

The Man, The Torts Legend

Author : Ellen Bublick

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- Christopher Robinette, *The Prosser Letters: 1919-1948*, 101 **Iowa L. Rev.** ___ (forthcoming 2016), available at [SSRN](#).
- Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 **J. Tort Law** 27 (2015), available at [SSRN](#).

United States courts cited Dean Prosser's hornbook on Torts more than 200 times over the course of 2015. In that year, courts also cited Dean Prosser's Restatement (Second) of Torts more a thousand times. Dean Prosser's work shaped the law of Torts in the United States and continues to do so today, forty-three years after his death. Despite Prosser's out-sized influence in the field, surprisingly few articles have been written about this founder of contemporary Tort law.

Two recent articles begin to fill that gap. [Ken Abraham](#) and [Ted White](#) tackle the subject of Prosser's work and influence. Meanwhile, [Chris Robinette](#) uncovers the private correspondence of the man behind the law. Both the Abraham and White article and the Robinette article are insightful, a pleasure to read, and ultimately leave the reader ready to purchase the next chapter (Robinette reveals that part two is in the works).

Looking at Prosser from a biographical perspective, Abraham and White begin with an outline of Prosser's career. While much of that background is generally known—from Prosser's early teaching at Minnesota to his Deanship at Berkeley—there are surprises—that Prosser dropped out of Harvard Law School after his first year, that he began writing his hornbook in only his second year of Torts teaching, that Warren Seavey corresponded with Prosser “almost weekly” for the four-year period of the hornbook's writing, that Prosser himself became something of a “laughingstock” at Harvard after a student filed suit against him for Prosser's classroom demonstration of converting the student's \$5 bill, that Prosser's “practical jokes” included delivering hearses to the homes of acquaintances, and that Prosser disapproved of faculty who refused to sign a loyalty oath.

After an overview of Prosser's history, Abraham and White examine a seminal moment in Prosser's career—the publication of Prosser's Handbook on Torts, in 1941, to universal acclaim. They illustrate Prosser's rhetorical style through closer examination of his handling of two particular torts, intentional infliction of emotional distress and invasion of privacy. Though they give credit to Prosser's powerful and engaging writing, they ultimately conclude that his hornbook “was influential precisely because...it was somewhat deceptive.” (p. 64.) They contend that Prosser's footnote-laden work, particularly in the two torts they examine, was not the synthesis of existing cases that readers of that time would have expected. Instead, although Prosser's citations provided a “mantle of authoritativeness,” had readers “actually looked more carefully” they would have been dissatisfied with Prosser's generalized propositions, which were largely unsupported by the authorities he invoked in their support. (p. 64.)

Meanwhile, Professor Robinette reexamines Prosser not from his published work, but from two collections of Prosser's private letters—one set given by Prosser's son to the Berkeley Law Center, and another given to the University of Minnesota Law Library by a person who purchased them at a yard sale. From these letters, Robinette pieces together key facts about Prosser's childhood, education, and the start of his career. From Robinette's work, we learn about Prosser's father, a well-educated lawyer who ran an industrial institute and was known as the “Father of Vocational Education.” (p. 5.) We also learn about Prosser's mother, who spent evenings reading aloud to her son and was proud of the way he could “sling the King's English.” (p. 5.) The article discusses Prosser's undergraduate education at Harvard, his enlistment during World War I, his 1L year at Harvard, his work as a sales manager in Minneapolis, his

schooling at the University of Minnesota Law School, his work at a Minneapolis law firm, his time on the Minnesota faculty, and then his year on the faculty at Harvard.

Robinette's examination reveals new information that shows Prosser as less deity than a man of his place and time. Prosser's work "makes liberal use of ethnic references." (p. 4.) For example, he's glad not to spend Christmas in Germany "among the Heimies," and a key feature of his law club is that it is "not Hebrew." (p. 6.) Concerning honesty, when working as Secretary to the Commercial Attaché in Brussels, Prosser makes plans to smuggle some personal gifts via government supply truck and states that he hasn't "any conscience about beating the government out of money." (p. 12.) Moreover, readers (and Professor Robinette), are left to wonder why Prosser did not return for a second year of a play writing program at Harvard, or of Harvard Law School. Might he have been among the 1/2 of play writing students or 1/3 of law students who were not permitted to return?

That both the Abraham and White article and the Robinette article suggest there may have been a mere man behind the curtain of the great and powerful Torts scholar, does not ultimately detract from the professional accomplishments to which Prosser lays abundant claim. As all acknowledge, his fluid use of language makes him one of the most readable scholars in the field. His attention to detail— and to blending decided cases with broadly-articulated policy interests— warrants the full attention that courts have paid him. And his controlling influence in the field even today reveals his keen political acumen. Perhaps it is true, as Abraham and White have argued, that Prosser wrote in a time when Restatements and treatises were thought only to synthesize existing law and not to create it, but it is difficult to imagine that all of Prosser's readers were either too lazy or obtuse to realize the ruse. Instead, perhaps Abraham and White underestimate the latitude Prosser's readers gave him to shape the law beyond narrow descriptive boundaries. Indeed, the wide-spread acceptance of Prosser's work suggests that, even after the realist moment, a broad and intelligent audience might accept normative development of doctrinal common law rules as long as the craftsman is skillful, modest in policy approach, and reflects well the values of the time.

Writing as only brilliant academics at elite institutions can, Abraham and White suggest that Prosser "certainly is not revered today in the way that he was in his own time." (p. 2.) What they mean of course, is that Prosser is not revered by elite academics looking for interdisciplinary policy analysis served straight up, rather than shrouded in the traditional common law language of case law and doctrines. But as they lament, in that rarefied academic world, it is more difficult to show any broad scholarly influence at all. Rather than consigning Prosser to the dust bin of historical relics, perhaps Prosser can be seen as an exemplar for current scholars to build impact—by using both instrumentalist and formalist tools. While it may be difficult to trace the impact of contemporary academics devoted to interdisciplinary policy analysis, it is not difficult to admire the enduring edifice of Prosser's work—just count this year's judicial citations.

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