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# REVIEW ESSAY

## Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy

PROSSER AND KEETON ON THE LAW OF TORTS. By W. Page Keeton (General Editor), Dan B. Dobbs, Robert E. Keeton, and David G. Owen (5th ed.). St. Paul, Minn.: West Publishing Co., 1984. Student Edition: pp. xxiii, 1286, \$25.95. Lawyer's Edition: pp. xxiii, 1456, \$44.95.

*Reviewed by Craig Joyce\**

### "Prosser on Torts!

It has a completed sound, a belonging sound, a natural sound,  
a sound to be remembered for years to come."<sup>1</sup>

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• 1986 by Craig Joyce and *Vanderbilt Law Review*.

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1. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CALIF. L. REV. 1255, 1255 (1972) (in memoriam). (John W. Wade is dean emeritus and distinguished professor emeritus at Vanderbilt Law School.)

More recently, the Washington Post has described Prosser as "a scholar and author who was to torts what Dr. Spock is to child care." Reid, *The Liability Crisis: Litigation Loosens the Stiff Upper Lip*, The Washington Post, Feb. 24, 1986, at A1, col. 2, A7, col. 1.

## I. INTRODUCTION

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. Even today, fourteen years after his death in 1972, "Prosser on Torts" remains in the minds of students, teachers, the bench, and the bar alike a single thought, its parts indistinguishable one from the other. Indeed, the passage of time has done nothing to diminish the influence of the man on the subject. His articles remain landmarks in the development both of the literature of torts and of the law itself.<sup>2</sup> The *Restatement (Second) of Torts*, begun by Prosser in 1963 and recently completed under the reportership of John W. Wade of Vanderbilt, increases in authority with every passing year.<sup>3</sup> Prosser's casebook on torts, now in the third printing of its seventh edition, remains the most widely adopted text in a highly competitive market.<sup>4</sup> All in all, no small accomplishment for a notorious practical joker who, until nearly his fiftieth birthday, had spent his entire legal career as a student, teacher, and practitioner in the provinces of Minnesota, far from the established capitals of scholarship.<sup>5</sup>

There is more, however, to the Prosser legacy. In many respects, and certainly in the minds of the generations of lawyers who have studied from and employed it to their profit and amuse-

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2. See, e.g., Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); Prosser, *The Borderland of Tort and Contract*, in W. PROSSER, *SELECTED TOPICS IN THE LAW OF TORTS* (The Thomas M. Cooley Lectures, Fourth Series, University of Michigan) (1954); Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

3. RESTATEMENT (SECOND) OF TORTS, vol. 1 at III, vol. 2 at III (1965).

4. W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* (7th ed. 3d printing 1982).

5. Prosser was born on March 15, 1898 in New Albany, Indiana. He received a B.A. from Harvard in 1918, served in the Marines during World War I, and attained an LL.B. from the University of Minnesota in 1928. Following admission to the Minnesota bar, he joined the Minneapolis firm of Dorsey, Colman, Barker, Scott & Barber in 1928. He was appointed to the faculty of the University of Minnesota Law School in 1930, where he remained until reentering practice with his old law firm in 1943. G.E. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 156 (1980). Prosser joined the Harvard Law School faculty in 1947, but left in the following year for the University of California at Berkeley (Boalt Hall). Eldredge, *William Lloyd Prosser*, 60 CALIF. L. REV. 1245, 1247 (1972). He served as dean there until 1961 and remained a member of the faculty until 1963. In the latter year, he moved across the Bay to Hastings College of the Law, where he remained until his death in 1972.

ment, the jewel in the crown remains Prosser's *Handbook of the Law of Torts*.<sup>6</sup> The fourth and last edition of the *Handbook* to be edited by Prosser himself appeared in 1971. Much has occurred in the law of torts since then, including the explosion of products liability litigation in the 1970s. As the need for a thorough updating and revision of the *Handbook* became increasingly obvious, West Publishing Company faced the choice of discontinuing the work or transferring responsibility for it to an author capable of carrying on in the Prosser tradition, if indeed such a scholar could be found. West eventually settled upon an ingenious solution. It entrusted the task to a *team* of revisers, selected and supervised by W. Page Keeton of Texas as General Editor.<sup>7</sup> The result is *Prosser and Keeton on the Law of Torts, Fifth Edition*, published in 1984.

The legal profession has expected much of the Fifth Edition, and rightly so. As custodians of Prosser's learning, insights, and style, how well have the revisers fared? Also, to what extent have they added constructively to the edifice erected in the first four editions of the *Handbook*? The answers to these questions require a survey both of Prosser's legacy and of the accomplishments of his successors.

## II. THE FIRST EDITION

The beginnings of the *Handbook* in 1941 were humble, or so its author would have had his readers believe. Prosser began the

6. There were four editions of PROSSER ON TORTS, dated 1941, 1955, 1964, and 1972, prior to the 1984 edition entitled PROSSER AND KEETON ON THE LAW OF TORTS (Fifth Edition). All editions have appeared in West Publishing Company's Hornbook Series. For the benefit of the curious, West has provided the following capsule history of the "hornbook":

It was used throughout Europe and America between the late 1400s and the middle 1700s.

Shaped like an old-fashioned butter paddle, the first hornbooks were made of wood. The paper lesson the child was to learn was fastened to the wooden paddle and covered with a piece of horn. The transparent strip of horn was made by soaking a cow's horn in hot water and peeling it away at the thickness of a piece of celluloid. The horn was necessary to protect the lesson from the damp and perhaps grubby hands of the child. Hornbooks commonly contained the alphabet, the vowels, and the Lord's Prayer.

PROSSER AND KEETON ON THE LAW OF TORTS ii (W.P. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984) [hereinafter cited as PROSSER AND KEETON]. Hence, as West explains, the hornbook was originally a "first book for children." *Id.* (quoting Dr. Johnson). Interestingly, this description appears facing the title page of the Lawyer's Edition of the new Prosser and Keeton hornbook, but not in the Student Edition.

7. The other revisers of the Fifth Edition were Dan B. Dobbs of the University of Arizona, Robert E. Keeton of Harvard Law School, and David G. Owen of the University of South Carolina.

preface to the First Edition by recalling ironically the example of Joel Bishop, who upon proposing to write a text on torts in 1853 had been advised by prospective publishers that no market existed for such a work and that, "if the book were written by the most eminent and prominent author that ever lived, not a dozen copies a year could be sold."<sup>8</sup> Obviously, as Prosser pointed out, the outpouring of cases and periodical commentaries on torts since Bishop's day made the availability of a work on the subject greatly more desirable a century later. Prosser's stated goals were modest. He had attempted, he wrote in the preface, "to keep the text . . . relatively simple throughout" (for the benefit of students), but to make the footnote material "much more extensive than is usual in a [work] of this size" (as an aid to practitioners).<sup>9</sup> Overall, he had tried to select decisions and secondary discussions "particularly significant in light of the problems of the present day."<sup>10</sup> Although he left the thought unexpressed, no doubt Prosser anticipated stronger sales than those projected for Bishop.

He need not have worried. Among students and practitioners, the *Handbook* won an immediate and enthusiastic following. In addition, it quickly achieved widespread acceptance among Prosser's academic peers. Of the sixteen reviews that appeared immediately following its publication, not one was critical.<sup>11</sup> A young Page Keeton observed: "In this book Professor Prosser has given the subject of torts the most thorough and thoughtful treatment that it has yet received."<sup>12</sup> Indeed, Prosser himself supplied the work's most searching, if hardly damaging, criticism in his whimsical report on the proceedings at a mythical symposium of the National Union of

8. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* vii (1st ed. 1941). In publishing the first edition of his hornbook, Prosser joined an illustrious company: other entries in the Hornbook Series, according to an advertisement immediately preceding the preface, included ATKINSON ON WILLS, BOGERT ON TRUSTS, DOBIE ON FEDERAL JURISDICTION AND PROCEDURE, GOODRICH ON CONFLICT OF LAWS, McCORMICK ON DAMAGES, MILLER ON CRIMINAL LAW, POWELL ON AGENCY, STEVENS ON CORPORATIONS, VANCE ON INSURANCE, and VOLD ON SALES.

9. W. PROSSER, *supra* note 8, at vii.

10. *Id.*

11. See Campbell, Book Review, 26 MINN. L. REV. 137 (1941); Edgar, Book Review, 16 ST. JOHN'S L. REV. 166 (1941); Eldredge, Book Review, 90 U. PA. L. REV. 505 (1942); Feezer, Book Review, 36 LL. L. REV. 594 (1942); Gifford, Book Review, 27 IOWA L. REV. 172 (1941); Gregory, Book Review, 9 U. CHI. L. REV. 196 (1941); Harper, Book Review, 55 HARV. L. REV. 312 (1941); Keeton, Book Review, 20 TEX. L. REV. 255 (1941); Lockhart, Book Review, 30 CALIF. L. REV. 120 (1941); MacIntyre, Book Review, 4 ALBERTA L.Q. 160 (1941); Richards, Book Review, 7 MO. L. REV. 198 (1942); Sealy, Book Review, 11 BROOKLYN L. REV. 249 (1942); Traylor, Book Review, 30 KY. L.J. 336 (1942); Vold, Book Review, 11 FORDHAM L. REV. 239 (1942); Wilson, Book Review, 27 CORNELL L.Q. 159 (1941).

12. Keeton, *supra* note 11, at 255.

Torts Scholars, popularly known as "N.U.T.S."<sup>13</sup> As one eminent intellectual historian has noted aptly: "When an author is his severest public critic, success or anonymity is assured, and Prosser was not destined to be anonymous."<sup>14</sup>

Clearly, many factors contributed to this warm reception. One was the *Handbook's* style. Whereas the works of leading torts scholars who preceded Prosser, most notably the redoubtable Francis Bohlen, had suffered from "cumbersome, weighty prose" of minimal aesthetic appeal, "Prosser's picturesqueness saturated every level of his writing on Torts."<sup>15</sup> A contemporary found Prosser's expression "bright," "spritely," and "fun to read."<sup>16</sup> Another remarked of the First Edition that "there are frequent sentences which not only drive home a point to, but also produce a smile for the reader. Some may deprecate this but a little sparkle and levity can be a good thing in a law book as well as elsewhere."<sup>17</sup> Prosser's ability to bring his material to life, therefore, significantly strengthened the appeal of the work.

Even more important to the success of the *Handbook* was the author's characteristic methodology in analyzing the raw data of his subject matter. In surveying the law of torts as it had developed to 1941, Prosser saw spread before him a picture of vast and surfeiting disarray. To this untidy scene, he brought order. Prosser viewed the seemingly scattershot cases on the various issues of tort law as capable of reconciliation and harmonization, if only the individual parts of those decisions were disassembled, inventoried, and recombined to illustrate the common values that, taken as a whole, they sought to vindicate (or, in Prosser's view, *ought* to vindicate).<sup>18</sup> In effect, he treated the "doctrines" of tort law as amalgams of principles and processes, each of which could be reduced to a relatively simple formula. Each formula distilled the aggregate

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13. See Prosser, Book Review, 4 LA. L. REV. 156, 156 (1941). Prosser's "critics" at the symposium included Warren A. Seavey of Harvard, Fleming James, Jr. and Harry Shulman of Yale, Laurence H. Eldredge of Pennsylvania, Charles O. Gregory of Chicago, Fowler V. Harper of Indiana, Leon Green of Northwestern, and Clarence Morris and W. Page Keeton of Texas. Prosser's response to them all: "that he was very sorry, that he greatly regretted the whole matter, and that he would never do it again." *Id.* at 164.

14. G.E. WHITE, *supra* note 5, at 162 (1980).

15. *Id.* at 156.

16. Wade, *supra* note 1, at 1255.

17. Eldredge, *supra* note 11, at 505.

18. As Prosser admitted elsewhere in his writings, the process of administering justice entailed weighing the interests of the plaintiff against the interests of the defendant, "together with the importance of those [interests] themselves." Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 17 (1953).

wisdom of countless cases, "no one of which precisely embodied all the elements of the formula" in quite the form propounded by Prosser.<sup>19</sup> By deriving these "general rules" of tort law, he hoped to provide encapsulations "sufficiently flexible to allow for the particular circumstances, and yet so rigid that lawyers may predict what the decision may be, and men may guide their conduct by that prediction."<sup>20</sup>

To accomplish his goal, Prosser collected a vast number of cases (more than 15,000 in the footnotes of the First Edition)<sup>21</sup> to dramatize the diversity of the reported decisions and presumably also to emphasize the need for general rules. 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. The clarity of understanding that these techniques produced undoubtedly helped to make the *Handbook* more popular and widely read.<sup>22</sup>

Style and methodology, however, are not everything in academic law. Ultimately, the success of Prosser's *Handbook* turned on a third factor largely external to its author's undoubted talents. That factor was timing. In the decades immediately preceding the appearance of the *Handbook*, an exuberant Realism had dominated the intellectual climate of American law.<sup>23</sup> In its extreme form, Realism maintained that "the participants in a case, the atmosphere it created, and the interests at stake were what determined [the case's] outcome, quite independent of rules or principles."<sup>24</sup> Indeed, militant Realists had scorned certainty and predictability as legitimate ends of the legal system, arguing that maturity and wisdom came with the recognition that legal issues were endlessly diverse, complex, and fluid.<sup>25</sup> By 1940, Realism had become the subject of a pronounced critical reaction. American legal thought seemed to be "in quest of itself,"<sup>26</sup> as scholars both in

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19. G.E. WHITE, *supra* note 5, at 157.

20. W. PROSSER, *supra* note 8, at 17-18.

21. *Id.* at vii.

22. These techniques also helped to make it more widely cited. For commentary on the Fifth Edition's appendix, collecting instances of "Prosser in the Courts," see *infra* notes 68-69 and accompanying text.

23. See generally G.E. WHITE, *supra* note 5, at 63-113.

24. *Id.* at 85 (citing reviews of L. GREEN, *THE JUDICIAL PROCESS IN TORTS CASES* (1931)). Green argued that "the science of law" was in reality "the science of the administration of law." Green, *The Duty Problem in Negligence Cases* (pt. 1), 28 COLUM. L. REV. 1014, 1016 (1929) (emphasis added).

25. G.E. WHITE, *supra* note 5, at 139.

26. See generally L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940).

torts and in other areas of the law began to confront and reject Realism's inability to formulate any comprehensive analytical framework on which trained professionals could agree.<sup>27</sup>

Prosser had the good fortune to be the right person in the right place at the right time. Clearly, any satisfactory response to Realism had to encompass more than a mere return to the barren Scientism to which Realism had been a reaction. By the 1940s Legal Science in its pure form was a dead letter.<sup>28</sup> To be sure, scholars had begun to show a renewed interest in doctrinal perspectives on torts, as a means of restoring unity and certainty to the law.<sup>29</sup> But the Realists' emphasis on process, which the essential accuracy of their observations fortified, was by then beyond total uprooting from the scholarly consciousness.<sup>30</sup> Instead, the quest for a new, reunifying vision of tort law evolved into a search not for the false certainty of hard-and-fast rules, but for a justifiable faith that American common law was fundamentally moral, rational, and, if subjected to diligent analysis, capable of producing predictable results on which competent scholars could agree. Thus, tort law might be viewed as a proper subject of what Professor G. Edward White of Virginia calls "Consensus Thought."<sup>31</sup>

The methodology of Prosser's *Handbook*, aided and abetted by his appealing style, ideally suited the needs of Consensus Thought, which it also helped to define. In effect, Prosser fused the insights of the Realists, who emphasized the possibilities of social

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27. See G.E. WHITE, *supra* note 5, at 139-40.

28. The school of thought known as Legal Science had flourished during the late nineteenth century, the heyday of the scientific method. Proponents of this approach rejected what they regarded as "dogmatic propositions" handed down, as if from on high, by prior generations of legal scholars. Nonetheless, the Scientists believed in the power of inductive logic to extract from the decided cases a series of general principles that then could be shaped into a comprehensive doctrinal system. Realists, in contrast, were skeptical of all doctrine, no matter how derived. They sought not an organizing theoretical framework for the law, but rather a methodology capable of explicating the decisional process in particular cases, with all the potential for purposeful engineering of social policy that such an approach seemed to promise. See generally *id.* at 20-113.

29. As exponents of this view, White cites Warren Seavey, Roscoe Pound, Clarence Morris, and Page and Robert Keeton, all of whom either taught or had studied law at Harvard. *Id.* at 153.

30. See *id.* at 110-13.

31. Consensus Thought sought to reestablish a theoretical predictability in the law by drawing usable generalizations from the study of large numbers of cases with similar or overlapping fact patterns. Although exemplars of this school never reasserted the Scientists' claim that the principles so discovered should be accorded the status of eternal verities, neither did they accept the apparent view of many Realists that predictability was a goal not only beyond attainment, but also vaguely illegitimate. See generally *id.* at 139-46.



engineering, with the countervailing demands of the doctrinally-oriented Scientists and their latter-day descendants for renewed predictability in the law.<sup>32</sup> Prosser's genius was to acknowledge and identify the various interests to be balanced, while relentlessly asserting (and, by copious citations and deceptively simple illustrations, seeming to prove) that the results of the cases, on proper analysis, were but multiple, somewhat varied yet ultimately consistent examples of Prosser's own general rules.

Whatever the relative importance of the *Handbook's* style, methodology, and timing, the magic of the First Edition was undeniable. The miracle is that Prosser managed not only to maintain but even to improve upon that achievement in the next thirty years.

### III. PROSSER'S SUBSEQUENT EDITIONS

Following the *Handbook's* initial triumph in 1941, it went through three further editions under Prosser's authorship. Each appeared more quickly than its predecessor. Prosser waited fourteen years before publishing the Second Edition in 1955. Nine years later came the Third Edition in 1964 and, eight years after that, the Fourth Edition in 1971.<sup>33</sup> Prosser continually reworked his treatment of the fundamental principles of tort law, clarifying his presentation through adjustments in organization, keeping the work fresh by the addition of new illustrations, and updating his citations to recent cases and articles. He also carried out major revisions of the *Handbook* in rapidly developing areas of law, such as products liability, defamation, privacy, and immunities. Together, these efforts dramatically enhanced the work's value to the profession.

Just as he had done in introducing the First Edition,<sup>34</sup> Prosser affected considerable modesty in describing the aims of succeeding volumes of the *Handbook*. In his preface to the Fourth Edition, he wrote:

As before, [the writer] must express his gratitude, together with his apologies, to the dozens of other able and distinguished writers whose ideas he has un-

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32. *Id.* at 157.

33. During the same period of 1941 to 1971, Prosser remained prolifically active on other scholarly projects. See *supra* notes 2 (articles), 3 (Second Restatement), and 4 (casebook). The secret of this phenomenal output, one of Prosser's collaborators has said, was a "pent-up energy" that allowed him to complete writings of epic proportions in "much less than minimum time." Wade, *supra* note 1, at 1256.

34. See *supra* text accompanying note 10.

blushingly appropriated. A packrat is at best a collector, and no heroic figure; and the most that can be said for him is that he sometimes chooses well.<sup>35</sup>

Surely, as a critical self-assessment, this is one of the great understatements in all legal writing. It may be praise too strong to label Prosser, or indeed *any* figure who inhabits primarily the groves of academe, "heroic." But much more can be said to commend the first four editions of the *Handbook* than that its author "sometimes ch[ose] well." In terms of both presentation and substance, Prosser proved himself to be what today might be called a Great Communicator.

Only a hopeless illiterate could dispute that Prosser presented his materials with uncommon felicity and tidiness. Edition after edition, the *Handbook* remained eminently readable—even a joy—because of the unique Prosser style.<sup>36</sup> But clarity of presentation also played a major part in enhancing the work's popularity. Each chapter contained many clearly labeled sections, which in turn divided neatly into a handful of clearly labeled segments of readily digestible length. From one edition to another, the organization of the chapters remained basically the same (apart from an occasional new or reorganized chapter reflecting increased emphasis on a particular area of the law by the courts and society).<sup>37</sup>

35. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* xi (4th ed. 1971).

36. See *supra* text accompanying notes 15-17. For example, Prosser's description of the reasonable person's responsibility for anticipating the conduct of others shows his unique style:

Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law. Under such ordinary circumstances, it is not reasonably to be expected that anyone will intentionally tamper with a railway track, blow up a powder magazine, forge a check, push another man into an excavation, assault a railway passenger, or hold up a bowling alley and shoot a patron. Although such things do occur, as must be known to anyone who reads the daily papers, they are still so unlikely in any particular instance that the burden of taking continual precautions against them exceeds the apparent risk.

W. PROSSER, *supra* note 35, at 173-74 (citations omitted). As White points out, Prosser's citations, indicating that each of these supposedly unanticipatable events was the subject of an actual lawsuit, "only heightened his effect." G.E. WHITE, *supra* note 5, at 156-57.

37. Not every change in the organization of the *Handbook* should be ascribed to changes in the state of the law. For example, the First Edition contained a single chapter, entitled "Proximate Cause," in which Prosser discussed both causation-in-fact and the concept that, in § 431 of the Restatement (Second) of Torts, he tried to rechristen "legal cause." Both the Second and Third Editions made a laudable attempt to clarify usage by treating these two aspects of causation in separate chapters. By the Fourth Edition, however, Prosser had given up the fight. In that edition, the two concepts reappeared in a single chapter, again entitled "Proximate Cause," with an apology that, because of "long ingrained practice," "no present prospect" of stamping out the offending terminology existed. W. PROSSER, *supra* note 35, at 244.

Thus, each revision of the *Handbook* bore a comforting resemblance to its predecessors, almost like an old friend whose appearance remains unchanged from visit to visit but for the addition of a bit of the latest finery here or there.<sup>38</sup>

On examination, however, the seeming familiarity of the *Handbook's* successive editions proves to have been in large measure an illusion—but an illusion with a purpose. Prosser claimed merely to be classifying, cataloguing, and synthesizing the reported decisions to reveal the general rules, or at least the bundles of relevant factors, underlying them all. In doing so, of course, he brought order and predictability to entire areas of law that theretofore had been studies in particularized chaos. The process, however, had substantive consequences, intended or otherwise.

Most of the changes wrought by Prosser were highly beneficial in developing and settling the law.<sup>39</sup> His contribution to advancing the law of privacy as a separate tort, for example, can hardly be understated. Before Prosser, the tort lacked any unifying core of doctrine. True, Warren and Brandeis had drawn attention to the need for society to protect the privacy of individuals in certain limited circumstances, notably when the media disclosed “gossipy” details of prominent people’s private lives,<sup>40</sup> and, in the wake of *Roberson v. Rochester Folding Box Co.*,<sup>41</sup> the New York legislature had provided statutory protections against unauthorized commer-

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38. Indeed, White says that a perusal of the organization of the *Handbook's* first four editions might leave one with “the impression . . . that tort law had changed only slightly from the 1940s to the 1970s.” G.E. WHITE, *supra* note 5, at 178.

39. To be sure, a few of Prosser’s well-meaning improvements on the law seem of dubious utility. Anyone who has taught torts from the Prosser, Wade, and Schwartz casebook, for example, occasionally must have doubted the wisdom of drilling into young minds the famous Prosser pseudo-rules for deciding “last clear chance” cases: (1) when plaintiff is helpless but defendant is aware of his or her peril, “all of the courts” allow recovery, although (2), in helpless plaintiff or unaware defendant cases, only a “considerable majority” hold for plaintiff, whereas (3), when plaintiff is merely inattentive and defendant is aware of the peril, “most courts” permit a plaintiff’s verdict, except that (4), if the matter is really one involving an inattentive plaintiff but an unaware defendant, “nearly all of the courts” agree that the plaintiff cannot recover. See W. PROSSER, *supra* note 35, at 427-33 (same characterizations of fact patterns as in First Edition, but more definite statements of courts’ decisionmaking tendencies concerning each of Prosser’s “rules”). Arguably, the law of last clear chance existed in a state of deplorable confusion before Prosser. The predictive value of his formulations, however, appears to be practically nil, and even he conceded elsewhere that there is “no substitute for dealing with the particular facts.” Prosser, *supra* note 18, at 32; see also G.E. WHITE, *supra* note 5, at 158-61 (discussing Prosser’s contribution to development of last clear chance doctrine).

40. See Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 195-96 (1890).

41. 171 N.Y. 538, 64 N.E. 442 (1902) (refusal to recognize claim for commercial appropriation).

cial exploitation of a person's name or likeness.<sup>42</sup> Nonetheless, in 1941 privacy remained nothing more than a catchbin of cases and concerns that the legal community dimly perceived to be somehow related.

In the First Edition of the *Handbook*, Prosser lumped the fledgling "right of privacy" with immunities, joint torts, and election to sue for restitution in a final chapter entitled simply "Miscellaneous." Arranging the cases into three distinct groups,<sup>43</sup> he described the right "as primarily concerned with the protection of a mental interest,"<sup>44</sup> and, as such, "only a phase of the larger problem of the protection of the plaintiff's peace of mind against unreasonable disturbance."<sup>45</sup> Thus, if intentional infliction of emotional distress were ever to receive general recognition, "the great majority of the privacy cases [might] be expected to be absorbed into it."<sup>46</sup> By the appearance of the Second Edition in 1955, Prosser saw a substantially brighter future for the right of privacy than he had predicted originally. Moving quickly past the dispute about whether the tort existed at all, he declared privacy to be "in reality . . . a complex of four distinct wrongs"<sup>47</sup> and awarded it a chapter of its own immediately following defamation. By 1960 he had fully rejected any understanding of privacy rights as merely a residual category of tort law and declared them to be "an independent basis of liability."<sup>48</sup> The Third Edition in 1964 identified the "common features" of the four branches of the tort,<sup>49</sup> and the Fourth Edition in 1971 almost proudly proclaimed that "as yet no decided case allowing recovery" in privacy had occurred "which does not fall fairly within one of the four categories" that Prosser himself had invented!<sup>50</sup>

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42. 1903 N.Y. LAWS ch. 132, §§ 1-2 (current version at N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976)).

43. At this point, Prosser's terminology was imprecise—understandably so, in view of the essentially creative character of the effort. Today's students would recognize the three types of cases distinguished in the First Edition as commercial appropriation, public disclosure of private facts, and intrusion into the plaintiff's solitude.

44. W. PROSSER, *supra* note 8, at 1053, citing Harper and McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426.

45. W. PROSSER, *supra* note 8, at 1053-54.

46. *Id.*

47. The fourth wrong, added to Prosser's catalogue since 1941, was what we presently call "false light" privacy.

48. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 422 (1960).

49. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 842-44 (3d ed. 1964) (e.g., plaintiff in each instance has a personal rather than a property right).

50. W. PROSSER, *supra* note 35, at 816.

It was a bravura performance. In his typical fashion, Prosser had collected the cases, rationalized their results by distilling the underlying concerns of the courts, balanced the interests at stake in each of the various (but previously unrecognized) branches of the tort, and stated general rules for use in deciding future cases.<sup>51</sup> Similar stories might be told concerning many other torts that Prosser "sponsored" over the years.<sup>52</sup>

In assessing the *Handbook's* importance to the literature of torts, the validity and worth of its author's insights on any particular topic may properly be subject to debate. This much, however, is not: in the last thirty years of his life, Prosser lived to see his unassuming hornbook become indisputably the single most important torts resource in America. Speaking of the Fourth Edition on the occasion of Prosser's death, his friend and colleague, Laurence Eldredge, said simply: "I doubt if *any* American scholar in the field of torts could hope to equal it."<sup>53</sup> It has fallen to the revisers of the Fifth Edition to try to do just that. How well have they succeeded?

#### IV. THE FIFTH EDITION

Prosser's passing in 1972 occasioned among his professional colleagues both a flood of fond recollection and a profound sense of loss.<sup>54</sup> In every meaning of the word, he had become irreplaceable. Yet, at the time of his death, much of his work was ongoing. How, and by whom, should it be continued?

Fortunately, two of Prosser's projects already were assured of an able successor: Dean John W. Wade of Vanderbilt. Wade followed Prosser as Reporter for the *Restatement (Second) of Torts*

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51. See also G.E. WHITE, *supra* note 5, at 173-76 (discussing Prosser's contribution to the development of privacy law).

52. Space limitations prevent the multiplication of examples in this Review, but readers interested in further exploration quickly will discover certain predictable patterns in Prosser's method. His campaign to expand the law of products liability, to take but one instance, bears a striking resemblance to the right of privacy saga just recounted. White discusses these efforts at length. See *id.* at 168-73. Also of interest is the treatment accorded Prosser's contributions to products liability in Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 416, 505-18 (1985). While acknowledging Prosser's "extraordinary influence over the direction of the law," Priest argues that Prosser's "ideas and proposals were derived from those of [Fleming] James and [Friedrich] Kessler" and that he accomplished the adoption of § 402A of the *Restatement (Second) of Torts* by the American Law Institute through "clever exhortation built on a blurred interpretation of then-current legal developments." *Id.* at 465.

53. Eldredge, *supra* note 5, at 1246-47.

54. See, e.g., Wade, *supra* note 1; Eldredge, *supra* note 5; Malone, *More in Sorrow Than in Anger*, 60 CALIF. L. REV. 1252 (1972).

upon the latter's resignation in 1970.<sup>55</sup> In addition, at Prosser's invitation, Wade had become coauthor of Prosser's casebook beginning with the 1971 edition.<sup>56</sup>

The *Handbook* was another matter, although perhaps less pressing. The Fourth Edition had been published in 1971, only a year before Prosser's death. It had neither a coauthor nor a designated successor.<sup>57</sup> That choice, therefore, fell to West Publishing Company, which held the copyright in the work. In 1976, West approached W. Page Keeton of Texas about the possibility of updating the *Handbook*, and Keeton agreed.<sup>58</sup> The scale and importance of the undertaking led Keeton, in turn, to engage the assistance of three additional revisers<sup>59</sup> under Keeton's own leadership as General Editor. The product of their labors, entitled *Prosser and Keeton on the Law of Torts*, appeared in 1984.<sup>60</sup>

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55. Volumes 1 and 2 of the Second Restatement were carried to completion by Prosser and published in 1965. At the time of his resignation, Prosser also had prepared, and had reviewed with his Advisers (including Wade), preliminary drafts for the remaining two volumes. Portions of the outstanding Prosser drafts, especially those concerning defamation and privacy, were quickly outdated by major upheavals in the law. These portions were subsequently rewritten by the new Reporter. Overall, the drafts required extensive revision and supplementation. Volumes 3 and 4, bearing the distinct imprint of Wade's careful reconsideration of the areas of law treated therein, were published by the American Law Institute in 1977 and 1979 respectively. See *RESTATEMENT (SECOND) OF TORTS*, vol. 3 at VII-VIII (1977), vol. 4 at VII-VIII (1979).

56. W. PROSSER & J. WADE, *CASES AND MATERIALS ON TORTS* (5th ed. 1971). West's friendly rival, Foundation Press, Inc., publishes the casebook, *supra* note 4, now in its Seventh Edition. Wade's present coauthor is Victor E. Schwartz, a prominent Washington D.C., practitioner.

57. Prosser apparently had anticipated that Prof. Allan H. McCoid of the University of Minnesota Law School would assume responsibility for the *Handbook*, but McCoid's tragic death in 1973 forestalled that plan.

58. Keeton had long been a professional associate of Prosser. See *supra* note 12 and accompanying text (Keeton's book review of the *Handbook's* First Edition). In addition, Keeton and his brother Robert previously had coauthored a torts casebook in West's American Casebook Series: P. KEETON & R. KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS* (1st ed. 1971, 2d ed. 1977). The present version of that work is P. KEETON, R. KEETON, L. SARGENTICH & H. STEINER, *CASES AND MATERIALS ON TORTS, AND ACCIDENT LAW* (1983).

59. See *supra* note 7 (listing names and institutional affiliations of other revisers).

60. PROSSER AND KEETON, *supra* note 6. Although Prosser's name has been deleted from the list of authors, it now appears (with Page Keeton's) in the title of the work. Also, the designation "Handbook" has been deleted from the title. Hence, the work is cited hereinafter as "Fifth Edition."

Two further preliminary notations are appropriate here: (1) the revisers elected not to claim individual credit for the sections of the Fifth Edition for which each had primary responsibility, thereby creating a most entertaining guessing game for their colleagues in academia; and (2) the cut-off date for the bulk of the research in the Fifth Edition, insofar as one can judge from the footnote citations, appears to have been 1982.

### A. Structure and Presentation

Even the most cursory comparison of the tables of contents in the Fourth and Fifth Editions reveals that the revisers have scrupulously observed one of Prosser's own cardinal precepts: no matter how extensive the substantive changes in the work as a whole, a comforting sense of familiarity should be preserved through retention of its overall structure.<sup>61</sup> Indeed, with but one exception,<sup>62</sup> the chapter-by-chapter layout of the two editions is precisely the same.<sup>63</sup> Within a few of the chapters, the subject matter presentation has been significantly restructured,<sup>64</sup> and within individual sections, the revisers have proceeded strictly according to the dictates of the material itself. Overall, however, the effect is one of continuity with the Fourth Edition. This preservation of familiar structure from the *Handbook's* previous editions undoubtedly will promote and facilitate ready reference to the Fifth Edition by students, lawyers, and judges.

The revisers and their publisher have taken care to maximize the utility of the work in other, more practical ways as well. Unlike its predecessors, the Fifth Edition is available in two versions, one for students and one for practitioners. In virtually all significant aspects, including the text and footnotes, the Student Edition and the Lawyer's Edition are identical.<sup>65</sup> The main differences, and certain useful common features, occur in the end matter.

One common feature is entirely predictable—the "Table of Cases." Although otherwise valuable, the table has one notable deficiency: it provides entries indexed by first-named party only (e.g.,

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61. The revisers note, with only slight overstatement, that "the general plan of this book is the same as that adopted by the Restatement of Torts." PROSSER AND KEETON, *supra* note 6, at 31.

62. The revisers have deleted the Fourth Edition's Chapter 21 ("Constitutional Privilege"), but shifted its contents to other chapters. See *infra* text accompanying notes 81-90.

63. The revisers have renamed a few chapters along the way in order to reflect more accurately their contents. Generally, this is helpful. The chapter formerly entitled "Liability Insurance," for example, has been expanded and rechristened "Compensation Systems." In one instance, however, the result is so cumbersome that the revisers seem to have paid too high a price for the presumed gain in clarity: Chapter 13, formerly designated "Strict Liability," is now "Strict Liability for Physical Harm to Persons and Tangible Things From Accidental Invasions."

64. Two examples of wholesale reorganization occur in the chapters concerning products liability and nuisance. See *infra* text accompanying notes 91-98, 114-20.

65. To be sure, obvious cosmetic differences exist between the two versions. The binding of the Lawyer's Edition, for example, is satisfyingly more posh; and the Student Edition omits any consideration of the West Hornbook Series' venerable antecedents. See *supra* note 6. But clearly such features, by themselves, would not justify the \$19 price differential between the two editions.

*New York Times Co. v. Sullivan* appears under "N" but not "S"). That failing, however, is unavoidable because the table already fills 171 pages.

The second feature common to both editions—an appendix entitled "WESTLAW References"—is more unusual. The purpose of the appendix is to explain the use of WESTLAW, the publisher's computer-assisted legal research service, in conjunction with the preformulated search requests that follow every section of the text. WESTLAW staff members, rather than the revisers, prepared the search requests (or "queries"). On the whole, the queries appear to perform as promised,<sup>66</sup> and the appendix provides suggestions to assist the user in tailoring a preformulated search request to suit his or her specific research problem.<sup>67</sup> This feature is mercifully short at only fourteen pages.

In addition to the two resources just mentioned, the end matter to the Lawyer's Edition contains two features not available in the Student Edition. The first is an eighty-three page table tracing the recent history of "Prosser in the Courts." The table lists cases decided since January 1, 1978, that cite the Fourth Edition of the *Handbook* as authority.<sup>68</sup> Citations are arranged under the section number of the subject matter as it appears in the Fifth Edition. A prefatory note by the publisher explains that "the primary purpose of the table is to afford ready access to the prevailing local rule or, where local precedent is inadequate, to other judicial authority."<sup>69</sup>

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66. There are exceptions. For example, one of the queries following § 96 of the text ("Negligence and Liability for Physical Harm to Persons and Tangible Things") reads: "topic(313a) /p negligenc\*\* /p fail! adequate\*\* /p warn!". When the author first tested this query in early 1985 using the "ALLSTATES" database, WESTLAW rejected the specified request with the notation: "YOUR QUERY CANNOT BE COMPLETED BECAUSE IT HAS GENERATED TOO MANY SEARCH TERMS TO BE PROCESSED EFFICIENTLY." The search logic of WESTLAW was modified subsequently, and the query in question now runs without objection.

67. Despite these virtues, the crassly commercial and self-laudatory tone of this appendix likely will offend at least a few readers. One doubts, for example, whether it was necessary to advise the reader, as the final sentence of the appendix does, that "[t]he power and flexibility of WESTLAW affords users of [the Fifth Edition] a unique opportunity to greatly enhance their access to and understanding of the law of torts." PROSSER AND KEETON, *supra* note 6, Lawyer's Ed. at 1174, Student Ed. at 1090.

68. The publisher compiled the table using a full text word search on WESTLAW. West chose the beginning date for the search arbitrarily, presumably with an eye both to printing costs and to the table's utility. PROSSER AND KEETON, *supra* note 6, at 1177.

A similarly derived table appears in the latest edition of C. MCCORMICK, MCCORMICK ON EVIDENCE (E. Cleary 3d ed. 1984), probably West's second most popular hornbook. "McCormick in the Courts" contains approximately 3000 entries. Perhaps to no one's surprise, "Prosser in the Courts" is larger still at 3443 entries.

69. PROSSER AND KEETON, *supra* note 6, at 1177. The revisers, exercising commendable



The second significant feature of the Lawyer's Edition not found in the Student Edition is an eighty-two page appendix entitled "Significant Statutes and Proposed Statutes on Tort Law." This compendium provides examples of federal and state legislation, either already enacted or presently under consideration, in areas of the law in which codification of tort principles is, or is becoming, prevalent.<sup>70</sup> Among the statutes discussed are sample medical malpractice acts, the Federal Employers' Liability Act and the Federal Tort Claims Act, various civil rights statutes, federal and state trademark acts, and proposed (but as yet unadopted) legislation concerning products liability and comparative fault.<sup>71</sup>

Like the appendices, the text of the Fifth Edition provides ample evidence of the revisers' learning and industry. Quite apart from instances of significant substantive reworking,<sup>72</sup> the revisers' determination to enhance the value of the work to the reader is plainly visible. Virtually all the chapters sport new introductions clearly establishing the practical and doctrinal contexts of the material to follow. Within each chapter, the presentation generally is organized more clearly than in predecessor editions, often with additional and more precise headings to highlight important distinctions. In their choice of language, the revisers have been sensitive to the problem of gender-specificity.<sup>73</sup> Even the Fifth Edition's

restraint, appear not to have made any special effort in their footnotes to include cases citing the Fourth Edition as authority.

70. Prosser's likely reaction to this appendix must remain a matter of amusing conjecture. His attachment to the common law was legendary, and the Fourth Edition straightforwardly identified courts as the principal crucibles of "social engineering" in the field of torts. See W. PROSSER, *supra* note 35, at 14-16. Although tort law no doubt remains overwhelmingly a creature of common law, Americans in the 1980s live in an era of accelerating codification. The revisers recognize the point explicitly in the Fifth Edition's helpful § 3 ("Policy and Process"), acknowledging the difficulties that this development poses for the courts and referring the reader to thoughtful reflections on the problem in the secondary literature, including CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1981). See PROSSER AND KEETON, *supra* note 6, at 15-20.

71. Senate Bill 44, the proposed products liability statute, was introduced in Congress in January 1983, but died in committee. The sample comparative negligence statute, curiously, is not the Uniform Comparative Fault Act. Rather, it is a proposed state act, rejected in Texas despite sponsorship by a blue ribbon committee of the State Bar (including Page Keeton), which the revisers nonetheless suggest could be adopted "in any state . . . by judicial decision." PROSSER AND KEETON, *supra* note 6, at 1148.

72. See *infra* text accompanying notes 104-23.

73. In § 32, for example, the Reasonable Man has become the Reasonable Person. The revisers' general sensitivity to the problem of sexist language, however, should not be confused with a whole-hearted commitment to the use of inclusive language in its place. As they explain in a prefatory note, "[t]he pronouns 'he,' 'his,' 'him,'" used throughout the book, "are not intended to convey the masculine gender alone"; rather, they are employed "in a

footnotes are greatly improved.<sup>74</sup> Old cases and articles have been culled for relevance, and new matter added for currency. In addition, the revisers have addressed and remedied one of the *Handbook's* most glaring deficiencies: the footnotes to the Fifth Edition quite consistently say what the text indicates they are *supposed* to say.<sup>75</sup>

One further notable aspect of the text generally: in comparison with prior volumes of the *Handbook*, the Fifth Edition places considerably less emphasis on common-law history and correspondingly greater stress on contemporary developments, including frequent references to the *Restatement (Second) of Torts*.<sup>76</sup> The revisers also refer often to recent academic literature, including, appropriately, their own work.<sup>77</sup> Interestingly, however, the Fifth Edition contains few, if any, citations to the growing and important body of scholarship devoted to economic analysis of tort law.<sup>78</sup>

generic sense so as to avoid awkward grammatical situations which would likely occur due to the limitations of the English language." PROSSER AND KEETON, *supra* note 6, Lawyer's Ed. at vii, Student Ed. at xvii.

74. One purely mechanical but exceedingly welcome improvement is that footnote numbers begin afresh with each section rather than simply repeating from 1 to 99, as in prior editions.

75. In fairness, the Fifth Edition has the great advantage that many of Prosser's campaigns for reform, supported in previous editions of the *Handbook* by citations of dubious relevance, succeeded so well that the revisers now can justify the propositions advanced in their text by reference to cases that invoke the *Handbook* as authority!

For another reflection on Prosser's propensity for invoking cases not directly on point in support of one or another of his campaigns for improvement of the law, consider Priest's assessment of the decisions cited by Prosser to the American Law Institute in urging the adoption of the final, broadly stated version of Restatement (Second) of Torts § 402A: "A rereading of these cases today suggests either that what Prosser meant by strict liability is vastly different from the regime that has evolved or that Prosser's discovery of a trend in the case law was largely his own creation." Priest, *supra* note 52, at 514.

76. One explanation for the revisers' greater reliance on the Restatement (Second) is that two of its volumes appeared subsequent to publication of the Fourth Edition. See *supra* note 55. But the revisers also seem to delight less in the peculiarities of common law historical development than did Prosser, and to be more devoted to the systematic explication of the law that reference to the Restatement facilitates.

To be sure, in some instances, contrary to the general pattern, the revisers *deemphasize* the Restatement (Second). See, e.g., *infra* note 92 (cites but does not quote provisions of § 402A). In such instances, case law development and critical scholarship subsequent to the Fourth Edition arguably justify decreased attention to Restatement formulations.

77. If anything, the revisers are *less* aggressive in promoting their views than one reasonably might have expected. For example, in Chapter 14 ("Compensation Systems"), the revisers have deleted Prosser's sarcasm but otherwise preserved most of the Fourth Edition's text—including Prosser's discussion of the Keeton-O'Connell plan (proposing "no-fault" automobile insurance), which is actually *shortened*.

78. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); *Symposium on Efficiency as*

The rationale, although unstated, is clear: such analysis is radically incompatible with Consensus Thought, as represented by both Prosser and the revisers.<sup>79</sup> Indeed, Page Keeton describes the selection of his fellow revisers as having been based on the principle that "those participating in the revision process should in general be sympathetic with (a) the nature and structure of the book to be revised, and (b) the major objectives of the book's original author."<sup>80</sup>

Looking, then, solely at structure and presentation, one can safely observe that the Fifth Edition significantly adds to, and in many ways improves upon, its predecessors. But what of the *substance* of the Fifth Edition?

### B. *Substantive Aspects*

Several chapters in the new *Prosser and Keeton* have been heavily revised from the Fourth Edition, largely because of the vast amount of change in the law since 1971. Perhaps the most obvious reworking is the deletion of the Fourth Edition's chapter on constitutional privilege,<sup>81</sup> accompanied by the integration of its subject matter into the Fifth Edition's chapters on defamation<sup>82</sup> and privacy.<sup>83</sup> The lack of similar integration had been a conspicuous deficiency of the Fourth Edition. There, for example, Prosser's chapter on defamation<sup>84</sup> consisted of sixty-five pages, but failed completely to apprise the reader of the significant constitutionalization of the area that the Supreme Court already was undertak-

*a Legal Concern*, 8 *HOFSTRA L. REV.* 485; *A Response to the Efficiency Symposium*, 8 *HOFSTRA L. REV.* 811 (1980).

79. Economic analysis of law focuses its examination of torts cases on the costs—both social and private—of injury-causing occurrences, with a view toward allocating resources to maximize efficiency. The basis of such analysis "is the assumption that the people involved with the legal system act as rational maximizers of their satisfactions"; its conclusion, "that the logic of the law is really economics . . ." Posner, *The Economic Approach to Law*, 53 *TEX. L. REV.* 757, 761, 764 (1975).

The revisers are not alone among contemporary torts scholars, of course, in giving short shift to this school of thought in their commentaries. See generally, e.g., M. SHAPO, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* 2-17 (1984) (opting instead for a more traditional process of decisionmaking, in part because of "its telescopic perspective, comprehending a multitude of interests and considerations outside the articulated, or judicially divined, risk-benefit choices of the parties").

80. PROSSER AND KEETON *supra* note 6, Lawyer's Ed. at ix, Student Ed. at xix.

81. W. PROSSER, *supra* note 35, at 819-33.

82. PROSSER AND KEETON, *supra* note 6, at 771-848.

83. *Id.* at 849-69.

84. W. PROSSER, *supra* note 35, at 737-801.

ing. Not until the chapter on constitutional privilege<sup>85</sup> was *New York Times Co. v. Sullivan*,<sup>86</sup> decided seven years before the publication of the Fourth Edition, even cited—and then only once.<sup>87</sup> No doubt, Prosser recognized the importance of *Sullivan* and its progeny.<sup>88</sup> But his isolation of these cases in a separate chapter and the discussion in the defamation chapter tended to emphasize common-law history at the expense of current first amendment developments of superseding consequence. In the Fifth Edition the revisers correct that imbalance by placing proportionately more emphasis on the constitutional aspects of modern defamation law and by interweaving their discussion of *Sullivan* and more recent first amendment cases<sup>89</sup> with an explanation of the common-law principles of continuing significance in the area. The revisers treat privacy law similarly.<sup>90</sup>

Another example of extensive revision mandated chiefly by extensive case law development is the Fifth Edition's chapter on products liability.<sup>91</sup> In this area, perhaps more than any other, the torrent of decisions since 1971 had rendered the Fourth Edition's discussion obsolete long before the appearance of its successor. That obsolescence, however, resulted only in part from the sheer number of cases. The greater significance of the courts' hyperactivity in the products liability field in the 1970s and early 1980s was that it exposed the numerous and difficult theoretical problems barely visible on the horizon when the Fourth Edition went to press. Relatively speaking, Prosser's task was easy. With respect to strict tort liability for products, for example, he could content himself with offering little more than the *Restatement (Second)*'s Section 402A<sup>92</sup> and Justice Traynor's seminal opinion in *Greenman v.*

85. See *supra* note 81.

86. 376 U.S. 254 (1964).

87. W. PROSSER, *supra* note 35, at 819-21.

88. E.g., *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

Besides describing *Sullivan* as a "bombshell," W. PROSSER, *supra* note 35, at 819, Prosser asserted flatly that the Court's broadening of the traditional defamation privileges there and in subsequent decisions was "unquestionably the greatest victory won by the defendants in the modern history of the law of torts." *Id.*

89. E.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

90. Compare W. PROSSER, *supra* note 35, at 802-18 with PROSSER AND KEETON, *supra* note 6, at 849-69.

91. PROSSER AND KEETON, *supra* note 6, at 677-724.

92. Prosser quoted § 402A in the text of the Fourth Edition. W. PROSSER, *supra* note 35, at 657. The revisers of the Fifth Edition merely allude to §402A, PROSSER AND KEETON, *supra* note 6, at 693, without setting forth its oft-cited terms in their text or footnotes.

*Yuba Power Products, Inc.* (which Prosser described as “[t]he first case to apply [section 402A]”),<sup>93</sup> and the satisfied observation that, by 1971, this “simple ground” of products liability had “swept the country.”<sup>94</sup> Strict products liability, however, has proved to be anything but “simple.” An obvious instance concerns the *types* of damages for which recovery should be permitted under each of the available theories. Whereas the Fourth Edition barely noticed the issue,<sup>95</sup> the Fifth Edition delineates the problem and propounds solutions.<sup>96</sup> Similarly, the newer edition is greatly more detailed and clear than its predecessor in discussing the many problems, including availability of the state-of-the-art defense, that have confronted the courts in their attempts to define when a product is dangerously defective or unsafe.<sup>97</sup> In summary, the products liability chapter, like the chapters on defamation and privacy, illustrates the revisers’ considerable facility in updating, adapting, clarifying, and, in general, improving the materials that Prosser bequeathed them.<sup>98</sup>

Interestingly, despite the revisers’ general enthusiasm for up-

Presumably, the revisers were influenced in this decision by the substantial criticism to which § 402A has been subjected, both in the courts and in learned publications. *See, e.g.* *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973). Still, it seems peculiar virtually to omit discussion of the provision around which so much of the later debate has centered.

93. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), characterized in W. PROSSER, *supra* note 35, at 657. The revisers, with the benefit of hindsight, note more accurately that *Greenman* was “[t]he first case to apply a tort theory of strict liability generally.” PROSSER AND KEETON, *supra* note 6, at 694.

94. W. PROSSER, *supra* note 35, at 657.

95. *Id.* § 101 (“Interests Protected”).

96. For example, the revisers come down firmly in favor of permitting recovery, under strict liability in tort, for physical harm to persons and tangible property, but would preclude awards for intangible direct or consequential economic losses except under warranty theory. *See* PROSSER AND KEETON, *supra* note 6, §§ 95A (“Warranty and Intangible Economic Losses”), 98 (“Strict Liability in Tort for Physical Harm to Persons and Tangible Things”), 101 (“Summary—Interests Protected and Theories of Recovery”).

97. *See id.* § 99 (“Meaning of Dangerously Defective or Unsafe Products”). The footnotes to this section, and indeed to the entire chapter, are especially full and helpful. The revisers have been careful to cite examples of scholarship representing a variety of viewpoints, including their own. On the particularly vexing issue of whether strict liability should be imposed on manufacturers for failure to warn of dangers not knowable as of the date of marketing, a citation candidly acknowledges a change in position by one of the revisers. *Id.* at 697 n.21; *see also* Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 761-64 (1983).

98. Other chapters, although not revised wholesale for updating changes, contain individual sections dramatically revised for that purpose. *E.g.*, PROSSER AND KEETON, *supra* note 6, ch. 9 (“Limited Duty”), § 55 (“Prenatal Injuries”).

dating, they have not become wild-eyed, plaintiff-oriented radicals, determined to be "on the cutting edge" at all costs. For instance, in discussing the trend inspired by *Rowland v. Christian*<sup>99</sup> toward abolition of the traditional distinctions in the duties of care owed to persons entering land (based upon the entrant's status as a trespasser, licensee, or invitee), the Fifth Edition notes that the abolition movement has come "to a screeching halt," as courts "acquir[e] more generally a healthy skepticism toward invitations to jettison years of developed jurisprudence in favor of a beguiling legal panacea."<sup>100</sup> Similarly, at the conclusion of a valuable examination of the effects of the adoption of comparative fault upon other tort doctrines,<sup>101</sup> the revisers caution courts "not to become caught up by the sheer momentum of the movement, and with the facile simplicity of the doctrine, but instead [to] apply deliberate thought to each new call for its further extension."<sup>102</sup> In these passages, the Fifth Edition seems to be much less a vehicle of reform than were its predecessors.<sup>103</sup>

The revisers, however, are not entirely without an agenda of their own. On the contrary, many of the Fifth Edition's most interesting changes from prior incarnations of the *Handbook* result not primarily from updating, but from the revisers' disagreement with Prosser over the treatment of certain topics. Generally speaking, these changes are the product of the revisers' effort to achieve a clearer understanding of the present state of the law, rather than proposals for new departures in doctrine.

Typical of this latter type of change is the Fifth Edition's treatment of causation in fact.<sup>104</sup> In the main, the revisers have performed what might be called a "nip and tuck" operation. They carefully preserve the Prosser legacy—the framework of analysis, the actual language of the Fourth Edition whenever possible, and even most of the hypotheticals and examples that Prosser drew from the case law—while tightening a little here, clarifying a little there.<sup>105</sup> But the revisers also make their own contribution, and

99. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

100. PROSSER AND KEETON, *supra* note 6, at 433-34.

101. These doctrines include last clear chance, assumption of risk, and liability theories not based on negligence.

102. PROSSER AND KEETON, *supra* note 6, at 479 (footnote omitted).

103. *Cf., e.g., supra* notes 39-51 and accompanying text (expansion of right of privacy in earlier editions).

104. PROSSER AND KEETON, *supra* note 6, ch. 7 ("Proximate Cause"), § 41 ("Causation in Fact") at 263-72.

105. The usual element of updating is also present. In discussing the plaintiff's burden

identify it unambiguously as their own. In describing the "substantial factor" test exemplified by the Minnesota Supreme Court's decision in *Anderson v. Minneapolis, St. P. & S.S.M.Ry. Co.*,<sup>106</sup> Prosser had commented that, as applied to actual causation, "no better test" had yet been devised.<sup>107</sup> The revisers not only delete that observation, but offer a new, "more helpful" test, apparently of their own devising:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.<sup>108</sup>

The revisers make a strong case for their alternative formulation,<sup>109</sup> which in many respects provides an apt latter-day example of Consensus Thought at work. The Fifth Edition, however, then proceeds to do something that would have been highly unusual in prior editions of the *Handbook*: it lets light in on the magic. Rather than citing selected cases *consistent* with their new test and leaving it at that, as Prosser typically did when no authority directly supported his own additions to the law, the revisers simply aver the existence of these cases and straightforwardly admit that "no judicial opinion has *approved* this formulation."<sup>110</sup> No doubt the revisers should be commended, as scholars, for their candor, but forthright disclosure that their alternative test lacks direct support in the case law takes much of the fun out of the game and, more importantly, may decrease the likelihood that this sensible attempt to restate the unifying rationale underlying the reported decisions will be explicitly adopted by others.<sup>111</sup>

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of proof in causation-in-fact cases, the Fifth Edition considers not only *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948), which had received extensive treatment in the Fourth Edition, but also *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), the more recent decisions first applying the theory of market share liability. PROSSER AND KEETON, *supra* note 6, at 271-72.

106. 146 Minn. 430, 179 N.W. 45 (1920).

107. W. PROSSER, *supra* note 35, at 240.

108. PROSSER AND KEETON, *supra* note 6, at 268.

109. *Id.* at 268-69.

110. *Id.* at 268 n.40 (emphasis added).

111. Elsewhere in Chapter 7, in the discussion of legal (or "proximate") cause, the revisers are more subtle in advocating their own viewpoints. Compare, for example, § 42's discussion of "Generalizations About Proximate Cause" and § 45's survey of "Functions of Court and Jury," *id.* at 273-74, 319-21, with R. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 49-60, 79-81, 90-100 (1963). Having forcefully made the case for a "fresh approach" to the Risk Rule in determinations of tort liability, Keeton notes that, at least regarding adoption of the Restatement (Second) of Torts, further advocacy would have proved "futile," owing to "the obstacle of firmly held contrary opinions, including that of the Reporter" (citing the

The chapters on nuisance<sup>112</sup> and strict liability<sup>113</sup> provide even more dramatic instances of revisions based principally on differences of opinion between Prosser and the revisers. The former chapter, besides being greatly elaborated,<sup>114</sup> has been reorganized entirely and presents perhaps the most conspicuous example of strong disagreement.<sup>115</sup> Among other deviations from the Prosserian gospel, the revisers reject the Fourth Edition's contention that "nuisance is a field of tort liability, rather than a type of tortious conduct."<sup>116</sup> Rather, in the view of the revisers, "[p]rivate nuisance is a tort . . . arising from the [actor's] *intentional interference* [with] an interest in land that is deemed worthy of legal protection."<sup>117</sup> The revisers also disagree with Prosser's description of the

proximate cause chapter of the Second Edition of the *Handbook*). *Id.* at 96 & n.95.

112. PROSSER AND KEETON, *supra* note 6, ch. 15 at 616-54 ("Nuisance").

113. *Id.*, ch. 13 at 534-83 ("Strict Liability for Physical Harm to Persons and Tangible Things From Accidental Invasions").

114. Chapter 15 is nearly half again as long in the Fifth Edition as it was in the Fourth. The writing, although it may lack Prosser's verve, is considerably more clear. One quibble: the revisers have "adopted," to use their own words, a highly useful passage from D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 332-35 (1973), concerning the availability of damages as a remedy in actions for nuisance. PROSSER AND KEETON, *supra* note 6, at 637-40. Using a direct quotation of such length, with concomitant problems in the numbering of its extensive footnotes, seems unduly awkward. Perhaps it will be possible in future editions simply to recast this material, with an appropriate acknowledgment, as part of the text of PROSSER AND KEETON.

115. Compare the section headings employed by Prosser and the revisers:

FOURTH EDITION	FIFTH EDITION
§ 86. Meaning of Nuisance	§ 86. Meaning of Nuisance — Historical Origins
§ 87. Basis of Liability	§ 87. Private Nuisance: The Tort Action for Damages
§ 88. Public Nuisance	§ 88. Substantial and Unreasonable Interference
§ 89. Private Nuisance	§ 88A. Unreasonable Conduct and Injunctive Relief
§ 90. Remedies	§ 88B. Conduct of Others and the Plaintiff as Factors of Importance
§ 91. Defenses	§ 88C. "Absolute" Nuisance
	§ 89. Remedies
	§ 90. Public Nuisance: Remedies Available to the State

Elsewhere throughout the Fifth Edition, the revisers have been at pains to preserve at least the structure of presentation that Prosser employed in earlier editions. *See supra* notes 61-64 and accompanying text.

116. W. PROSSER, *supra* note 35, at 573.

117. PROSSER AND KEETON, *supra* note 6, at 622 (emphasis added). The revisers' objections are not confined to Prosser's treatment of private nuisance in prior editions. At another point in the Fifth Edition, they describe § 822 of the Restatement (Second) of Torts as approving liability for interference with another's use and enjoyment of land "not only



theoretical basis of the private tort action arising from a public nuisance. In the Fourth Edition Prosser had stated that a private action will lie "[only] if the plaintiff [can] show that he ha[s] suffered damage particular to him, and not shared in common by the rest of the public."<sup>118</sup> The revisers suggest instead that

a better description of the results of cases would show that a private individual cannot complain of public nuisance either by way of maintaining a tort action for damages or by way of obtaining an abatement of the so-called nuisance unless the conduct has resulted in the commission of an independent tort to the plaintiff.<sup>119</sup>

What seems odd is not the revisers' reconsideration of the tort's basis—which, although not beyond argument, certainly has much to recommend it—but rather their method of expounding it. Had Prosser himself thought it useful to readers to adopt a revised pattern of analysis, he simply would have replaced the old with the new. The revisers offer both,<sup>120</sup> thereby depriving their own recommended approach of the authority that they presumably believe it deserves. Similarly, in the strict liability chapter, the revisers clearly endorse the policy choices embedded in section 520 of the original *Restatement of Torts*,<sup>121</sup> believe that the *Restatement (Second)* represents a historic "wrong turn" in the law,<sup>122</sup> and therefore reject the positions that Prosser espoused in prior edi-

when the interference is intentional and proves to be unreasonable, but also when the interference is accidental and otherwise actionable under rules controlling liability either for negligent, reckless, or abnormally dangerous conduct"; and they observe dryly that this provision "has produced much confusion and some erroneous results." *Id.* at 652. The same determination to distinguish carefully between intentional and accidental invasions of interests led the revisers to make substantial revisions in Chapter 3 ("Intentional Interference With Property") also.

118. W. PROSSER, *supra* note 35, at 586.

119. PROSSER AND KEETON, *supra* note 6, at 650-51 (emphasis added).

120. The subsection entitled "The Tort Action—[A] General Case Approach," *id.* at 646-50, is lifted in toto from the Fourth Edition. The subsection entitled "The Tort Action—A Recommended Approach," *id.* at 650-52, is entirely new. Apparently out of deference to Prosser's memory, the Fifth Edition does not indicate the authorship of either subsection.

121. As capsulized by the revisers, "the idea was to visit strict liability on all those actors, almost altogether enterprisers, who elected to engage in an activity, however socially desirable, that introduced into the community . . . [a] risk . . . both highly dangerous and unusual." The revisers hold that "the First Restatement set forth the best way of articulating and describing the requirements that ought to be met for applying strict liability to dangerous activities." *Id.* at 555.

122. According to the revisers, the Restatement (Second) "is an attempt to combine Prosser's original ideas as to 'non-natural' or 'extraordinary uses' with the ideas accepted in the First Restatement," but "without any substantial change in judicial decisions" that would have justified the reformulation. The result—the six-factor analysis contained in present § 520—is "virtually the same thing" as negligence theory and thus "unsatisfactory." *Id.*

tions of the *Handbook*. But they retain Prosser's treatment of abnormally dangerous things and activities from the Fourth Edition and merely append a short statement of their own views.<sup>123</sup>

The revisers' decision not to excise Prosser's views on these and other points of disagreement is deliberate. As noted in the preface to the Fifth Edition:

However distinguished the work of the original author, a reviser must perform, in order to be intellectually honest, make some changes simply because of a difference of opinion about how best to explain the state of the law, both now and as it existed at the time the previous edition was published. Where this has been done, every effort has been made to preserve Prosser's insights so that the user can exercise his or her own informed judgment.<sup>124</sup>

The only point of debate, therefore, is whether the preservation of views rejected by the revisers was necessary or wise. One alternative to ignoring positions taken in earlier editions of the *Handbook* might have been to notice them in footnotes, with references to the relevant pages of the Fourth Edition for the curious. A matter of taste? Perhaps no more. But surely revisers need not be taxidermists. There seems little point to retaining Prosser's analyses when they clearly are outmoded or, in the opinion of the revisers, just plain wrong. Prosser himself believed in burying the dead, discreetly but finally, and showcasing the living.<sup>125</sup>

Fortunately, the revisers' bouts of ancestor worship are a minor problem, and, occasional quibbles about their execution aside, the revisers' intent is entirely commendable. In undertaking what was plainly a monumental task, they appear to have adopted as their rule of thumb the sound maxim: "if it ain't broke, don't fix it." Although much about the Fifth Edition differs from the

123. Compare "American Cases—Prosser's Interpretation in the 1971 Edition," *id.* at 548-54, with "Recent Developments and Reviser's Comments," *id.* at 554-56. The revisers indicate that they have acquiesced in retaining Prosser's preferred label for the things and activities in question ("abnormally dangerous") rather than pushing for restoration of its First Restatement counterpart ("ultra-hazardous"), noting that "[t]he choice between the labels . . . is not too important." *Id.* at 555-56.

124. *Id.* Lawyers Ed. at ix, Student Ed. at xix (emphasis added).

125. In that spirit, the revisers might consider reviving in the Sixth Edition a device employed with salutary results by Prosser himself in the First Edition: the chapter entitled "Miscellaneous." In effect, Prosser treated that chapter as a kindergarten for fledgling torts, which then graduated to chapters of their own once they achieved maturity, or at least a promising adolescence. See *supra* text accompanying notes 39-49 (development of privacy law). The addition of a chapter on miscellaneous or unclassified torts might enable the revisers to afford distinct, if not necessarily extensive, treatment to such emerging causes of action as duress, wrongful discharge from employment, bad faith in the performance of an insurance contract, and interference with constitutional or statutory rights.

Fourth, the revisers obviously believed that the 1971 edition, on the whole, was "not broke." The result is a valuable new resource, faithful to the Prosser tradition but distinctly improved in many critical respects by the revisers' diligence and insights.

## V. CONCLUSION

To underestimate the Fifth Edition would be easy. The revisers deliberately have maintained much that is familiar from prior editions of the *Handbook*, and with the few exceptions noted above,<sup>126</sup> they have taken care to introduce their own contributions as unobtrusively as possible. The true measure of the present work, however, is a careful comparison with the Fourth Edition. Without doubt, the Fifth Edition is easier to read, understand, and apply. It is more current than its predecessor, of course, but it is also more complete and, truth to tell, more clear. Even the Fifth Edition's research aids—the various tables and appendices—have been expanded and made more useful.<sup>127</sup> In short, the revisers have both preserved and significantly enhanced a resource that was already a classic when it came into their hands.

Will the Fifth Edition, then, attain the same preeminence in the literature of torts as did Prosser's own editions of the *Handbook*? The jury is still out, and will be for some time. But the revisers seem likely to suffer, just as Prosser so clearly benefited, from the changing fashions of legal scholarship. The success of earlier editions is attributable, in no small measure, to the fact that Prosser, and the *Handbook* with him, rode the rising tide of Consensus Thought during the middle decades of the century. In the 1970s and 1980s that tide has ebbed. Economic analysis of law, the major competing school of thought today,<sup>128</sup> seeks consistency of result by means which Prosser never would have countenanced. Nor have the revisers made any attempt to represent that school in the Fifth Edition.<sup>129</sup> The popularity of the work may suffer accordingly among those no longer in sympathy with the distinctive philosophical foundation upon which the *Handbook* always has rested. It seems doubtful whether any current revision,

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126. See *supra* text accompanying notes 104-24.

127. See *supra* text accompanying notes 66-71.

128. See *supra* note 79.

129. See *supra* text accompanying notes 78-80.

even one by Prosser himself, could have avoided these vicissitudes. In any event, his successors have done no more, or less, than to be faithful custodians of his legacy.

