 217, at 816.

234. *Id.*

Sales, and now McCormick on Damages, are a distinct improvement over anything that has gone before.”<sup>235</sup>

These reviews make it clear that Prosser held an appreciation not just for a particular subject matter, but that he studied and admired a particular format: the treatise. Prosser’s love of a format then combined with the proper subject matter: torts. Perhaps this happened when he began teaching the class. Perhaps he thought torts was his best opportunity to perform a service, to “improve the law.”<sup>236</sup> In any event, by January 26, 1937, Prosser had a contract with West Publishing Company to write a torts treatise.<sup>237</sup>

At this point, it is possible, through the reflections of others, to catch a glimpse of Prosser as he worked on the treatise. Professor David W. Louisell encountered Prosser as a first-year student at Minnesota during this period: “Those were the years when *Prosser*, First Edition, was aborning. The Law Review staff might leave at midnight, but the Northern Lights—from Bill Prosser’s office—gave way only to dawn.”<sup>238</sup> Merrifield’s memories are equally vivid; he

remembers Prosser leaving books out all over the library while checking citations in his book. He’d take a book down, then on to another, leaving them for students to replace. He was well liked so this isn’t a critical statement but it did leave an impression of a busy, preoccupied professor.<sup>239</sup>

All of which brings us to September 30, 1938, the first day of Torts class. Immediately after defining torts, comparing torts to other areas of law, and commenting that torts are a “battleground of social theories,”<sup>240</sup> Prosser gave his first-year law students a comparative survey of torts treatises, both English and American. He began with the English “Texts”:

Pollock-13th Ed.-English law

Salmond-8th Ed.-English law-best text

Clark & Lindsell-8th Ed.-English law<sup>241</sup>

He then turned to “American Texts”:

235. *Id.* at 817.

236. Prosser, Harper Book Review, *supra* note 66, at 259.

237. The Minnesota Archives contain a letter from Dean Fraser to President Coffman, attempting to increase Prosser’s salary in order to retain him. In mentioning Prosser’s many credentials, Fraser stated, “He is now engaged in writing a textbook on Torts under contract with the West Publishing Company.” See Letter, *supra* note 73. Unfortunately, there is no way to be more precise because West has purged its records pertaining to Prosser. E-mail from John S. Bloomquist, Publisher, Found. Press to author (June 27, 2008, 14:46:02 CDT) (on file with author).

238. David W. Louisell, *William Lloyd Prosser—The Myth and the Man*, 51 CAL. L. REV. 263, 263 (1963). Louisell served on the Berkeley faculty with Prosser. This tribute was written for Prosser’s retirement from Berkeley and move to Hastings.

239. E-mail from Leroy S. Merrifield to Clarke Madden (June 16, 2008, 08:44:49 EDT) (on file with author).

240. See Notebook, *supra* note 95, at 1.

241. *Id.*

Cooley-4th Ed.-not good but best  
Chapin-1913 “hornbook” accurate but incomplete  
Harper-1933 disciple of Bohlen (casebook author)  
theoretical-presents one view-most useful<sup>242</sup>

Notably, Prosser found all of the torts treatises lacking. Even the best American text was “not good.” Chapin was “incomplete.” Prosser had seen a need in the market, and he was working to fill it.

In December, Prosser would publish a review of an English treatise on negligence.<sup>243</sup> At this point, Prosser was deep into his project. He was conscious of treatise writing style, as well as all of the points of comparison:

If such comments are addressed to the cases, rather than to the text itself, it is because Mr. Charlesworth has set forth what is in the cases, with an effective organization of his material, but has contributed very little of his own. This is a practicing lawyer’s book, and will be useful chiefly as summary of what the decisions say. There is no such attempt to tear the law apart, get to the bottom of it, find out how it came to be, consider problems left open and challenge views that seem wrong—or, as Horace Greeley once said, to discover where the fire is and the best exit—as in Stallybrass’s ninth edition of Salmond, which remains the best text on Torts extant today. By the same token, Beven on Negligence is a better book, and so, in our own country, is Harper.<sup>244</sup>

Another sign of Prosser’s project appears throughout the notebook. As anyone reading *Prosser on Torts* can attest, Prosser’s footnotes are voluminous. He “collected a vast number of cases (more than 15,000 in the footnotes of the First Edition) . . . He frequently used examples and hypotheticals to show graphically the operation of the rules upon various fact patterns rather than simply stating the doctrine at issue abstractly.”<sup>245</sup> To fill the footnotes and examples, Prosser needed cases. The fruits of this search are evident on almost every page of the notebook. Many, if not all, of the cases he cited to his class were incorporated into *Prosser on Torts*.

For example, on November 1, 1938, Prosser was teaching the doctrine of consent.<sup>246</sup> The general topic was consent obtained by fraud. One of the cases he used was *Bartell v. State*,<sup>247</sup> which is in the textbook.<sup>248</sup> *Bartell* is a criminal case in which the defendant purported to be a mag-

---

242. *Id.* at 2.

243. Prosser, *supra* note 218.

244. *Id.* at 343.

245. Joyce, *supra* note 2, at 856.

246. Notebook, *supra* note 95, at 31–32.

247. 82 N.W. 142 (Wis. 1900).

248. BOHLEN, *supra* note 95, at 51.

netic healer. In “treating” a young girl, “about eighteen years of age,”<sup>249</sup> the defendant caused her to remove all of her clothing, sit on his lap, and took “indecent liberties” with her.<sup>250</sup> The issue in the case was not the legitimacy of magnetic healing generally, but whether the girl’s consent was induced by fraud. The court affirmed a jury verdict for the prosecution.<sup>251</sup>

To explore consent, Prosser used seven cases and a hypothetical based on cases. Each case presents a slightly different twist on applying the doctrine of consent. For the first case, Merrifield wrote, “*1 At.2nd 501*—D posed as a doctor in making an indecent physical exam of a woman with a wooden leg—when he was a D.D. not a M.D. Held: guilty.”<sup>252</sup> Second, the hypothetical: “A gives B poisoned candy. Does B consent to eat *poisoned* candy? You need knowledge on the part of A; ignorance on part of B; and some false representation on which B relied.”<sup>253</sup> For the third and fourth cases, Merrifield wrote, “*State v. Langford*, 102 At. 63 (D) A consents to intercourse—not knowing B had a venereal disease. B is liable. *Crowell v. Crowell*, 181 N.C. 518, 105 S.E. 206.”<sup>254</sup> The fifth case: “A consents to intercourse with B believing him to be husband ‘mock marriage’—he was not. Held: guilty. *Blossom v. \_\_\_\_\_* 37 N.Y. 434.”<sup>255</sup> At this point, Prosser noted that Minnesota has interspousal immunity.<sup>256</sup>

Prosser continued. The sixth case: “*46 Mich. 160*—A, doctor, brought B, a stranger along to see childbirth. P allowed B to hold her hands under belief he was a doc. She collects from doc. agency.”<sup>257</sup> For the seventh case, Merrifield wrote, “*44 R.I. 494*—consent to fight a man with fists is not consent to fight against a knife.”<sup>258</sup> Finally, Prosser offered an eighth case: “*Oberlin v. Opson*, 84 Ohio State 411. A consents to intercourse under promise of marriage. Held: no cause of action. Rule good in Minn. There are other remedies however.”<sup>259</sup>

Each of these seven cases and the cases on which the hypothetical was based appeared in *Prosser on Torts*.<sup>260</sup> In essence, Prosser used his

249. *Bartell*, 82 N.W. at 142.

250. *Id.*

251. *Id.* at 143.

252. Notebook, *supra* note 95, at 34. The case is *Commonwealth v. Gregory*, 1 A.2d 501 (Pa. Super. Ct. 1938).

253. Notebook, *supra* note 95, at 34. Based on *Commonwealth v. Stratton*, 114 Mass. 303 (1873); *State v. Monroe*, 28 S.E. 547 (N.C. 1897). See PROSSER, *supra* note 17, at 121 n.60.

254. Notebook, *supra* note 95, at 34. The cases are *State v. Lankford*, 102 A. 63 (Del. Gen. Sess. 1917); *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920).

255. Notebook, *supra* note 95, at 34. The case is *Blossom v. Barrett*, 37 N.Y. 434 (1868). In the notebook, the case is attached to the holding with an arrow.

256. Notebook, *supra* note 95, at 34.

257. *Id.* The case is *De May v. Roberts*, 9 N.W. 146 (Mich. 1881).

258. Notebook, *supra* note 95, at 35. The case is *Teolis v. Moscatelli*, 119 A. 161 (R.I. 1923).

259. Notebook, *supra* note 95, at 35. The case is *Oberlin v. Opson*, 95 N.E. 511 (Ohio 1911).

260. PROSSER, *supra* note 17. *Commonwealth v. Gregory* is on page 122 n.63; the candy hypothetical is on page 121; the cases on which it is based appear at 121 n.60; *State v. Lankford* is on page 900 n.15; *Crowell v. Crowell* is on pages 121 n.61, 701 n.2, and 904 n.47; *Blossom v. Barrett* is on page 122

research to probe the holding of the case in the casebook. Each case presented a slightly different angle on the general subject of the effect of fraud on consent. In fact, Prosser used his research exactly as we use cases in the notes of modern textbooks. Bohlen's *Cases on Torts* did not have note cases,<sup>261</sup> but Prosser obviously valued the technique and supplied his own material.

By May 1939, Prosser had written a draft of his treatise.<sup>262</sup> It is remarkable how closely the draft correlated with the finished product. For example, the first reference, made on a day Prosser covered imputed negligence between drivers and owners of automobiles, was "owner present Prosser p.498."<sup>263</sup> On page 498 of the first edition of *Prosser on Torts*, section 66(a) states: "The principle of vicarious liability has been applied by some courts to: (a) The owner of an automobile who is present as a passenger when it is driven by another."<sup>264</sup> Even more impressive is a reference on May 26, 1939. Prosser covered whether mailing a postcard qualifies as publication for defamation purposes. Merrifield wrote, "Prosser p. 811 note 58-case says no publication."<sup>265</sup> On page 811, note 58 of Prosser's treatise are cases supporting the proposition that mailing a postcard is usually regarded as insufficient for publication.<sup>266</sup>

### B. *The Restatement*

Given Prosser's later role as the Reporter for the *Restatement (Second) of Torts*, his attitude about Restatements is significant. On the first day of class, in addition to covering torts hornbooks, Prosser stated: "Restatements-American Law Institute-Carnegie money give rules-cite no cases-beyond first year students-doubtful whether courts will follow it."<sup>267</sup> It is difficult to discern whether Prosser was discussing Restatements generally or the *Restatement of Torts* in particular when he stated "doubtful whether courts will follow it." On the one hand, he uses the plural form of Restatement, and the comments are general, so as to cover the whole project of Restatements. On the other hand, he stated "doubt-

n.62 and 703 n.16; *De May v. Roberts* is on page 122 n.63, 701 n.2, and 1055 n.49; *Teolis v. Moscatelli* is on page 120 n.53; *Oberlin v. Upson* is on pages 122 n.64 and 933 n.51.

261. Note cases are the short summaries of facts and holdings from cases in numbered paragraphs following the longer cases in casebooks. The first casebook to have note cases, KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930), appeared the same year as Bohlen's third edition of *Cases on Torts*. See, e.g., ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 163 (1990); Albert Ehrenzweig, *The American Casebook: "Cases and Materials,"* 32 GEO. L.J. 224, 235 (1943).

262. By the end of the academic year, the notebook contains references to "Prosser," followed by a page number. The first instance occurs in the notes for May 12, 1939. Notebook, *supra* note 95, at 237. Prosser had not published a book of any kind by that time; rather he made an advance copy of the text available to his students.

263. *Id.*

264. PROSSER, *supra* note 17, at 498.

265. Notebook, *supra* note 95, at 277.

266. PROSSER, *supra* note 17, at 811.

267. Notebook, *supra* note 95, at 2.



ful whether courts will follow *it*,” which is singular. Also, he was addressing a first-year Torts class, after having just covered torts hornbooks.

Either interpretation is plausible, and both are intriguing. If Prosser was talking about the project of Restatements generally, courts have cited them frequently, and Prosser’s own *Restatement (Second) of Torts* may have been the most influential of all.<sup>268</sup> He undermined his own prediction.

If Prosser was talking solely about the *Restatement of Torts*, that is consistent with his earlier book review of Fowler Harper’s treatise on torts.<sup>269</sup> In his book review, Prosser made it clear that he regarded Harper as a disciple of *Restatement of Torts* Reporter Francis Bohlen. Continuing his theme of writing a hornbook as a war correspondent, Prosser wrote: “The army to which Mr. Harper has attached himself is the group primarily responsible for the American Law Institute Restatement of the Law of Torts . . . . There is a commander-in-chief, and his name is Bohlen.”<sup>270</sup> Prosser thought Harper’s views were extraordinarily close to those of Bohlen (and, thus, the *Restatement of Torts*): “There is in this volume a great deal of the gospel according to St. Francis. It is not too much to say that there are entire chapters where the hand is the hand of Esau, but the voice is the voice of Jacob.”<sup>271</sup>

It appears that Prosser thought Bohlen was involved in a project to radically reconceptualize the law of torts:

Now any rationalized statement of the views of Mr. Bohlen and his disciples must be of tremendous value, not only because it serves to explain for the first time in print much that has gone into the Restatement, but more especially because of the complete re-examination of the law, and the modification of fundamental assumptions and concepts in which Mr. Bohlen has been the leader. One has only to compare this book with anything extant ten years ago, when negligence was negligence, and Williston had spoken the last word on misrepresentation, and Beale had closed the book on proximate cause, to realize how much has been going on. To anyone who has not followed the work of the Restatement, or the publications in legal periodicals during the last decade, many of Mr. Harper’s suggestions will seem entirely novel, if not fantastic.<sup>272</sup>

In short, he thought Harper’s treatise was “an exposition of a theory, rather than a disquisition on the law as it stands.”<sup>273</sup> By extension, Prosser viewed the *Restatement of Torts* the same way; it was an attempt to shape the law, rather than “restate” it. Given that Prosser has often been criti-

---

268. See *supra* note 14 and accompanying text.

269. Prosser, Harper Book Review, *supra* note 66.

270. *Id.* at 257. At the time of the class, he still believed Harper to be a follower of Bohlen. See Notebook, *supra* note 95, at 2 (in which “Harper” is described as a “disciple of Bohlen”).

271. Prosser, Harper Book Review, *supra* note 66, at 257.

272. *Id.*

273. *Id.* at 259.

cized for this exact failing, both for his work on the treatise and the Restatement,<sup>274</sup> this comment is ironic.

Despite being dubious about its reception, Prosser frequently referenced the *Restatement of Torts* during class. Sometimes he doubted its conclusions.<sup>275</sup> Sometimes he pointed out authority to the contrary.<sup>276</sup> In at least one instance, his focus on authority to the contrary would lead to a noted law review article.<sup>277</sup> Several times he noted the absence of authority on a particular issue.<sup>278</sup> At least once, he praised the Restatement.<sup>279</sup> Most often, he simply noted the position the Restatement took on a particular issue.<sup>280</sup>

### C. *Intentional Infliction of Emotional Distress*

Prosser's article legitimizing intentional infliction of emotional distress as an independent tort<sup>281</sup> was published in April 1939. Prosser would present the work on New Year's Eve in 1938 at the "Round Table on Torts" at the annual meeting of the Association of American Law Schools.<sup>282</sup> So, when Prosser taught the "Intentional Infliction of Mental Suffering" on October 21 and 25, 1938,<sup>283</sup> the class received a preview. It

274. See, e.g., Priest, *supra* note 92, at 512–18; see also Phillip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 653–54 (2006):

The obvious question is, "how could a legal realist of this stripe have himself written a treatise?" One might suspect an ulterior agenda. For example, I was once told a story about how another legal realist, William Prosser, created the first edition of his famous torts treatise . . . . According to this account (or legend), the text of the first edition of Prosser's hornbook, published in 1941, contained a variety of interesting, debatable, progressive propositions about tort law. But sometimes the cases cited in the footnotes did not support these assertions. The cited cases might have involved a fact pattern somewhat like a hypothetical given in the text, but sometimes they turned on points of law unrelated to those posited in the text by Prosser as the correct way to resolve the hypothetical. As the story goes, in the second edition of the hornbook, published in 1955, the text remained largely the same, but the footnotes changed, citing recent cases that actually supported the assertions made in the text—cases that themselves had cited the first edition of the hornbook as the authority relied upon.

275. See, e.g., Notebook, *supra* note 95, at 23. Prosser is discussing false imprisonment: "Do parties have to be in presence of each other? How about phone calls, saying 'You are under arrest.' Restatement says 'no.' Prosser wonders about it. No cases."

276. See, e.g., *id.* at 142. After referring to a Restatement rule on causation, Prosser noted "no court has followed." Merrifield then listed that an alternative rule "has been adopted by most courts—98%."

277. See *id.* at 28. Prosser is discussing false imprisonment, specifically the issue of whether the plaintiff must be conscious of the confinement: "Restatement Sec. 42-P must be conscious that he is being restrained. There is later dictum to the contrary and Salmon takes this view." See also *id.* at 30. After listing "knowledge" as an element of false imprisonment, Merrifield wrote, "This is disputed by some authorities—but the Restatement takes this view." In the year Prosser was named Reporter, he wrote an article taking issue with the knowledge requirement. See William L. Prosser, *False Imprisonment: Consciousness of Confinement*, 55 COLUM. L. REV. 847 (1955).

278. See, e.g., Notebook, *supra* note 95, at 40, 45, 93.

279. See *id.* at 159 ("Restatement has the best summary of criminal intervention and proximate cause.")

280. See, e.g., *id.* at 51, 54, 66, 134, 157, 161, 164, 166, 183, 189, 212, 230, 247, 253, 268.

281. Prosser, *supra* note 25. For White's description of Prosser's contribution in this area, see WHITE, *supra* note 20, at 102–06.

282. Prosser, *supra* note 25, at 874 n.\*.

283. See Notebook, *supra* note 95, at 14–21.

also may have very well been the first Torts class to include intentional infliction of emotional distress as one of the basic intentional torts.<sup>284</sup>

Prosser began by discussing the “old view”<sup>285</sup> that “where nothing happens as a result of an act but mental anxiety or pain, the law cannot value it and will not give redress for it.”<sup>286</sup> Prosser used *Lynch v. Knight*<sup>287</sup> for this proposition, both in class<sup>288</sup> and in his subsequent article.<sup>289</sup> Prosser then proffered numerous fact patterns under which plaintiff had been compensated for mental suffering alone.<sup>290</sup> The cases and fact patterns will be extremely familiar to those having read Prosser’s article: the high school girl accused of having sexual intercourse by her principal,<sup>291</sup> railroad employees treating passengers abusively,<sup>292</sup> the person ejected from the theater with insulting language and accusations of indecent conduct,<sup>293</sup> as well as the woman led to believe she had gold buried in her back yard.<sup>294</sup>

At this point, Prosser announced “New Tort-*Intentional infliction of mental suffering*.”<sup>295</sup> He then immediately attempted to show the limits of the new tort. First, he covered cases in which no recovery was allowed,<sup>296</sup> emphasizing “Recovery limited to extreme, outrageous, intentional acts to produce serious mental suffering.”<sup>297</sup> Prosser cautioned, “If minor claims are allowed, the disadvantages of allowing them will be greater than the advantages.”<sup>298</sup> Next, Prosser emphasized that only in-

---

284. That Prosser was altering a traditional structure is emphasized by the page numbers of the cases he covered regarding intentional torts. In covering battery and assault, the page numbers in the casebook for the cases Prosser covers steadily increased from five to seventeen. *See id.* at 5–13. These pages correspond with Bohlen’s chapters II (“Intentional Invasions of the Interest in Bodily Security (‘Battery’)”) and III (“Intentional Invasions of the Interest in Freedom from Apprehension of Harmful or Offensive Contacts (‘Assault’)”). While covering “intentional infliction of mental suffering,” for which Bohlen has no chapter, Prosser jumped to a few cases in chapter VI (“Liability for Emotional Disturbance and Physical Injury Resulting Therefrom”), but, for the most part, taught the class using his own cases. *See id.* at 16–21. When he returned to false imprisonment, he moved back to page 21 in chapter III (“Intentional Invasions of the Interest in Freedom from Confinement (‘False Imprisonment’)”).

285. *Id.* at 16.

286. *Id.*

287. (1861) 11 Eng. Rep. 854, 863 (H.L.).

288. Notebook, *supra* note 95, at 16.

289. Prosser, *supra* note 25, at 875 n.5.

290. Notebook, *supra* note 95, at 16–17.

291. *Id.* at 16 (citing *Johnson v. Sampson*, 208 N.W. 814 (Minn. 1926)); *see* Prosser, *supra* note 25, at 885 n.71.

292. Notebook, *supra* note 95, at 17; *see* Prosser, *supra* note 25, at 881–82.

293. Notebook, *supra* note 95, at 16 (citing *Saenger Theatres Corp. v. Herndon*, 178 So. 86 (Miss. 1938)); *see* Prosser, *supra* note 25, at 883 n.50.

294. Notebook, *supra* note 95, at 17 (citing *Nickerson v. Hodges*, 84 So. 37 (La. 1920)); *see* Prosser, *supra* note 25, at 881 n.36.

295. Notebook, *supra* note 95, at 17.

296. *Id.* at 18. Prosser covered, for example, a request for sexual intercourse, *Reed v. Maley*, 74 S.W. 1079 (Ky. Ct. App. 1903), and someone swearing over the phone, *Kramer v. Ricksmier*, 139 N.W. 1091 (Iowa 1912).

297. Notebook, *supra* note 95, at 18.

298. *Id.* at 19.

tentional actions would suffice for liability.<sup>299</sup> Finally, he emphasized the reasonableness requirement: “The act must be something which would produce extreme emotional disturbance in a normal person.”<sup>300</sup>

Prosser then summarized this emerging tort:

Summary of intentional infliction of mental anguish -a new tort  
Not assaults because no physical contact is intended or apprehended.

- 1) Outrageous conduct - extreme practical jokes, insults, etc.
  - a. must be intentional or consequences substantially certain to follow.
  - b. Conduct must be outrageous and extreme.
  - c. Must result in mental suffering of severe nature, resulting in severe physical consequences.
  - d. The mental suffering must be reasonable under the circumstances.

If D actually does an act of outrageous character which is especially calculated to and does result in severe mental suffering he is liable for a tort.<sup>301</sup>

In essence, Prosser expanded compensation for emotional distress in a number of literally exceptional cases to become an independent tort doctrine.<sup>302</sup> Once Prosser announced this “new” tort in his 1939 article and 1941 hornbook, official recognition followed. In a 1948 supplement to the *Restatement of Torts*, the intentional infliction of emotional distress was recognized as an independent tort.<sup>303</sup> Over time, state after state adopted the tort, and now it is the law of every jurisdiction in America.<sup>304</sup>

#### *D. Strict Products Liability*

One of Prosser’s major contributions to tort law was his role in altering the standard of liability in products liability from negligence to strict liability.<sup>305</sup> On the first day of class, Prosser described strict liability as the “old” rule.<sup>306</sup> He then noted the movement away from strict liability: “[W]e have swung away from the [strict liability] rule to the rule that one is liable only if at fault.”<sup>307</sup> However, Prosser followed that with,

299. *Id.* at 19–20.

300. *Id.* at 20.

301. *Id.* at 20–21.

302. *See, e.g.,* WHITE, *supra* note 20, at 104.

303. RESTATEMENT OF TORTS § 46 (Supp. 1948).

304. *See* Kircher, *supra* note 79, at 795–806, 852–82.

305. *See* WHITE, *supra* note 20, at 168–72; Priest, *supra* note 92, at 512–18; *supra* notes 17–21 and accompanying text. Whether liability was really “strict” and whether the new standard was an improvement are beyond the scope of this Article.

306. Notebook, *supra* note 95, at 2.

307. *Id.*

“[R]ecently we have swung back to the old rule in certain kinds of cases.”<sup>308</sup>

In covering duty, Prosser dedicated a separate “subsection” to “Manufacturer’s Liability.”<sup>309</sup> Prosser’s hostility to traditional limitations on liability in this area was palpable. He began by covering the “old” rule of privity of contract, using *Huset v. Case Threshing Machine* authored by Judge Sanborn.<sup>310</sup> Prosser noted that Judge Sanborn, “misstating Winterbottom case, says no one can sue in tort except A, party to contract.”<sup>311</sup> He added, “Bohlen exploded this in 1905.”<sup>312</sup> Prosser then listed the reasons that manufacturers should not be liable to the ultimate consumer: (1) “[r]esult cannot be anticipated,” (2) “[t]here is intervening human cause-A (dealer) assumes shifting responsibility when he re-sells to B,” and (3) “[u]nreasonable burden on industry.”<sup>313</sup> Prosser then covered three exceptions to the general rule of no liability: (1) “[w]here goods are used on manufacturer’s own premises,” (2) “knowledge of defects and concealment [there]of,” and (3) “articles intended to preserve, destroy, or affect human life.”<sup>314</sup> With regard to the last of these exceptions, for articles intended to “preserve, destroy or affect human life,”<sup>315</sup> Prosser believed this to be, in essence, an exception for articles that are “inherently dangerous.”<sup>316</sup>

Prosser had no patience with the limited nature of the “inherently dangerous” exception. After introducing it, he asked, “But why this limitation?”<sup>317</sup> After covering a case in which a “bottle blew up”<sup>318</sup> and liability was found because it was “technically a food-intended to preserve human life,”<sup>319</sup> Prosser apparently opined, “[a]ll this quibbling is absurd,”<sup>320</sup> and could not find a reasonable way to distinguish among goods.<sup>321</sup>

At this point, Prosser covered *MacPherson v. Buick Motor Co.*,<sup>322</sup> which “throws over all”<sup>323</sup> of the exception. This is “[n]ow accepted as

---

308. *Id.*

309. *Id.* at 80–85.

310. *Huset v. J. I. Case Threshing Mach. Co.*, 120 F. 865 (1903).

311. Notebook, *supra* note 95, at 80.

312. *Id.*

313. *Id.* After the first reason, “[r]esult cannot be anticipated,” Merrifield wrote “(B.S.)”

314. *Id.* at 80–82.

315. *Id.* at 82.

316. *Id.* This is the exception Judge Cardozo would interpret in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

317. Notebook, *supra* note 95, at 82.

318. *Id.*

319. *Id.*

320. *Id.*

321. After covering another case, Prosser stated, “Why distinguish these articles? If there is any duty at all, it . . . .” *Id.* Unfortunately, Merrifield did not finish the sentence, but Prosser’s attitude is clear.

322. 111 N.E. 1050 (N.Y. 1916).

323. Notebook, *supra* note 95, at 84.

the law in all states except Mass. and a few others,”<sup>324</sup> and Prosser, as usual, covered a number of cases following the “new” rule.<sup>325</sup> Of course, the *MacPherson* rule only removed privity of contract as a bar to recovery, and left tort law with a negligence standard.<sup>326</sup> The only reference Prosser made to a move beyond negligence is: “There is also tendency to hold manufacturer, even if he has not been negligent, for injuries by his product. Making manufacturer the insurer of his good. This will be taken up in sales.”<sup>327</sup> Thus, despite the fact Prosser would argue in his hornbook for a tort-based, not contract-based, breach of warranty theory,<sup>328</sup> he bowed to conventional wisdom and taught the material in Sales.

Fortunately, Merrifield was not the only future law professor to save his notebook from a course taught by Prosser. Stanley V. Kinyon, who would become a property scholar and teach at the University of Minnesota Law School from 1936 until 1973,<sup>329</sup> retained notebooks of his 1931–32 Sales course and 1932–33 Pleadings course, both of which were taught by Prosser.<sup>330</sup>

Kinyon’s Sales notebook demonstrates that Prosser’s attitude on strict liability for products was formed years before he ever taught a Torts class. The notes from Prosser’s Sales class, taken nearly a decade prior to the publication of Prosser’s treatise and taken before Prosser published a single law review article, indicate the origins of Prosser’s view on strict liability for products. First, there is Prosser’s general view of its acceptability. Prosser noted that in cases between manufacturer and consumer, just as between buyer and seller, there were essentially three possible actions: deceit, negligence, and breach of warranty.<sup>331</sup> Prosser stated that a few jurisdictions had dispensed with the privity bar for implied warranties, apparently because of the difficulties of proving negligence.<sup>332</sup> According to Prosser, “these cases can’t be justified on existing principles of law.”<sup>333</sup> Prosser did not protest: “Maybe they are a beginning of something new in the law of sales and if so, Prosser says it’s probably O.K.”<sup>334</sup>

Kinyon’s notebook also foreshadows Prosser’s methodology. According to White, in all of Prosser’s efforts to achieve strict liability for products: “Only his bold stroke of stripping strict liability from its ‘illusory contract mask’ and declaring its status as a tort doctrine ranked as a

---

324. *Id.* at 83.

325. *Id.* at 84–85.

326. *See, e.g.*, Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231, 235 (1996).

327. Notebook, *supra* note 95, at 86.

328. PROSSER, *supra* note 17, at 688–93.

329. STEIN, *supra* note 42, at 75, 443.

330. Both are available in the archives of the Minnesota Law Library.

331. Stanley V. Kinyon, Notebook for Sales with William Prosser 105–06 (1931–32).

332. *Id.* at 107.

333. *Id.*

334. *Id.*

genuinely creative effort.”<sup>335</sup> Prosser justified this move from contract to tort on history.<sup>336</sup> It was a history Prosser was already working with in 1931–32. When discussing a case,<sup>337</sup> Prosser asked a series of questions revealing both his awareness of the history of warranty and the extent to which warranties were regarded as the province of contracts:

What kind of an action is this? Tort action for breach of warranty says the ct. But how about this? Can you have a tort action for breach of contract? Seems so, but how can that be? The original action for breach of express warranty was a tort action on the breaking of the promise.<sup>338</sup>

Prosser would take these attitudes forward into his work on torts, and they would shape his scholarship. In turn, his scholarship would shape the path of the law and ensure that strict liability became the rule for products cases.

#### V. THE NOTEBOOK AS INTELLECTUAL HISTORY

Prosser’s class took place during a dynamic period in which the meaning of law was being reconceptualized. In the late nineteenth and very early twentieth centuries,<sup>339</sup> there was a “tendency to generalize and systematize” the law.<sup>340</sup> The “principal end” during this period “was the derivation and application of universal principles of law.”<sup>341</sup> Law was conceived as “neutral, natural, and necessary.”<sup>342</sup> In this manner, a sharp distinction was drawn between law and politics.<sup>343</sup> Although politics was an area of conflict and choices based on subjective considerations, “[l]ate-nineteenth century legal thought has often been called formalistic because of its aspiration to be able to render one right answer to any legal question.”<sup>344</sup> This idea was manifested in a “faith in the coherence and integrity of bright-line boundaries”<sup>345</sup> and “legal reasoning based on logical deduction from general premises.”<sup>346</sup>

---

335. WHITE, *supra* note 20, at 173.

336. See, e.g., PROSSER, *supra* note 17, at 690:

But the action for breach of a warranty was originally a tort action, for breach of a duty assumed, and it is by no means clear that it was anything more than the accident that the cases which arose involved contracts that led to its being regarded as a matter of contract at all. A return to the tort theory is still possible, if the courts choose to find that the manufacturer has assumed a duty toward those who use his product.

337. *Farrell v. Manhattan Mkt. Co.*, 84 N.E. 481 (Mass. 1908).

338. Kinyon, *supra* note 331, at 90.

339. Professor Morton J. Horwitz identifies the period as “Classical Legal Thought,” 1870–1905. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 9 (1992). Professor White describes the period as “Legal Science,” 1880–1910. WHITE, *supra* note 20, at 20.

340. HORWITZ, *supra* note 339, at 14.

341. WHITE, *supra* note 20, at 64.

342. HORWITZ, *supra* note 339, at 169.

343. *Id.* at 170.

344. *Id.* at 199. Horwitz also labels this “categorical thinking.”

345. *Id.*

346. *Id.* at 131.

Some time in the early twentieth century, the claim that law was “autonomous and self-executing” came under increasing scrutiny.<sup>347</sup> Legal realists argued that law was open textured. It was not self-executing, but required discretion: “The most important legacy of Realism . . . was its challenge to the orthodox claim that legal thought was separate and autonomous from moral and political discourse.”<sup>348</sup> If law is discrete, insular, and apolitical, its outcomes are likely to be accepted. When those assumptions are undermined, there is a concomitant desire to attain the “right” result, however that is conceived. This is particularly true if there is a widespread perception that “law and life were out of sync.”<sup>349</sup> Indeed, it is during this period that “both American legal theory and philosophy marched hand in hand to embrace consequentialism.”<sup>350</sup>

If American law generally moved from an emphasis on abstract, conceptualist truths to a more consequentialist, “policy” focus, tort law experienced parallel developments. In a 2003 article, Professor John C.P. Goldberg described twentieth-century tort theory as a project to reconceptualize tort law after the “traditional account” was heavily criticized at the beginning of the twentieth century.<sup>351</sup> According to Goldberg, pursuant to the traditional account of tort law, tort “suits were understood as occasions to resolve disputes over whether an actor (or actors) could be held responsible under the law for injuries suffered by the plaintiff(s).”<sup>352</sup> In the late nineteenth century, judges and commentators began to structure the rules and concepts applied in these suits around “formal ‘elements’ and ‘defenses.’”<sup>353</sup>

The early twentieth-century skepticism toward neutral, natural, and necessary concepts also affected tort law. Goldberg notes: “Conceptually, jurists . . . came to the conclusion that premodern lawyers and judges had been fooling themselves into thinking that the rules and concepts of tort law could actually guide the adjudication of tort disputes.”<sup>354</sup> For instance, a crucial element of tort law was causation. As Horwitz noted, “[I]n tort law especially, where the dangers of social engineering had long been feared, the idea of objective causation played a central role in preventing the infusion of politics into law.”<sup>355</sup> Objective causation was the idea that it was objectively possible to determine whether one person caused another person’s injury.<sup>356</sup> If one of several acts caused an injury, a court might have discretion to find liability on the part of one of several

---

347. *Id.* at 193.

348. *Id.*

349. *Id.* at 188.

350. *Id.* at 142.

351. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 521 (2003).

352. *Id.* at 518.

353. *Id.*

354. *Id.* at 520.

355. HOROWITZ, *supra* note 339, at 51. The “dangers of social engineering” were principally a fear of redistribution of wealth. *Id.*

356. *Id.* at 52.



actors, making economic redistribution a danger and blurring the line between law and politics.<sup>357</sup> Realists attacked the legal doctrine of objective causation as a fiction, pointing to the factual interdependence of causes. Heisenberg, with his “uncertainty principle,” questioned the notion of causation even in the natural sciences.<sup>358</sup> As a result, objective causation was discredited.<sup>359</sup>

At the same time, the Industrial Revolution created the impression that life and law were out of synch. First, the torts that came from industrialization—workplace, vehicular, and product injuries—did not resemble the more morally based torts of the traditional account, such as battery or defamation.<sup>360</sup> Second, the sheer number of injuries caused by the forces of industrialization attracted increased attention as a public, not just a private, problem.<sup>361</sup> Workplace injuries were so significant they led to worker’s compensation laws—which provided an alternative method of addressing accidental injuries.<sup>362</sup> The very existence of an alternative to tort suits “permitted jurists and politicians to think seriously about and fashion systematic legal responses to the problem of accidents outside of tort law.”<sup>363</sup> In short, there was nothing neutral, natural, or necessary about the response of extant tort theory and doctrine.

Around the turn of the twentieth century, tort theorists began searching for “radically different theories of what tort law is, does, and ought to do.”<sup>364</sup> Those theories have largely been consequentialist. First, the realists tended to support the goal of compensation, or loss-spreading.<sup>365</sup> Compensation theorists believe “that accident costs should be borne collectively, not individually, and that the tort system should be evaluated in terms of its capacity to spread risk and provide meaningful, expeditious, and low-cost compensation or insurance to the victims of these activities.”<sup>366</sup> In addition to worker’s compensation, this theory eventually led to a more pro-plaintiff tilt to tort law, including the advent of strict liability for products cases.<sup>367</sup> The compensation theory began to ebb in the early 1970s, at about the same time another consequentialist theory, law-and-economics deterrence, began to emerge.<sup>368</sup> Deterrence theorists seek to ensure that liability rules and defenses “induce both ef-

---

357. *Id.*

358. *Id.* at 63.

359. *Id.* at 54–63.

360. See Goldberg, *supra* note 351, at 519.

361. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* 2–3 (2004).

362. Goldberg, *supra* note 351, at 520 (citing John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 *HARV. L. REV.* 690, 779–837 (2001)).

363. Goldberg, *supra* note 351, at 520.

364. *Id.* at 516.

365. See *infra* text accompanying notes 409–15.

366. DON DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW* 6 (1996).

367. See *supra* notes 17–21 and accompanying text.

368. See, e.g., WHITE, *supra* note 20, at 218–23. At this point in time, a non-consequentialist tort theory, corrective justice, also began to gain adherents. *Id.* at 223–30.

efficient levels of care and efficient levels of activity,” thus reducing accidents to an optimal amount.<sup>369</sup> Both deterrence and compensation theories are consequentialist in the sense that they focus on how torts can be used to further an independent social or public policy goal, preventing accidents or ameliorating the consequences of accidents that occur.<sup>370</sup>

The notebook was written during the realist period, when the traditional theory of tort law had been largely abandoned.<sup>371</sup> The realist goal of compensation was dominant among legal academics, and would later affect tort doctrine. The law-and-economics deterrence goal was still decades away from prominence. Not surprisingly, the notebook allows us to see a realist-inspired, compensation-oriented Prosser in the classroom. However, it also establishes that Prosser’s conception of negligence was remarkably similar to that of Learned Hand’s famous algebraic equation, the “Hand test,” the crux of much law-and-economics tort theory.<sup>372</sup>

### A. Realism

#### 1. Realism in the Academy

At the time of the 1938–39 academic year, “[r]ealism had become well established in American legal education.”<sup>373</sup> Unfortunately, defining “realism” has proven somewhat elusive. One reason is the fractured nature of the “movement”:

Leading participants in the movement disclaimed any striking theoretical unity or coherence in Realism and took pains to disassociate their own jurisprudential positions from those of purportedly Realist colleagues. Some self-styled Realists even went so far as to deny that Realism was a jurisprudential theory at all, locating its essence in its methodology.<sup>374</sup>

Another reason, according to Professor Brian Z. Tamanaha, lies in the historical origin of the name: a series of articles and books by Karl Llewellyn, Jerome Frank, and Roscoe Pound in 1930 and 1931.<sup>375</sup> All three

---

369. DEWEES, *supra* note 366, at 5.

370. See, e.g., Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 347 (2007). The traditional theory, like modern corrective justice theory, is deontological, focusing on the vindication of individual moral rights. The focus is on doing justice between the parties, any emphasis on society as a whole is viewed as illegitimate. *Id.*

371. See WHITE, *supra* note 20, at 71.

372. See *infra* text accompanying notes 426–43.

373. WHITE, *supra* note 20, at 74.

374. *Id.* at 63; see also HORWITZ, *supra* note 339, at 169 (“Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory.”).

375. Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 735 (2009) [hereinafter Tamanaha, *Legal Realism*]. It should be noted that Tamanaha argues the formalist/realist dichotomy with regard to judging is overstated. See, e.g., Brian Z. Tamanaha, *The Bogus Tale About the*

men used some version of the word “realism” in their works responding to one another.<sup>376</sup> As Tamanaha notes, “‘Legal realism’ was born in this skirmish.”<sup>377</sup> However, “[t]he main protagonists were themselves unsure about what the ‘realist’ label meant—as made plain by the later-revealed private correspondence between Pound and Llewellyn.”<sup>378</sup> Thus, “[t]his haphazard origin explains why historians and theorists continue to disagree over what the label stood for and who qualified as a legal realist.”<sup>379</sup>

Despite the difficulty, there are working definitions of “realism.” Perhaps the most widespread impression of realists is that they argued that the law is “indeterminate.” Professor Brian Leiter begins his explanation of realism by noting realists understood indeterminacy as both “rational” and “causal.”<sup>380</sup> The law is rationally indeterminate, “in the sense that the available class of legal reasons did not *justify* a unique decision (at least in those cases that reached the stage of appellate review).”<sup>381</sup> The law is causally indeterminate, “in the sense that legal reasons did not suffice to explain why judges decided as they did.”<sup>382</sup> Given this, it is necessary, at least in some cases, to look beyond the law to explain why judges decide as they do.<sup>383</sup> This leads Leiter to what he terms the “Core Claim” of realism: “[I]n deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons.”<sup>384</sup> Thus:

By emphasizing the indeterminacy of law and legal reasoning, and the importance of nonlegal considerations in judicial decisions, the Realists cleared the way for judges and lawyers to talk openly about the political and economic considerations that in fact affect many decisions. This is manifest in the frequent discussion—by courts, by lawyers, and by law teachers—of the “policy” implications of deciding one way rather than another.<sup>385</sup>

Despite the nebulous nature of the topic, it is possible to extract an essence of realism. As noted above, basically realism is a rejection of legal doctrine as discrete, insular, and sufficient. Necessarily concomitant is the idea that law is connected to, and should aim to serve, society. This is a rejection of abstract, theoretical truths to focus on fact-specific cir-

---

*Legal Formalists* (St. John’s Univ. Sch. of Law, Legal Studies Research Paper Series No. 08-0130, 2008), available at <http://ssrn.com/abstract=1123498>.

376. JEROME FRANK, *LAW AND THE MODERN MIND* 42–47 (1930) (chapter entitled “Legal Realism”); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

377. Tamanaha, *Legal Realism*, *supra* note 375, at 735.

378. *Id.* at 735–36.

379. *Id.* at 736.

380. Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 51 (Martin P. Golding & William A. Edmundson eds., 2003).

381. *Id.*

382. *Id.*

383. *See id.*

384. *Id.* at 52.

385. *Id.* at 59–60.

cumstances. Thus, realists focused on social forces and “policy” discussions.

## 2. *Realism in the Notebook*

The notebook contains many examples of realism, the dominant academic trend of the time. In fact, on the first day of class, Prosser’s description of the subject of torts is in realist terms. Prosser stated, “Much of the law of torts is not settled—it is ‘the battleground of social theories.’”<sup>386</sup> In this statement lies a rejection of the idea that tort law is stable, orderly, and separate from the society to which it applies. Instead, tort law is depicted as in flux, chaotic—nothing is less orderly than a battlefield—and directly tied to society (after all, it is the *social* theories that are battling).

The tie between the content of the law and the society it governs is even more explicit as Prosser discussed the privilege of defending others:

Originally, privilege of going to defense of others was limited to members of head of family’s household. Later extended to any relations of family, servant, employee, etc. Present trend to extend privilege to all cases where the social and moral point of view of the community regards it necessary and desirable.<sup>387</sup>

In his discussion of *Palsgraf*, Prosser offered a concrete example of how “social philosophy” can affect the content of the law:

Whether you follow Cardozo or Andrews depends on your social philosophy of where the loss should fall:

1. On D who has injured someone by a negligent act, the consequences of which he could not foresee.
2. On P, who is injured, being entirely innocent of any fault.<sup>388</sup>

Prosser offered more examples of how “social philosophy” or “policy” impact liability. For instance, the entire element of proximate cause is based on policy. In distinguishing “innocent”<sup>389</sup> causation and that of “wrongdoers,”<sup>390</sup> Prosser stated that “[f]rom here on we assume that D’s conduct has been a cause.”<sup>391</sup> According to Prosser, “[T]he question is should he be legally responsible?”<sup>392</sup> The question “has nothing to do

---

386. Notebook, *supra* note 95, at 1.

387. *Id.* at 44.

388. *Id.* at 62. Prosser was referring to Benjamin N. Cardozo, the Chief Judge of the Court of Appeals of New York who wrote the majority opinion in *Palsgraf*, and William S. Andrews, who wrote the dissent. Cardozo denied liability based on a lack of duty, while Andrews argued the issue was a matter of proximate cause and for the jury. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99, 101 (N.Y. 1928).

389. Notebook, *supra* note 95, at 136.

390. *Id.*

391. *Id.*

392. *Id.*

with causation. It is a matter of policy.”<sup>393</sup> The next sentence implied that other elements of negligence are based on policy as well: “It is a question of whether D had a duty or obligation to protect P from the particular consequences.”<sup>394</sup> This evokes a point Prosser made at the beginning of his coverage of negligence. Prosser listed the elements of negligence: duty, standard of conduct, breach of duty, causation, and damages.<sup>395</sup> Merrifield then wrote, “The five elements are really all the same thing. You can only define each one in terms of the other four.”<sup>396</sup> This statement combines realism’s lack of faith in doctrine—the elements are all the same thing—with its emphasis on the importance of relationship—the elements can only be defined in terms of each other.

In the area of premises liability, “social policy” was invoked as the reason for liability. While discussing *Palmer v. Gordon*,<sup>397</sup> Merrifield wrote, “[I]t is comparatively slight burden on D to require him to use reasonable care not to injure a known trespasser by D’s affirmative act. . . . Social policy makes D liable.”<sup>398</sup>

Despite Prosser’s obvious acceptance of realism, Professor White has argued that Prosser’s career was successful because of his “consensus” approach to tort law.<sup>399</sup> White writes,

Torts, by the Second World War, had been pictured for at least a decade in casebook and treatise literature as a shapeless mass; its leading principle, negligence, as inherently variegated and fluid; its rules in a constant state of change; its boundaries uncertain. Few subjects seemed as relativistic, as susceptible to intuitive, emotional decisionmaking, or as incapable of being made orderly and coherent. Or so Torts appeared in Realist literature.<sup>400</sup>

Yet Prosser did not embrace this radical, stark view of tort law. He “treated tort law as a collection of doctrines, each of which was capable of being reduced to a general formula that articulated its salient features.”<sup>401</sup> At the same time, these formulas “represented only simplified aggregates of countless cases, no one of which precisely embodied all the elements of the formula.”<sup>402</sup>

The goal of this method, as Prosser said in his treatise, was “to make the rule sufficiently flexible to allow for the particular circumstances, and yet so rigid that lawyers may predict what the decision may be, and men

---

393. *Id.* He had made a similar, published, comment before. See Prosser, *supra* note 69, at 27 (calling the unforeseeable consequences aspect of proximate cause a question of “policy”).

394. Notebook, *supra* note 95, at 136. In the same article in which Prosser said (at least a major portion of) proximate cause is a matter of policy, he also said duty is a matter of “social policy.” Prosser, *supra* note 69, at 33.

395. Notebook, *supra* note 95, at 55.

396. *Id.*

397. 53 N.E. 909 (Mass. 1899).

398. Notebook, *supra* note 95, at 181.

399. See WHITE, *supra* note 20, at 157.

400. *Id.* at 145–46.

401. *Id.* at 157.

402. *Id.*

may guide their conduct by that prediction.”<sup>403</sup> Thus, Prosser combined “the insights of Realism and the countervailing demands of doctrinally oriented theories of tort law.”<sup>404</sup> This “third way” of tort law has been called “methodological,”<sup>405</sup> “soft,”<sup>406</sup> or “moderate.”<sup>407</sup> Regardless of what it is called, Prosser staked out a “position between advocates of policy and enthusiasts for doctrine.”<sup>408</sup>

The notebook provides evidence both for and against this understanding. On the one hand, the fusion of doctrine and policy is apparent. The numerous references in the notebook with a realist/policy-based focus were presented within a doctrinal framework.<sup>409</sup> As discussed in Part III, Prosser’s yearlong class was structured doctrinally. He based his discussion around a tripartite structure of doctrine that is familiar to anyone teaching, or taking, a modern Torts course: intentional torts, negligence, and strict liability. His discussion of negligence was structured doctrinally: duty, standard of conduct, breach, causation, and damages. He did not adopt Leon Green’s “functional approach” in which doctrine was discarded in favor of categories based on factual similarity, e.g., “automobile traffic.”<sup>410</sup> On the other hand, the remark that “the five elements are really all the same thing”<sup>411</sup> calls into question how seriously Prosser considered doctrine.

---

403. PROSSER, *supra* note 17, at 18.

404. WHITE, *supra* note 20, at 157.

405. John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1423 (1999) (book review).

406. *Id.*

407. WHITE, *supra* note 20, at 163; Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1528 (1997).

408. WHITE, *supra* note 20, at 163.

409. See *supra* notes 95–198 and accompanying text.

410. See LEON GREEN, *THE JUDICIAL PROCESS IN TORT CASES* 887–970 (1931). Perhaps Prosser’s rejection of radical realism or, put another way, his retention of doctrine, can be partially attributed to the fact that he had held more traditional views in the recent past. Prosser’s first torts publication, Prosser, Green Book Review, *supra* note 66, was a review of Green’s *JUDGE AND JURY*. He was not impressed:

Ever since Dean Pound began “balancing the interests,” we have all been waiting rather hopefully for some Daniel come to judgment who should provide us with a method by which we can decide, in any given case, which “interests” to consider, and to which “factors” to give the greater weight. This neither Dean Green nor any other realist has given us.

*Id.* at 223. This is strong language for a man who would include in his hornbook that torts is about “balancing the interests.” PROSSER, *supra* note 17, at 17. Prosser concluded his review: “It seems on the whole more desirable, and probably more accurate, to predict that, while there may be occasional dips and declinations, the judge will steer his course, in the absence of some compelling reason to the contrary, by the magnetic needle of stare decisis.” Prosser, Green Book Review, *supra* note 66, at 223.

411. Notebook, *supra* note 95, at 55. This was discussed in note 396, *supra*, and accompanying text.

## B. *Consequentialist Torts Rationales*

### I. *Compensation*

Prior to the twentieth century, tort actions “had not principally been conceived as devices for compensating injured persons.”<sup>412</sup> Yet many realists were proponents of the compensation rationale of torts. They believed it was preferable “to divide a loss among a hundred individuals than to put it on any one.”<sup>413</sup> White attributes this, at least partially, to the realists’ reduction of doctrine’s role in tort law.<sup>414</sup> Many tort doctrines were designed as a way to confine liability to “blameworthy” individuals.<sup>415</sup> Once doctrine was of lesser importance, the focus could shift to policy issues.<sup>416</sup> At the same time, liability insurance made the compensation function of tort law apparent.<sup>417</sup> Finally, realists tended to share a perception of social interdependence.<sup>418</sup> Under such a perception, sharing losses in order to diminish them is very attractive. As a result of these factors, many realists held a consequentialist view of the tort system as a loss-spreading, compensatory device.

The notebook provides evidence of this compensatory emphasis. When discussing workplace injury suits prior to the enactment of workers’ compensation, Prosser stated, “80% of cases denied recovery. This fact, added to the terrible industrial conditions, lay the ground for remedial legislation.”<sup>419</sup> After covering the basic features of workers’ compensation, Prosser noted, “There is agitation for a similar scheme for all auto accidents.”<sup>420</sup> While covering a case on landlord-tenant injuries, Prosser discussed the rationales for holding the landlord liable. One of these rationales was pure loss-spreading: “[T]he landlord is probably more able to pay—and in better position to distribute the loss.”<sup>421</sup>

When discussing contributory negligence, Prosser described its all-or-nothing nature. “Why not split it between the two guilty parties?” Prosser asked.<sup>422</sup> Then, he provided an answer:

Best explanation is historical. About 1800, when the tort of negligence and the defense of cont. neg. developed, the law took a very hard-boiled, individualistic approach. P cannot recover for D’s

---

412. WHITE, *supra* note 20, at 62. See *supra* text accompanying notes 351–53.

413. Priest, *supra* note 92, at 471.

414. See, e.g., WHITE, *supra* note 20, at 151–52.

415. *Id.* at 152.

416. See *id.*

417. *Id.*

418. *Id.* at 66.

419. Notebook, *supra* note 95, at 207.

420. *Id.* at 208.

421. *Id.* at 211–12.

422. *Id.* at 225. At this point, only three jurisdictions had adopted comparative negligence: Mississippi (1910), Nebraska (1913), and Wisconsin (1931). See Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41, 43 (2003).

negligence when he was not careful himself. The rule is firmly embedded in the common law—but it results in injustice often . . . .<sup>423</sup> Apportioning the damages is called “the ultimate solution.”<sup>424</sup> Prosser added, “The fair thing to do is to apportion the damages if you can do it.”<sup>425</sup>

## 2. *Law-and-Economics Deterrence*

The second major consequentialist torts rationale in the twentieth century is law-and-economics deterrence. Pursuant to the deterrence rationale, tort law exists to prevent injuries by threatening potential tortfeasors with liability or the inability to recover damages. Deterrence theorists seek to ensure that rules and defenses for liability induce efficient levels of care, as well as efficient levels of activity.<sup>426</sup>

One of the cornerstones of the deterrence theory is then-Professor Richard Posner’s 1972 article *A Theory of Negligence*.<sup>427</sup> As the “essential clue”<sup>428</sup> to the function for negligence, Posner pointed to Judge Learned Hand’s famous algebraic equation defining reasonable care. In *United States v. Carroll Towing Co.*,<sup>429</sup> Hand wrote that reasonable care requires an actor to take all actions in which the burden of the precaution was less than the product of the probability of the injury and its gravity.<sup>430</sup>

At least one scholar has argued there is a close tie between Prosser’s scholarship and Judge Hand’s formula for negligence.<sup>431</sup> Professor Benjamin Zipursky explains the connection between Prosser and Hand:

Prosser’s central concept—and the central element of negligence law—is the negligent act itself, or “breach.” Breach can be understood as the failure to act “reasonably,” the failure to take “reasonable care,” or the failure to take the care that a “reasonable person” would take. Though it originated in Holmes’s work, the concept of a duty of reasonable care had been enormously influenced by Richard Posner’s economic theory of tort law, which in turn draws upon the famous “Hand” formula of *United States v. Carroll Towing Co.*<sup>432</sup>

---

423. Notebook, *supra* note 95, at 225–26.

424. *Id.* at 227.

425. *Id.* at 229.

426. DEWEES ET AL., *supra* note 366, at 5.

427. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

428. *Id.* at 32.

429. 159 F.2d 169 (2d Cir. 1947).

430. *Id.* at 173.

431. See Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649, 650 (1998).

432. *Id.* at 651 (citations omitted). It should be noted that Zipursky has argued that Posner took the Hand formula out of context and that the Hand formula fails to capture the essence of negligence. Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 1999–2001 (2007).



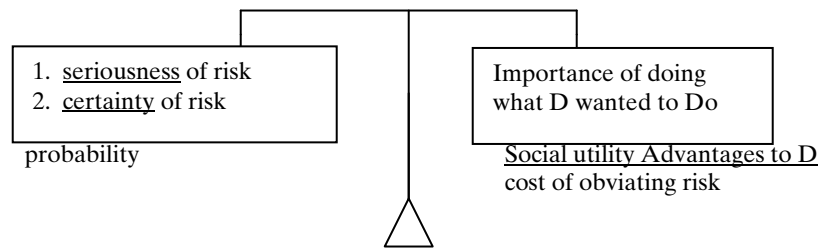
In other words, Prosser took Holmes's idea of a duty of reasonable care and elevated it to the crux of negligence. Posner then refined the concept of reasonableness, drawing upon the Hand test.

Prosser's published work demonstrated his sympathy for an economic understanding of negligence.<sup>433</sup> However, the notebook provides stronger support for Zipursky's basic point: Hand's understanding of negligence was generally consistent with Prosser's understanding. On January 21, 1939, Prosser covered *Beatty v. Iowa Railroad*,<sup>434</sup> a case that sounds familiar to a modern reader accustomed to hearing negligence described in economic terms. The following are Merrifield's complete notes on the case:

*Beatty v. Iowa R.R.*, 1882, p. 163. Risk is slight compared with cost to D of obviating risk. Assuming the risk of horse-running away is foreseeable-A is not negligent. The criterion is that a reasonable man will take some foreseeable risks. Is conduct reasonable in light of the risk?<sup>435</sup>

At that point, Merrifield drew this scale:<sup>436</sup>

weigh the balance



What the reasonable man will do!

On the left side of the scale, written inside the scale itself, is:

1. *seriousness* of risk
2. *certainty* of risk<sup>437</sup>

Written outside the scale, right underneath "certainty of risk" is "likelihood," but it has been crossed out. "Probability" is written beneath that. On the right side of the scale, written inside the scale itself, is: "Importance of doing what D wanted to Do."<sup>438</sup> Written outside the scale,

433. See, e.g., PROSSER, *supra* note 17, at 220-23.

434. *Beatty v. Cent. Iowa R.R. Co.*, 12 N.W. 332 (Iowa 1882).

435. Notebook, *supra* note 95, at 101.

436. *Id.*

437. *Id.*

438. *Id.*

right underneath that phrase are: “Social utility Advantages to D” and “cost of obviating risk.”<sup>439</sup>

In other words, Prosser balanced the seriousness of the risk and the certainty or probability of the risk against the social utility advantages to the defendant and the cost of obviating the risk. Thus, one side of the scale/equation is exactly the same for Prosser and Hand. Both of them focused on the probability of the harm/risk and the seriousness/gravity thereof. In addition, on the other side of the scale/equation, the burden of precaution seems nearly identical to the cost of obviating the risk. Therefore, the major difference between the two concepts of negligence was Prosser’s inclusion of social utility advantages to defendant.<sup>440</sup>

That Prosser’s and Hand’s conceptions of negligence were so consistent is remarkable, and ties Prosser to the law-and-economics understanding of negligence in a more direct manner than is often attempted. Modern law-and-economics scholars have used Hand’s formula as the crux of negligence law.<sup>441</sup> This law-and-economics view has become “the dominant theory of torts.”<sup>442</sup> Prosser’s contribution to it is underappreciated.<sup>443</sup>

## VI. CONCLUSION

William Prosser’s influence on modern tort law cannot be overstated. The absence of his papers prevents us from a systematic, intimate view of Prosser and his theories of tort law as he advanced through his career. Merrifield’s notebook, however, allows us a glimpse of Prosser at a particularly significant time in his career. The notebook offers insight into Prosser’s creation of *Prosser on Torts*, his attitude toward the first *Restatement of Torts*, his early views of strict liability and intentional in-

439. *Id.* Underneath “obviating,” the word “avoiding” is written. Underneath both of these phrases is the term “Social Benefits,” which I take to be a summary of both of them.

440. This may have been inspired by section 291 of the *Restatement of Torts*, then only four years old. Section 291(1) references “the utility of the act,” and Comment d states, “[t]he magnitude of the risk is to be compared with what the law regards as the utility of the act.” RESTATEMENT (FIRST) OF TORTS § 291(1) cmt. d (1934). As should be obvious, the general idea of a risk calculus preceded *Carroll Towing*. *E.g.*, Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 42–44 (1915); *see also* Michael D. Green, *Negligence=Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1615–29 (1997). In fact, the next day in class, Prosser covered *B. & Q.R. Co. v. Kravenbuhl*, 91 N.W. 880 (Neb. 1902), a case frequently cited as a forerunner of law and economics analysis in negligence. *See* Green, *supra* at 1616–17.

441. *See, e.g.*, Posner, *supra* note 427, at 29–32.

442. PHILOSOPHY AND THE LAW OF TORTS 5 (Gerald J. Postema ed., 2001).

443. A few scholars have seen the general connection. *See, e.g.*, George W. Conk, *Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished*, 26 REV. LITIG. 799, 852 (2007) (“Prosser’s embrace of social engineering was adopted by the law and economics movement which saw tort in a purely instrumental way.”); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law of Redress and Wrongs*, 115 YALE L.J. 524, 582 (2005). Significantly, Judge Posner is among them. *See* Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1115 (1981) (“Someone who uses economics to expose the inner logic of the common law or to propose reforms to make the law more efficient is therefore taking up where Ames and Prosser left off . . .”).

No. 2]

THE PROSSER NOTEBOOK

619

fliction of emotional distress, his propensity for predictions, and his relationship to the law-and-economics movement. The word “treasure-trove” is not too strong.

APPENDIX:  
PROSSER'S TORTS QUIZZES AND EXAMINATION 1938-39

UNIVERSITY OF MINNESOTA

The Law School

Mr. Prosser

December 17, 1938.

Quiz in Torts.

1. A drove his automobile down a business street in a city of 20,000 population, at a speed of 45 miles per hour. He saw ahead of him a truck backing out of a driveway, and partially blocking the street. A did not reduce his speed, and collided with the truck. The truck contained a large box of dynamite sticks. This fact was unknown to A, and there was nothing in the appearance of the truck to indicate it. The dynamite exploded, and injured B, the driver of the truck, and also C, who was standing on the sidewalk fifty feet away from the truck. The explosion broke a window on the third floor of a building a block away on a side street, and a fragment of glass put out the eye of D, a stenographer working near the window.

B, C, and D each brought an action against A. In each action there was evidence that A had assumed that the truck would clear the street in time for him to avoid it. There was opposing evidence that A could not possibly have assumed anything of the sort, and must have known that he was sure to hit the truck unless he reduced his speed. In each action the trial court refused A's motion for a directed verdict in his favor, and left all questions involved to the jury, which returned a verdict for the plaintiff in each case. A appeals all three cases. As to each action, should it be affirmed, or reversed?

No. 2]

## THE PROSSER NOTEBOOK

621

2. The Supercolossal Motion Picture Company was making a motion picture, entitled "Virtue Will Triumph." The script called for A, the actor playing the villain, to undergo a beating at the hands of B, playing the hero, in a fight in the last real [sic]. This scene was staged in a public street in Los Angeles, in violation of a criminal ordinance against public disturbances. C, who was passing by, saw B beating A, did not realize that it was acting and rushed in to assist A. C punched B in the jaw, and B, defending himself, hit C on the nose. A came to B's rescue and kicked C in the shins, and C then hit A in the eye. At this point D, the director of the picture, intervened, collared C, kicked him severely, and threw him into the street with such force that C's arm was broken.

What are the liabilities of A, B, C, and D?

X. What is your seat number for this examination?

Y. Have you observed any appearance of giving or receiving aid in the writing of this examination? Answer yes or no.

## UNIVERSITY OF MINNESOTA

## The Law School

Mr. Prosser

March 24, 1939.

Quiz in Torts.

1. A city ordinance provides a fine for any person selling milk who sells or delivers unpasteurized milk, or milk in bottles having cracks, or with chipped edges. P bought from the Sunshine Grocery a bottle of Borden's milk, which had a chipped edge. In opening the bottle, she cut herself slightly on the rough glass. She paid no attention to the cut until she discovered an infection in it, when she went to a physician. The infection spread, and P became seriously ill. The physician then by mistake used a strong acid for an antiseptic, which, owing to P's lowered vitality, caused P's death. An action is brought by P's administrator, against both the Sunshine Grocery and the Borden Milk Company, for any damages recoverable by P, and for P's death. No other evidence than the foregoing is offered. What instructions should the trial court give the jury?

2. Defendant manufactures and sells ice cream. In each package it places a cake of solid carbon dioxide, or "dry ice," which has a temperature of 110 degrees below zero, and gives off gas very rapidly. The driver of defendant's truck, delivering ice cream, was a new employee, and entirely ignorant of the nature and properties of "dry ice." He threw a paper bag containing a cake of the "dry ice" into the street. An hour later a strong March wind suddenly arose, and blew the bag three blocks down the street, into the vicinity of a schoolhouse. School children playing during recess found it, and played for some time with the cake. A child eight years old put it into a bottle partly filled with water, hammered on the cap, and began to shake the bottle. Plaintiff, the

No. 2]

THE PROSSER NOTEBOOK

623

child's older sister, saw what she was doing, and forcibly took the bottle away from her. It exploded in plaintiff's hands, and put out plaintiff's eye. Plaintiff brings an action against defendant. The court left all questions to the jury, which returned a verdict for plaintiff. Affirmed or reversed?

--New York Eskimo Pie Corp. v. Rataj, (C.C.A. 3d Cir. 1934).

- X. What is your seat number for this examination?
- Y. Have you observed any appearance of giving or receiving aid in the writing of this examination? Answer yes or no.

UNIVERSITY OF MINNESOTA  
The Law School

Mr. Prosser

June 6, 1939.

Examination in Torts.

Eight questions. Try to divide your time. Think over your answers before you write them. Cover all points in each question, but avoid undue length, or giving superfluous information.

1. Defendant, drilling an oil well in the El Dorado field, brought in a “gusher”, and promptly proceeded to cap it as required by statute. The casing of the well was defective, and the pressure resulting from the cap forced gas through cracks into fissures in the surrounding earth. The gas came to the surface in the bed of a stream of water on the land of X, 950 feet away from the well, and created a small geyser, throwing large quantities of mud, water, and gas some 15 feet into the air. A crowd of people from El Dorado gathered along a railway track beyond X’s land to witness this phenomenon. Plaintiff was in the crowd when a man near him struck a match to light a cigar, with the result that there was a violent gas explosion, and plaintiff was severely burned. In Plaintiff’s action against defendant, the court directed a verdict for defendant. Affirmed or reversed?—Constantin Refining Co. v. Martin, (1922) Ark. , 224 S. W. 37.

2. A uses a small pond on his land as a skating place for himself and his friends. Children of the neighborhood also come to skate, against A’s sporadic protests, and in spite of a conspicuous sign reading “Trespassers will be prosecuted to the fullest extent of the law.” When the ice is thick enough, A cuts some of it in the center for summer use. The hole “skims over” during the following cold night. The next day, not knowing of the cutting or being otherwise warned of the thinness of the ice, three persons simultaneously fall in and are injured: B, a friend is C, a boy of nine, new to the town: and D, a policeman taking a short cut to A’s house to arrest him. Is A liable to any of these?

3. The Federal Safety Appliance Act provides, under criminal penalty, that it shall be unlawful for any railroad engaged in interstate commerce to use in such commerce any car not equipped with couplers coupling automatically by impact. Defendant railway company, while making up an interstate train, left a car loaded with pig iron on a grade, held in position by a wooden block in front of the wheels. The car had a defective coupler which would not operate. A second car was



“kicked” up grade against it, but the coupler failed to operate. The impact knocked the block from in front of the wheels, and both cars started back down the grade. Plaintiff, the switching foreman in charge, concluded from the antics of a switchman on top of the second car that its brakes would not work, and attempted to stop it by placing a block in front of the wheels. While he was doing so, the pig iron car collided with the second car, driving it forward against plaintiff, and running over his leg. He brings an action against the railway company. Should defendant’s motion for a directed verdict be granted? — Clapper v. Dickinson, (1917) 137 Minn. 415, 163 N. W. 752.

4. Plaintiff brought an action for personal injuries, joining defendants A, B, and C. His evidence was that he was walking along a city sidewalk when he was injured by the fall of a large electric sign from a building; that the building was owned by defendant B, and leased by it to A, with a provision in the lease that B would make periodic inspections and keep the building in repair; that the sign was installed by C a year before it fell, under a contract with A in which B had no part. There being no other evidence, each defendant moved for directed verdict. The court denied all three motions, and the jury returned a verdict for plaintiff against all three defendants. Affirmed or reversed? - cf. Smith v. Claude Neon Lights Co., (1933) 110 N.J.L. 326, 164 Atl. 423.

5. D was driving a truck loaded with telephone poles along a state highway after dark, traveling at a speed of 12 miles per hour. A state statute required that all trucks operating on the highway at night be equipped with flares to warn others of the presence of the truck if it should be compelled to stop on the highway, and that it have on its rear end a red light sufficiently powerful to be clearly visible 400 feet away. D had not equipped the truck with the flares required. It did have a tail light burning, which was powerful enough to comply with the statute, but the poles were so loaded as to obstruct the view of the light from any direction except straight to the rear. As D was rounding a long curve to the right, he was overtaken by an automobile owned and driven by X, in which Y, who had gone with X to a football game and agreed to share the expenses of the trip, was riding. X was driving at a speed of 65 miles an hour, although a statute limited the speed to 40 miles an hour at the time and place. X was unable to see D’s tail light on the curve until too late to avoid the collision. The automobile struck the poles on D’s truck, and they penetrated its body and killed Y. D was also injured. Y’s administrator brings actions for his death against D and X, and D brings an action against X for his injuries. What result in the three actions?

6. Plaintiff, who had lost a leg in a railway accident, went to defendant Eezee Artificial Limb Company to be fitted with an artificial leg, which was to be paid for six months. She wore the leg for a month, and then returned for a final examination. In the course of the examination, which was of a very personal character, defendant's manager called in to assist him a travelling salesman of another company, whom plaintiff erroneously supposed to be a physician. When the examination was over, and while the artificial leg was removed, defendant's manager demanded immediate payment. When plaintiff refused, the manager lost his temper, called plaintiff a damned deadbeat and a worthless cheating cripple, and proceeded to lock the leg up in his safe. Plaintiff, who could not walk without it, was compelled to pay in order to obtain it. Has she any cause of action?

7. Plaintiff was standing on a railway crossing so intently watching a burning house that he did not see the approach of a train. The trainmen were not watching the track, and had failed to sound the whistle. When about fifty feet distant, the engineer discovered plaintiff, and applied the brakes, which were in disrepair and failed to operate promptly. P was struck. The train crew gave him first aid and took him on the train, but failed to stop at the first town at which there was a doctor. Two hours later he was taken to a hospital, where he refused to permit a leg amputation. As a result he died. The medical testimony shows that neither the amputation nor the loss of life would have been necessary if he had been left at the first town, and that if he had consented to the amputation he would not have died. What is the liability of the railway company?

8. X, a close friend of Y, a young lady, discovers that Y is engaged to marry Z. Thinking that this is not for the best interests of Y, and desiring only to benefit Y, X writes Y a letter saying that "this man is not the kind of person whom any self-respecting girl would be willing to marry." X honestly believes that this statement is true, and that he has accurate information on which to base it. In fact it is false. Is X liable to Y or Z if

(a) Y believes the statement, and breaks off her engagement with Z?

(b) Y refuses to believe it, and marries Z?

X. What is your seat number in this examination?

No. 2]

THE PROSSER NOTEBOOK

627

Y. Have you observed any appearance of giving or receiving aid in the writing of this examination?

Answer yes or no.

