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Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook

Carl W. Tobias
University of Richmond, ctobias@richmond.edu

ARTICLES

GENDER ISSUES AND THE PROSSER, WADE, AND SCHWARTZ *TORTS CASEBOOK*

Carl Tobias*

Feminist jurisprudence is burgeoning. During the 1980s, there has been much excellent work in areas such as legal theory and practice, women's legal history, and specific substantive fields of law. Some law faculty also have analyzed gender bias in legal casebooks. Moreover, the eighth edition of William Prosser's renowned Cases and Materials on Torts, the most widely used torts casebook in American law schools, is scheduled for classroom use in the autumn of 1988.[1] All of these developments make this a promising time to consider gender issues and *Prosser, Wade, and Schwartz*. This paper is meant to begin that discussion and to contribute to the broader work on feminist issues in progress.

The first section of the piece affords a general examination of many aspects of the *Prosser* casebook that involve issues of gender. This overview should enhance the understanding of readers, especially those persons not accustomed to thinking consciously in terms of gender, while providing a setting for the

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1. *See* W. Prosser, J. Wade & V. Schwartz, CASES AND MATERIALS ON TORTS (7th ed. 1982) [hereinafter W. Prosser]. Although estimates of actual usage vary and are difficult to calculate accurately, it appears that most law students today learn from this casebook.

specific assessment in the second segment of the paper. That section explores how issues implicating gender can arise in the classroom context of learning and teaching from *Prosser's* materials on affirmative causes of action for intentional torts to persons and privileges to those torts. The final part reflects on the future of gender issues and *Prosser, Wade, and Schwartz.*[2]

I. A General Survey Of *Prosser, Wade, and Schwartz*

This section is a general survey of numerous specific dimensions of *Prosser, Wade, and Schwartz* that implicate gender. The examination is meant to enhance the appreciation of readers who may be unaware of these gender issues and to afford a backdrop for the more focused analysis of intentional tort materials in the second part of the piece. The general assessment in the first section principally explores the editors' treatment of women and briefly compares certain abstract characteristics traditionally ascribed to males with the characteristics of the text.

A. Treatment of Women in *Prosser, Wade, and Schwartz*

Although examples of blatant, overt sexism and gratuitous,

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2. I am greatly indebted in this article to Professor Mary Joe Frug. Her pathbreaking study of J. Dawson, W. Harvey, and S. Henderson's Cases and Comment on Contracts (4th ed. 1982) informs much of my analysis. *See* Frug, *Re-Reading Contracts: A Feminist Analysis of A Contracts Casebook*, 34 American U. L. Rev. 1065 (1985). I subscribe to a number of her ideas, especially the methodology she employs. *See, e.g., id.* at 1067-74. Nonetheless, my focus is narrower than hers in certain respects. For example, I include less feminist jurisprudence, and my analysis of Prosser is less exhaustive. I concentrate on intentional torts because they are fairly representative and illustrate numerous important concepts: according women intentional tort causes of action can empower females by, for instance, affording them a measure of protection against sexual harassment in the workplace and battering in the home. Moreover, I only mean to offer constructive criticism of the Prosser casebook, not criticism of the late William Prosser, or of John Wade or Victor Schwartz, to whom all who work in the torts field are indebted. I also do not underestimate the difficulties entailed in editing and revising a 1300-page casebook in a rapidly changing area of substantive law. Furthermore, the pedagogical suggestions for teaching torts that I make principally implicate gender issues. For thought-provoking analysis of generic issues, *see* Feinman & Feldman, *Pedagogy and Politics*, 73 Geo. L.J. 875 (1985). Finally, I hope to advance discussion which explores ways that law schools might reduce the possibility that any members of their intellectual communities will feel excluded. For a list of efforts similar to this one in other substantive fields and analysis of a large project on gender issues in criminal law, *see*, Erickson, 38 J. Legal Educ. 101 (1988).

derogatory commentary regarding women do appear in *Prosser, Wade, and Schwartz*, these are relatively rare.[3] Most important are the subtler ways in which the casebook editors treat women: the problems are of omission rather than commission; of supplying insufficient, or no, historical material; or failing to mention context when context is everything.

1. *Women as Characters in the Casebook*

At first glance, *Prosser, Wade, and Schwartz* seems to treat women rather favorably as characters in the casebook, especially in contrast to their treatment in a major contracts casebook, *Dawson, Harvey, and Henderson*.[4] Upon closer examination, however, the differences in treatment become explicable or insignificant, while certain deficiencies in *Prosser* are emphasized. For example, the number of principal cases in which women are parties constitutes a significantly larger percentage in the torts casebook.[5] This difference may be attributable to the inherent nature of the two substantive areas, such as the focus in contracts on commercial activity and the emphasis in torts on injury.[6] Moreover, in *Dawson, Harvey, and Henderson*, the female litigants appear in a marginally narrower range of life situations,

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3. There are a few examples, however, such as the editors' characterization of the "persistent legend that [a husband] was privileged to beat [his wife] with a stick 'no thicker than his thumb' " as a "gentle rule for the preservation of family peace and harmony." *See* W. Prosser, *supra* note 1, at 140. And, these sexist comments make one "wonder whether men and women live on the same planet." *See* C. MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION, at 89 (1979). *Cf.* Frug, *supra* note 2, at 1068-69 (finding contracts casebook "cleansed of any gratuitously negative comments about women"). In fairness to the current editors, John Wade, Victor Schwartz and William Prosser may have been responsible for the casebook's overt or more subtle sexist treatment of women. For example, much problematic commentary included in the notes and questions which accompany principal cases bears Prosser's imprint, and the current editors' failure to alter the material may reflect respect for Prosser who substantially influenced the development of modern tort law.

4. *See* Frug, *supra* note 2, at 1076-94.

5. "Only thirty-nine of the 183 major cases in the [contracts] casebook contain women." Frug, *supra* note 2, at 1077. By contrast, nine of the nineteen principal cases in the *Prosser* casebook's materials on affirmative causes of action for intentional torts to persons contain women.

6. In both areas, the number of women parties may leave a mistaken impression, because in some cases male parties are involved, while in others the women lack an independent presence as women because they are suing with their husbands. *See, e.g., infra* notes 12-19 and accompanying text; Frug, *supra* note 2, at 1077 n.23 and accompanying text.

such as their occupations,[7] and are depicted in minimally more stereotypical and unflattering ways,[8] but these clearly are matters of degree not kind. Indeed, in *Prosser*, there are remarkably few women parties who seem to have admirable qualities or to warrant readers' respect. (I mean women who appear to be reasonable or normal human beings, not Eleanor of Aquitaine, Joan of Arc, or Marie Curie). Instead, numerous female parties pursue what appears to be frivolous, vindictive, or unsubstantiated litigation or otherwise seem to be crazy, inconsiderate or weak people.[9]

Perhaps most important to *Prosser, Wade, and Schwartz*'s treatment of women, however, is the casebook's silence respecting considerations of great saliency to women.[10] A valuable, general example of this phenomenon is the effective failure to treat in the intentional tort materials intentional torts in the family, such as wife battering or marital rape, or in the workplace, such as sexual harassment, which in American society are ubiquitous and fundamental to women.[11]

More specifically, the two decisions comprising the entire block of material on assault are illustrative of opinions in which the authors of the cases and the editors of the casebook delete pertinent historical information that is particularly significant for women. The 1348 date of *I de S et ux. v. W de S*[12] might excuse the failure to explain why "I de S *and* M, his wife, complain[ed of] an assault upon the said M" for which "assault a *man* shall recover damages," even though one may wonder why

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7. *Compare* Frug, *supra* note 2, at 1077-83 *with infra* notes 9, 90-91, 102 and accompanying text.

8. *Compare* Frug, *supra* note 2, at 1083-87 *with infra* notes 9, 88-89, 115 and accompanying text.

9. *See, e.g., infra* notes 89-91, 135-41 and accompanying text. I am not saying that every woman or female party has to be superwoman or meet "male" notions of autonomy, independence, or rationality. I only mean to ask why so many women parties appear unusual.

10. Professor Frug found corresponding silence in the contracts casebook. *See* Frug, *supra* note 2, at 1087-93.

11. Some of these ideas are mentioned. *See, e.g.*, W. Prosser, *supra* note 1, at 65 n.2, 138-40. Their effect is reduced or vitiated, however, by de-emphasis, ineffective placement, or failure to place them in context. *See, e.g., infra* notes 21-28 and accompanying text.

12. *See* At the Assizes, 1348 Y.B. Lib. Ass. folio 99, placitum 60, *excerpted in* W. Prosser, *supra* note 1, at 34.

today the only reference to a married woman in certain court papers is couched in the same antiquated Latin phraseology.[13] It is difficult to understand, however, why one page away and 600 years later similar deficiencies could attend *Western Union Telegraph Co. v. Hill.*[14] In *Hill*, defendant's employee made sexual overtures to Mrs. Hill, but her husband sued for assault. It is unclear whether Mr. Hill was the plaintiff because the assault was considered more an injury to the husband's interest in the inviolability of his wife's body than to the woman herself or because the Alabama Married Women's Property Acts had not yet removed the wife's common law disability to sue on her own behalf.[15] The opinion's author and the casebook editors provide no information, and this silence has important implications. At best, it suggests that Mrs. Hill was dependent on her husband even to pursue tort litigation for injuries she suffered, and at worst it depicts Mrs. Hill as her husband's chattel.[16] Because some students are surprised and others are shocked to learn that wives only recently have been empowered to bring certain types of suits on their own behalf in numerous states, the omission of this important information could allow the students to remain unaware and insensitive to the continuing consequences of these difficulties.[17] The failure to mention the Married Women's Acts also represents a lost opportunity, because these statutes are significant to doctrinal developments in substantive areas of tort law important to women, such as interspousal tort immunity and consortium.[18] Moreover, the relevant history, especially of women's legal status in America before enactment of the legisla-

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13. *Id.* For a recent example, see Robert P. Smith, et ux. v. United States, et al., 106 S.Ct. 875 (1986).

14. *See* 25 Ala. App. 540, 150 So. 709 (1933), *excerpted in* W. Prosser, *supra* note 1, at 35.

15. "The action in this case is based upon an alleged assault on the person of plaintiff's wife by one Sapp, an agent of defendant . . . ." *Id.*

16. In fact, Mrs. Hill could have pursued her own litigation, because Alabama was one of the first states to permit women to sue husbands who assaulted them in tort. *See* Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).

17. For analysis of the history of how wives were empowered to bring their own suits, see Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WISC. L. REV. 55.

18. For the Acts' significance for abolition of interspousal tort immunity, see Tobias, *Interspousal Tort Immunity In America*, 22 GA. L. REV. No.2 (unpublished manuscript; forthcoming Spring, 1988). For analysis of the Acts, see N. Basch, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK (1982); Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

tion, is crucial to understanding why wives have had so little legal or actual power at common law or in the family.[19] Furthermore, readers who are cognizant of that history may be offended by the editorial omission of material pertinent to women.

Prosser, Wade, and Schwartz neglects additional considerations of substantial consequence to women. New or developing areas of substantive tort law, such as some fields of product liability and the areas of wrongful discharge and sexual harassment in the workplace, essentially are not discussed.[20] When certain issues significant to women are mentioned, the effect of doing so may be vitiated or reduced, because the treatment is cryptic or out of context. For instance, the discussion accorded interspousal immunity under the "discipline" section of privileges[21] is so terse as to be ineffective, if not confusing or misleading.[22] Similar difficulties plague the casebook's treatment of other doctrinal developments important to women, such as parent-child immunity and a wife's cause of action for loss of her husband's consortium, which was not recognized by any jurisdiction in the United States until 1950.[23]

Several problems of context are illustrated by inclusion in the chapter on "causation in fact" of *Sindell v. Abbott Laboratories*.[24] *Sindell* was one of many cases in which daughters of women who ingested diethystilbestrol (DES) to prevent miscar-

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19. For analysis of that history, see Olsen, *supra* note 17; Powers, *supra* note 17. Professor Frug found deficiencies similar to those described above in the contracts casebook. *See* Frug, *supra* note 2, at 1088-89.

20. In fairness, certain of these developments are quite new, and it is unclear precisely what direction the law will take. For example, Professor MacKinnon has argued cogently that recognition of a tort cause of action for sexual harassment is inadequate, because it fails to acknowledge that the behavior is gender discrimination. *See* C. MacKinnon, *supra* note 3. Moreover, the casebook does mention some of the developments. *See, e.g.*, W. Prosser, *supra* note 1, at 201 n.5 (discussing doctors' failure to warn patients of risks of failing to have pap test or to have Dalkon Shield removed).

21. *See* W. Prosser, *supra* note 1, at 138-40.

22. *See infra* notes 45, 148-49 and accompanying text.

23. The 1950 date of Hitaffer v. Argonne Co., Inc., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950), is a telling comment on the causes of action each spouse was entitled to pursue. Prosser does afford some of the background, although the editors' views of the history and its impact as well as the future differ from mine. *See* W. Prosser, *supra* note 1, at 1207-08; Tobias, *supra* note 18. The parent-child immunity discussion under privileges which is similar to that on interspousal immunity is in W. Prosser, *supra* at 138-40.

24. *See* 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980), *excerpted in* W. Prosser, *supra* note 1, at 290.

riages developed cervical or vaginal cancer.[25] By offering the opinion at that point with little explanation of its factual background other than a pasteurized excerpt alluding to *a* cancer the plaintiff developed,[26] it will be difficult for students to understand what is at stake factually, substantively, or as a matter of product liability law. Indeed, it may be virtually impossible for students to comprehend that considerable recent product liability litigation has involved products, like DES, the Dalkon Shield and tampons, which are significant to women's reproduction, or to appreciate that cosmetics, products which are important to many women, essentially are unregulated.[27] All of these considerations implicate crucial issues for women of sexuality and reproductive freedom.[28]

2. *Women in the Language of, and as Authors in, Prosser, Wade, and Schwartz*

The terminology employed in the casebook does not fully recognize women. Prosser, Wade, and Schwartz, as well as writers of opinions and of secondary materials included in the casebook, rely almost exclusively on masculine pronouns to describe the generic person. The authors of cases employ such pronouns to elaborate the substantive rules of law even as they apply to women litigants.[29] Although historical usage may explain

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25. *See id.* at 290-91. For thorough discussion of one of these cases, see J. Bichler, DES DAUGHTER (1981).

26. I realize that no student will think that any cancer is innocuous; however, the peculiar locus of this cancer and its terrible consequences for women can be obscured or lost by the unnecessarily pasteurized treatment.

27. For the legislation "regulating" cosmetics, *see* 21 U.S.C. §§ 361-63 (1972). For more analysis of regulation, see Page & Blackburn, *Beyond The Looking Glass: Administrative, Legislative And Private Approaches To Cosmetic Safety Substantiation*, 24 U.C.L.A. L. REV. 795 (1977). For discussion of the Dalkon Shield, see M. Mintz, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD (1985). For discussion of Toxic Shock Syndrome which resulted from use of tampons, *see infra* note 69.

28. For full discussion of women as characters in a contracts casebook which reaches similar conclusions, see Frug, *supra* note 2, at 1076-93.

29. *See, e.g.*, Scott v. Bradford, 606 P.2d 554 (Okla. 1979), *excerpted in* W. Prosser, *supra* note 1, at 197, in which the opinion's author states the general proposition that "Anglo-American Law starts with the premise of thoroughgoing self-determination, each man considered to be his own master" and elaborates all of the specific substantive and proof requirements by employing masculine pronouns. *Accord* Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938), *excerpted in* W. Prosser, *supra* note 1, at 1085. For similar conclusions as to pronoun use in a contracts casebook, see Frug, *supra* note 2, at 1094.

this practice, Prosser, Wade, and Schwartz fail to exercise their prerogatives as editors to recognize women in other ways.[30] One egregious example of this problem is opinions which include unnecessary, denigrating observations regarding females that are flatly irrelevant to resolution of the cases and to the parties (all males) involved. In *Lipman v. Atlantic Coast Line Railroad Co.*,[31] the plaintiff could fairly be described as a bore who provoked a conductor into insulting him. Nonetheless, the case includes several passages, invoking the imagery of "cultivated and refined" Southern women on pedestals whom the railroad has an obligation to protect against "general obscenity, immodest conduct, or wanton approach."[32] Although this may not offend all readers, the characterization of women in *Campbell v. Weathers*[33] is more degrading. In that opinion, a past and prospective male customer who had purchased nothing was injured when using the store owner's bathroom. In ruling on the plaintiff's claim, the judge made the completely extraneous observation that "women do a great deal of shopping [and] sometimes shop all day in their favorite stores and fail to make a single purchase," unnecessarily invoking the image of woman as mindless consumer.[34]

Similar difficulties also appear in the casebook editors' own material. In the notes and questions following principal cases included in *Prosser, Wade, and Schwartz*, male characters substantially outnumber the women, and the male pronoun is employed more often than the female when a character is not described in a gender-neutral term, such as doctor or lawyer.[35]

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30. I am not saying that the editors should delete masculine pronoun use when that was the historical practice. For example, omitting masculine pronouns from an 1850 opinion might mislead readers about certain aspects of women's legal history that are relevant to understanding the history but that today are indefensible.

31. *See* 108 S.C. 151, 93 S.E. 714 (1917), *excerpted in* W. Prosser, *supra* note 1, at 57.

32. *See id.* at 58-59.

33. *See* 153 Kan. 316, 111 P. 2d 72 (1941), *excerpted in* W. Prosser, *supra* note 1, at 497.

34. *See id.* at 498. The judge added that "men frequently, during spare moments, [read: when they are not running the world] step into a place of business, which they patronize regularly" although they do not intend to make a purchase at that time. *See id.*

35. *See, e.g.*, the notes and questions included in the first chapter of W. Prosser, *supra* note 1, at 1-16. For one exception to this practice, see *infra* notes 111-33 and accompanying text.

Most important, however, when the casebook authors choose to use women characters, they more frequently than men appear in an unflattering or stereotypical light. For instance, the shoppers invariably are female and the physicians male.[36]

Moreover, Prosser, Wade, and Schwartz leave the impression that writers of opinions and of secondary legal materials are all men. Practically no decisions included in the casebook were authored by woman judges, although the editors enable readers to discern that fact only by including pictures of judicial decisionmakers, 52 out of 52 of whom were male.[37] Correspondingly, numerous explicit references inform, while a number of hints suggests to, readers that legal scholarship is an overwhelmingly male domain.[38] The illustrations of the heroes of tort law, such as Holmes, Cardozo, and Traynor, and of legal writers, like Dean Bohlen and the all-male 1962 contingent of the Committee of Advisers to the Reporter for the Restatement of Torts furnish concrete reminders of who dominates torts scholarship.[39]

Much of the discussion above is what this writer assumes to be the good faith attempts by the editors to be responsive to women. For instance, a casenote near the beginning of the negligence chapter proclaims that use of the term "reasonable man" currently is outmoded: "Courts have traditionally referred to this mythical person in the masculine gender. Obviously, this form of description is now outdated. The form used here is the

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36. *See, e.g.*, the notes and questions following one of the principal cases on medical malpractice in W. Prosser, *supra* note 1, at 196. For similar conclusions as to a contracts casebook, see Frug, *supra* note 2, at 1095-96.

37. *See, e.g.*, W. Prosser, *supra* note 1, at 155 (photograph of Judge Learned Hand); *id.* at 244 (photograph of 1972 Oregon Supreme Court). For a comprehensive list of illustrations of judges, see *id.* at xxi. The editors do not include the first names of authors of opinions.

38. In contrast to the editors' gender-blind treatment of authors of opinions, the editors often do indicate the gender of legal writers, usually by including their first names. *See, e.g.*, W. Prosser, *supra* note 1, at 254 n.5 ("Sir James" Mansfield); *id.* at 298 n.1 ("Francis" Bacon, Lord Chancellor); *id.* at 229 n.4 ("Leon" Green). For similar conclusions as to a contracts casebook, see Frug, *supra* note 2, at 1096.

39. *See* W. Prosser, *supra* note 1, at 215 (illustration of Oliver Wendell Holmes, Jr.); *id.* at 214 (illustration of Benjamin Cardozo); *id.* at 740 (photograph of Cardozo); *id* at 758 (photograph of Roger Traynor); *id.* at 512 (photograph of Francis Bohlen); *id.* at 761 (photograph of 1962 Restatement Committee of Advisers). For more discussion of the issues in this paragraph from a different angle, see *infra* notes 58-61 and accompanying text.

reasonable, prudent person."[40] These declarations seem disingenuous, however, when readers discover that references to the "reasonable man" remain in the casebook's notes and that use of male pronouns to describe generic persons is peculiarly pervasive in those notes immediately following the declarations[41] and given the overwhelmingly male pronoun use and the less than sensitive treatment of gender issues in the remainder of the casebook.[42]

3. *The Placement of Cases and Materials Involving Women*

The ways in which Prosser, Wade, and Schwartz organize their casebook and position opinions involving women parties may have gender implications, suggesting that females have inferior status in society.[43] Some difficulties with the casebook's organization already have been mentioned.[44] Examples of other problems, however, can be afforded. For instance, placement of the interspousal immunity material under the discipline section of privileges in the casebook comes too late for readers to appreciate important considerations, such as the consequences of intentional torts within the family.[45] Deferring comprehensive treatment to chapter 12 means the material may receive no coverage.[46] Nearly identical problems attend editorial treatment of parent-child immunity.[47] Most importantly, readers may fail to appreciate fully certain gender implications of that immunity.

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40. W. Prosser, *supra* note 1, at 161 n.2.

41. For examples of reference to the "reasonable man" that remain in the notes, see *id.* at 163 n.7, 171 n.3. For examples of pervasive use of male pronouns in the notes, see *id.* at 163 nn. 4, 6, and 8, 167 nn. 3 and 5.

42. For an analysis of women as authors and in the language of a contracts casebook, see Frug, *supra* note 2, at 1094-99.

43. For an analysis of how casebook organization and positioning of opinions can have important gender implications generally and in the context of a contracts casebook, see Frug, *supra* note 2, at 1098-03.

44. *See supra* notes 21-28 and accompanying text (treatment of issues important to women vitiated or reduced because cryptic or out of context).

45. *See supra* notes 11, 23 and accompanying text.

46. *See* W. Prosser, *supra* note 1, at 643-48. Similiar difficulties obtain with the Married Women's Acts. *See supra* notes 15-19. Indeed, the wife's consortium action is not treated until page 1208 of W. Prosser. *See supra* note 23 and accompanying text.

47. Parent-child immunity, mentioned at *supra* note 23 and accompanying text, is treated briefly in W. Prosser's discipline section, at pages 138-40, and more fully at pages 648-53.

Children only have been permitted to sue their parents in tort since the 1960s, although parent-child immunity was not plagued by the merged legal identity of husbands and wives that afflicted interspousal immunity but rather was created essentially out of whole cloth in a trilogy of cases decided at the turn of the twentieth century.[48] In *Roller v. Roller*,[49] one of the trio, the court refused to allow a fifteen year-old young woman to bring a tort suit against her father for rape, because such litigation could disrupt familial harmony![50] Even though the idea that placement of cases may have gender consequences cannot be proved definitively, several examples drawn from the intentional tort material suggest that placement can have such implications. One is the juxtaposition of opinions involving male parties with those involving female litigants in which courts reach different substantive results: a male plaintiff may be denied an intentional tort cause of action in one case or note even as a female is afforded a cause of action in an adjacent or nearby opinion or note, because she appears vulnerable or overly sensitive.[51] Such treatment can reinforce the view that women are weaker or even subordinate.[52] A similar message is sent by placement of the intentional tort block of materials at the beginning of the casebook and by the organizational structure employed within discrete areas. For example, because the intentional tort causes of action essentially are about adjusting power in relationships, when women achieve disproportionate success in pursuing such claims, readers can be reminded that they historically had less power.[53] More specifically, nearly all of the cases included in the

48. For thorough treatment of parent-child immunity including its history, see Hollister, *Parent-Child Immunity: A Doctrine In Search of Justification*, 50 FORDHAM L. REV. 489 (1982).

49. *See* 37 Wash. 242, 79 P. 788 (1905).

50. *See id.* In fairness, this case and most of the developments examined in the text accompanying note 48 *supra* are mentioned in W. Prosser, *supra* note 1, at 651-53. But the treatment is too late and too little. For example, the absurdity of *Roller* can be lost by readers when buried in a casenote at page 651 with a citation followed by the parenthetical statement: "15 year-old girl attempting to bring a tort claim against her father for rape."

51. For example, *compare* the unsuccessful male plaintiff in the principal case of Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977), *excerpted in* W. Prosser, *supra* note 1, at 61, *with* the large number and percentage of successful females in the casenotes following *Harris*, W. Prosser, *supra* note 1, at 65-67.

52. For similar conclusions regarding a contracts casebook, see Frug, *supra* note 2, at 1098-01.

53. Women appear to achieve disproportionate success in the materials on the false imprisonment and mental distress causes of action. *See* W. Prosser, *supra* note 1, at 37-

notes introducing historical material on the independent cause of action for mental distress involve females who appear gullible, stupid, or weak, thus reaffirming notions of women's inferiority.[54]

B. THE "MALENESS" OF *PROSSER, WADE, AND SCHWARTZ*

If a torts casebook could be described in terms of characteristics traditionally considered female or male, *Prosser, Wade, and Schwartz* appears more male than female.[55] Assuming that "emotional intellect, attachment, compassion, and spontaneity seem feminine [while] analytical intellect, detachment, autonomy, and control seem masculine,"[56] an important feature of the torts casebook is that it appears analytical and abstract in nature.[57]

There are several ways in which *Prosser, Wade, and Schwartz* seems analytical and abstract. One telling example of the impersonal, abstract and, indeed, male character of the casebook is its illustrations,[58] which fulfill the adage that one picture is worth a thousand words. All of the illustrations of people, including the legal heroes, torts scholars and judges, are

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49; 50-70. I realize this idea is a two-edged sword: readers also may view women's disproportionate success as a sign of empowerment. *See infra* notes 111-33 and accompanying text.

54. *See* W. Prosser, *supra* note 1, at 53-54. This also is true of numerous other notes included in the materials on mental distress. *See, e.g., id.* at 65-67.

55. I realize that this way of conceptualizing a casebook may be debatable and will trouble some readers. I ask those who disagree, or are uncomfortable with the conceptualization, to read and evaluate on their merits the substantive propositions to which the characterizations male or female are attached. I do not subscribe to all of Professor Frug's ideas, although I rely substantially here on her work, especially her introductory explanation of the maleness of the contracts casebook. *See* Frug, *supra* note 2, at 1103-05.

56. *See* Frug, *supra* note 2, at 1105. I agree with Professor Frug that these "qualities are [not] essential to either sex [and] would argue that they are not" but that they describe "my impressions of the way many people understand the content of gender." *Id.* at 1105 (citation omitted).

57. For analysis of this feature in a contracts casebook, see Frug, *supra* note 2, at 1105-09.

58. Professor Frug found that the "*idea* of using illustrations in a law casebook suggests an editorial compassion for weary readers and a somewhat impish desire to surprise," so that the idea seemed to her "feminine." *See* Frug, *supra* note 2, at 1108 (emphasis in original). She ultimately concluded, however, that the illustrations in the contracts "casebook emphasize the abstract, depersonalized quality of the book as a whole . . . ." *Id.*

males.[59] For instance, the very first illustration at page seven of the casebook, that of Chief Justice Shaw, the quintessential Boston Brahmin, informs readers at the outset of their study of tort law exactly what type of people profoundly shaped American tort jurisprudence.[60] The depiction of sixty-one additional male judges might appear innocuous, until one realizes that at the time the casebook's seventh edition was released, Rose Bird was the Chief Justice of the California Supreme Court, probably the most influential court in the development of modern tort law, while many other women had been, or were, members of courts in the federal and state judicial systems.[61] Omitting pictures of any plaintiffs can be considered detached in the sense of de-emphasizing or masking the fact that injuries to real flesh and blood people are at the core of tort law.[62] These factors are exemplified by one of the illustrations of objects: inclusion of photographs of the Long Island Railroad Station seems inoffensive, unless the reader appreciates that they may be displacing a portrait of Mrs. Palsgraf, who became the plaintiff in the most infamous of all tort cases when she was injured in that station.[63]

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59. See *supra* notes 37 and 39 and accompanying text.

60. *See* W. Prosser, *supra* note 1, at 7. For a discussion of Shaw and his influence on American tort jurisprudence, *see* G. White, THE AMERICAN JUDICIAL TRADITION, 35-63 (1976); Roberts, *Negligence: Blackstone to Shaw to ?, An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191 (1961).

61. Thus, a photograph of the California Supreme Court with Rose Bird as Chief Justice might have accompanied the landmark *Sindell* case and perhaps offset its contextual deficiencies, discussed *supra* notes 24-28 and accompanying text. Many other women had been or were members of courts. For example, Shirley Hufstedler served on the United States Court of Appeals for the Ninth Circuit from 1968 until she was appointed Secretary of Education by President Carter, while Burnita Shelton Mathews had sat on the District of Columbia District Court since 1950 and Constance Baker Motley had sat on the Southern District of New York since 1966. Correspondingly, Susie Sharp was a member of the North Carolina Supreme Court from 1962 until 1979, serving as its Chief Justice from 1975 until 1979, while Shirley Abrahamson had been on the Wisconsin Supreme Court since 1976.

62. For thorough analysis of analogous ideas, *see* J. Noonan, PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON AND WYTHE AS MAKERS OF THE MASKS (1976).

63. *See* W. Prosser, *supra* note 1, at 316 (picture of "scene of *Palsgraf* accident"). The case was Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), *excerpted in* W. Prosser, *supra* at 316. *Cf.* J. Noonan, *supra* note 62, at ch. 4 (more discussion of case and Mrs. Palsgraf). The other illustrations of objects are marginally better. The St. Francis Hotel out of whose window a chair fell and struck Ms. Larson accompanies Larson v. St. Francis Hotel, 83 Cal. App.2d 210, 188 P.2d 513 (1948), *excerpted in* W. Prosser, *supra* at 265. The illustration is at 266. There also are two photographs of the Morts Dock, the subject of the *Wagon Mound* cases, *see id.* at 308 and 309; two photographs of ships involved in the *Kinsman* cases, *see id.* at 328, and a photograph of

Another characteristic of the casebook which makes it seem abstract and analytical is the severely edited nature of numerous opinions, because this characteristic encourages readers to focus on doctrinal analysis and the rules of substantive tort law, rather than the factual contexts out of which cases arise and the people involved in tort litigation.[64]

Prosser, Wade, and Schwartz also do not admit that their casebook may have a perspective, leaving unstated important information.[65] For instance, pertinent material regarding women's legal history, such as why wives only recently have been empowered to bring their own suits for torts inflicted upon them and the relevance of the Married Women's Acts, is omitted, thus skewing readers' views of certain cases and the women in them.[66] Concomitantly, legal issues that currently are controversial or of great significance to women may be excluded or material discussing such questions may be arranged in ways that complicate reader comprehension.[67]

In short, the overview of *Prosser, Wade, and Schwartz* illustrates that the casebook can have detrimental implications for women and perpetuate, and even contribute to, gender bias rather than help to eliminate or reduce sexism. Because this overview has been somewhat general, the next section affords a more focused analysis of gender issues that arise in the context of considering the materials on intentional torts.

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the Buick model that was the subject of MacPherson v. Buick Motor Co., *see id.* at 739. (Perhaps the explanation for choosing these objects is the same as the explanation for why little boys like rocks and little girls read fiction.) Consider how effective and graphic it might be to accompany one of the Dalkon Shield cases with the photograph of intrauterine devices pictured in THE NEW OUR BODIES, OURSELVES 250 (1984).

64. For examples of these ideas, see *supra* notes 26, 62-63 and accompanying text. Professor Frug found that the organization along doctrinal lines of, and the appellate opinions in, a contracts casebook also encouraged readers to focus on doctrinal analysis and rules. *See* Frug, *supra* note 2, at 1105-09. For another view of these issues, see Feinman & Feldman, *supra* note 2.

65. Professor Frug characterizes this, and a few characteristics described in the text in the paragraph immediately above, as being male in the sense of having an "authoritarian neutrality". *See* Frug, *supra* note 2, at 1109-13. Although I do not adopt her characterization, I do agree with most of the substantive propositions to which it is attached, and these ideas are included in the text. *See supra* note 55.

66. *See, e.g., supra* notes 12-19 and accompanying text.

67. *See, e.g., supra* notes 20-28, 43-50 and accompanying text.

II. A Specific Analysis Of Gender Issues That Arise In The Intentional Tort Materials

The assessment below constitutes a composite of the types of gender issues that have arisen in thirteen years of teaching the material on affirmative causes of action for intentional torts to persons and privileges to those causes of action, which are in Chapters two and three of *Prosser, Wade, and Schwartz*. In examining these materials, I have been selective, choosing issues that seem most significant in terms of the frequency with which they arise or the importance of the ideas they convey.[68] Moreover, the issues that arise can change from year to year, depending on numerous variables, such as class composition and size or intensity of student interest.[69] I also do not claim that these issues are representative, although my discussions with students and faculty over the years indicate that they are typical.[70] All I mean to say is that this is what I have observed in my experience;[71] I invite others to relate what they have seen and to contribute to ongoing discussion.

I realize as well that the intentional torts materials are not the only ones that could be explored. This information does afford, however, numerous advantages. It comprises the initial substantive block of material in a context where first impressions are important.[72] Moreover, it raises numerous issues that are similar to those that appear in additional substantive fields, such as negligence and strict liability. Nonetheless, examination of examples drawn from those areas and others in the general overview above illustrates that the intentional tort materials are

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68. Correspondingly, issues explored in the first section of this article generally will not be treated fully here, unless they were not so treated above or their frequency or importance warrants consideration.

69. There obviously are many others. One is issues that are controversial or in litigation during a specific year. For instance, when Toxic Shock Syndrome was injuring numerous women around 1980, that could have been considered when discussing product liability and federal regulation.

70. *Cf. infra* note 73 and accompanying text (intentional tort materials not atypical).

71. These observations are drawn from teaching the first-year torts course to classes ranging in size from 25 to 95 students at five law schools.

72. There is an introductory chapter, entitled "Development of Liability Based Upon Fault," which is an historical overview. *See* W. Prosser, *supra* note 1, at 1-16. For selective analysis of that chapter, see *supra* note 60 and accompanying text; *infra* notes 88-92 and accompanying text.

not atypical,[73] although their selection may involve trade-offs. For example, there are certain senses in which these materials may be different. Intentional torts peculiarly implicate power; thus, according women intentional tort causes of action can empower females while at the same time reinforcing the perception that they are comparatively powerless. On balance, however, the intentional tort materials are sufficiently important and representative to warrant the close analysis that follows.[74]

A. The Affirmative Causes of Action

1. *Intent*

The first part addressing the concept of intent would have been relatively innocuous, even though it continued two detrimental aspects of the initial chapter, which provides a short historical overview.[75] However, the editors effectively eliminated a principal case raising numerous gender issues that was included in the sixth edition.[76] In the seventh edition, *Lambertson v. United States*[77] displaced *Spivey v. Battaglia*,[78] which was relegated to cryptic treatment in the casenotes following *Lambertson*.[79] Substituting a more recent opinion for an older case,

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73. There are numerous other examples. For instance, the editors commence the privacy chapter with an historical overview, stating that the "defendant had made an unauthorized use of the picture of an attractive young lady to advertise its flour" in the seminal case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), *discussed in* W. Prosser, *supra* note 1, at 1084. Such treatment obscures the fact that suit may well have been brought, because defendant, by plastering 25,000 pictures of the young woman in saloons and other untoward places, had reduced her "marital opportunities".

74. I encourage others to analyze additional cases. For examination from a feminist perspective of other areas of tort law, especially negligence, see Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 21-25, 30-37 (1988). For a thorough discussion of the methodology employed to analyze gender issues in a contracts casebook, a methodology to which I essentially subscribe, *see* Frug, *supra* note 2, especially at 1067-74.

75. *See* W. Prosser, *supra* note 1, at 1-16. The two detrimental aspects are that male pronouns are used almost exclusively in the notes and that female parties in cases are portrayed in unflattering ways or have traits considered less laudable. The two aspects are discussed *infra* notes 88-92 and accompanying text.

76. That case is Spivey v. Battaglia, 258 So.2d 815 (Fla. 1972), *noted in* W. Prosser, *supra* note 1, at 23 note 2F, *excerpted in* W. Prosser, J. Wade, & V. Schwartz, Cases and Materials on Torts 19 (6th ed. 1976).

77. *See* 528 F.2d 441 (2d Cir. 1976), *excerpted in* W. Prosser, *supra* note 1, at 20.

78. *See* 258 So. 2d 815 (Fla. 1972).

79. In W. Prosser, *supra* note 1, at 23 note 3F, the editors state that the distinction

which is retained in the notes, seems an eminently reasonable editorial decision.[80] Less reasonable, yet still appearing to be within the bounds of editorial discretion, are that the newer decision illustrates no better than the earlier one applicable principles of substantive law[81] and that the older opinion appears in the notes only to show that distinctions between intent and negligence may have importance for running of the statute of limitations.[82] Indeed, the significance of the editorial choices becomes clear only upon examination of *Spivey*. In that case, a husband and wife sued the wife's co-employee. During the lunch hour when several employees, including the woman and the defendant, were seated at a work table, the defendant attempted to tease the woman, "whom he knew to be shy, intentionally" placing his arm around her and pulling the woman's head toward him.[83] What the defendant characterized as a "friendly unsolicited hug" paralyzed the "left side of her face and mouth".[84] In resolving *Spivey*, the court compared it with another case in which a man was found to have the requisite intent to commit assault and battery on a woman in the following factual context:

> The incident complained of occurred in the early morning hours in a home owned by the defendant. While the plaintiff was looking through some records, the defendant came up behind her, laughingly embraced her and, though she resisted, kissed her hard. As the defendant was hurting the plaintiff physically by his embrace, the plaintiff continued to struggle violently and the defendant continued to laugh and pursue his love-making attempts. In the process, plaintiff struck her face upon an object. . . .[85]

Thus, *Spivey* illustrates several issues important to women, especially that tort law will afford females relief against men who

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between "negligent and intentionally wrongful conduct . . . may be legally significant" and then ask "has the statute of limitations run" for which they cite *Spivey*.

80. Of course, *Lambertson* was decided only four years after *Spivey*.

81. In fact, although *Spivey* appears to have been decided incorrectly, that opinion illustrates better than *Lambertson* the difference between intentional and negligent behavior.

82. The information mentioned *supra* note 79 is all that appears in the applicable casenote.

83. *See* Spivey v. Battaglia, 258 So.2d 815, 816 (Fla. 1972).

84. *See Id.* at 816.

85. The quotation is in *Spivey* 258 So.2d at 816. The case compared is MacDonald v. Ford, 223 So.2d 553 (Fla. 1969).

have injured them by abusing authority in employment relationships or physical power in personal ones.[86] Placing *Spivey* as the second principal case in the first substantive block of material could set a different tone for what follows, permitting early mention, and even facilitating exploration, of issues significant to women.[87]

The displacement of *Spivey* would be less troubling, if the editors had not also carried forward into the second chapter two deleterious practices employed in the first. One is the predominant use of the male pronoun in the notes following the cases, even when the litigants in the principal case are women.[88] The other is that the opinions chosen involve female parties who are portrayed in an unflattering light or who have traits generally considered less laudable, if not undesirable. Thus, in the initial principal case on intent, *Garrett v. Dailey*,[89] the elderly, arthritic woman who sued her 6-year-old visitor for pulling out a chair where she was attempting to sit evokes little more sympathy than the female recipient of a free ride in the fourth principal opinion in chapter 1, *Cohen v. Petty*.[90] In *Cohen*, the female sued the driver for injuring her when he suffered a sudden, unforeseeable physical ailment. One woman plaintiff appears to be bringing frivolous litigation against a child who may not be able to appreciate the consequences of his acts and may be judgment proof, while the other seems ungrateful. Inclusion of the fourth principal case on intent, *McGuire v. Almy*,[91] might offset the second problem of female "character." *McGuire* involved a courageous nurse who was injured in attempting to help her patient. The positive impression left by the nurse's brave behavior, however, may be undercut because the nurse then sued the patient, an insane person with even less capacity than a child to appreci-

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86. For more discussion of these issues, see *infra* notes 125-33 and accompanying text. Indeed, *Spivey* can be read as a case in which the court makes "bad law" on the concept of intent so as to make possible recovery by the injured plaintiff.

87. The lost opportunity is focused sharply by contrasting *Spivey* with *Lambertson*, the "boys will be boys" case, and with certain other cases included in the "intent" block, discussed in the next paragraph in the text.

88. *See, e.g.*, W. Prosser, *supra* note 1, at 23 note 2D; 27 note 3.

89. *See* 46 Wash. 2d 197, 297 P.2d 1091 (1955), *excerpted in* W. Prosser, *supra* note 1, at 17.

90. *See* 65 F.2d 820 (1933), *excerpted in* W. Prosser, *supra* note 1, at 10.

91. *See* 297 Mass. 323, 8 N.E.2d 760 (1937), *excerpted in* W. Prosser, *supra* note 1, at 24.

ate what she was doing.[92]

2. *Battery*

The second component treats battery, which is the initial substantive cause of action for intentional torts to persons. This segment is similar to the first part in the sense that both represent lost opportunities. *Cole v. Turner*,[93] the first battery opinion, is an old English case which does little to enhance understanding of the cause of action. The elements of a battery cause of action might be illustrated by an interspousal immunity case involving wife beating. Even if cases involving wife battering and marital rape were deemed insufficiently clear to warrant inclusion as a principal case, these pervasive problems certainly deserve mention in the notes, especially in light of the editors' inclusion in subsequent notes of data informing readers that "shoplifting is a major headache for merchants."[94] The second principal battery case, *Fisher v. Carrousel Motor Hotel, Inc.*,[95] involves one of the few minority plaintiffs in the casebook. The court's willingness to recognize, what in different circumstances, might appear a tenuous cause of action suggests the kind of case selection that could raise, if not emphasize, gender issues. The opinion also illustrates considerations that are important to women, such as historical context and personal dignity as the essence of intentional torts as well as the special solicitude exhibited by some courts for certain individuals or groups that have been the victims of discrimination.[96]

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92. It also is important to remember that the plaintiff was a nurse, thus performing one of the more "stereotypical forms of women's work". *See* Frug, *supra* note 2, at 1078. Professor Frug finds analogous problems in the contracts casebook.

93. *See* 6 Modern Rep. 149, 90 Eng. Rep. 958 (Nisi Prius 1704), *excerpted in* W. Prosser, *supra* note 1, at 30.

94. *See* W. Prosser, *supra* note 1, at 127 n.1. Were wife battering and marital rape not so heinous, one might be tempted to respond by saying that wife battering is a major headache for two million wives annually. The editors at least should include comparable data on spouse abuse. Much relevant data are in Marcus, *Conjugal Violence: The Law Of Force And The Force Of Law*, 69 CALIF. L. REV. 1657 (1981); Note, *To Have And To Hold: The Marital Rape Exemption And The Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986).

95. *See* 424 S.W.2d 627 (Tex. 1967), *excerpted in* W. Prosser, *supra* note 1, at 32.

96. Much said in this paper about gender issues appears applicable to racial minorities. Analysis of *Prosser*, and other casebooks, in light of racial issues obviously is important and should be undertaken; however, such an effort is beyond the scope of this

3. *Assault*

The two principal assault cases which were discussed above[97] involve situations in which husbands sued defendants who allegedly assaulted their wives. Moreover, in *Hill* the defendant who propositioned the plaintiff's wife by offering to "fix her clock" (which he was obligated contractually to do) if she would let him "love and pet her"[98] was nearly as despicable as the father who raped his daughter and then asserted the defense of parent-child immunity in the *Roller*[99] case. Thus, both *Hill* and *Roller* are valuable, because they demand that even the most inveterate misogynist acknowledge the behavior's egregiousness and the inequity of denying recovery.[100] Moreover, students' appreciation of important implications of tort law for women would be enhanced by the inclusion at this point of historical materials, such as information on the disabilities imposed at common law on wives and the gradual removal of the incapacities with passage of the Married Women's Acts as well as the continuing relevance of much of this in areas such as wives' suits against their husbands for assaults inflicted by the men or against third parties for loss of their husbands' consortium.[101]

4. *False Imprisonment*

Faniel v. Chesapeake & Potomac Telephone Co., the most important of the five principal opinions on false imprisonment, is troubling in several ways.[102] The woman plaintiff who was em-

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paper.

97. *See supra* notes 12-19 and accompanying text.

98. *See* Western Union Tele. Co. v. Hill, 25 Ala. App. 540, 150 So. 709 (1933), *excerpted in* W. Prosser, *supra* note 1, at 35.

99. *See* 37 Wash. 242, 79 P. 788 (1905), *noted in* W. Prosser, *supra* note 1, at 651 n.1, discussed *supra* notes 49-50 and accompanying text.

100. In *Hill*, recovery was denied because Sapp, the employee, acted outside the scope of his employment, while in *Roller*, recovery was denied to preserve familial harmony.

101. For sources of pertinent historical materials, *see supra* notes 17-18, 48. For discussion of the issues, *see supra* notes 11-19, 23, 45-50, 94 and accompanying text.

102. *See* 404 A.2d 147 (1979), *excerpted in* W. Prosser, *supra* note 1, at 41. *Faniel* is most important, because it has numerous significant implications for women. The case also is important, however, in that it illustrates, while having the potential to obscure, significant substantive aspects of the false imprisonment cause of action and tort law. Narrower and more technical are the principal opinions preceding *Faniel*, Parvi v. City

ployed as a keypunch operator, when pressured during a work day by her supervisor and other management personnel, admitted that she had an unauthorized telephone and agreed to accompany those employees on a trip to her residence where the equipment was retrieved.[103] "Mrs. Faniel received a thirty-day suspension from work, but did not lose her job, and was promoted several months later,"[104] after which she sued her employer for false imprisonment. Thus, the plaintiff, appears to be not only a thief but also without gratitude. What makes the plaintiff's apparent stealing of the company's equipment and her suit against the employer subsequent to being promoted more problematic is that they divert attention from, and undermine appreciation of, two concepts important to substantive tort law. One is the specific idea of submission, which often is central to stating a false imprisonment cause of action, and the other is the generic notion that workplace interactions, especially between employers and employees, can merit special treatment in tort law.[105] For example, the plaintiff's apparent theft of the company's telephone and her later claim against the employer divert attention from the fact that the employee's exercise of truly free choice to accompany the management personnel may have been compromised by the employee-employer relationship.[106] Similarly, the plaintiff's apparent stealing and subsequent suit mask the cavalier, condescending, and unrealistic proclamation of the judge that "fear of losing one's job, although a powerful incentive, does not render involuntary the behavior induced."[107] Indeed, the full import only can be appreciated with the realization that the pronouncement came from a white, male judge with lifetime tenure regarding a black, female keypunch operator who worked for an employer whose operation, by the judge's

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of Kingston, 41 N.Y.2d 553, 362 N.E.2d 960, 394 N.Y.S.2d 161 (1977), *excerpted in* W. Prosser, *supra* note 1, at 39, and the principal case following *Faniel*, Enright v. Groves, 560 P.2d 851 (Colo. 1977), *excerpted in* W. Prosser, *supra* at 46.

103. *See Faniel*, 404 A.2d 147 (1979), *excerpted in* W. Prosser, *supra* note 1, at 41.

104. *See* W. Prosser, *supra* note 1, at 42.

105. I mean that the workplace is special in the sense that tort law should be sensitive to the realities of the workplace and solicitous of the needs of workers, particularly those who may be or have been injured on the job because they have less power than employers.

106. Thus, students seem unmoved by the plaintiff's explanation why she did not object to accompanying the supervisory personnel: "I just thought I had to go [I did not want to] but with Doris Powell being my supervisor, she was going and they told me I had to go, so I just assumed that I had to go." W. Prosser, *supra* note 1, at 44.

107. *See* W. Prosser, *supra* note 1, at 44.

own description, smacked of the paramilitary.[108]

The difficulties with *Faniel* may be counterbalanced somewhat by *Enright v. Groves*,[109] the principal case that follows it. In *Enright*, the woman plaintiff refused three times to comply with unlawful requests by a police officer that she produce her driver's license, after which he grabbed her arm and took her to jail. Thus, the plaintiff's actions engender more respect for her as a person and illustrate well the type of protest and concomitant submission necessary to make out a false imprisonment cause of action.[110]

5. *Intentional Infliction of Mental Distress*

The mental distress materials generally and in specific areas, such as organization, case selection, tone, and emphasis, leave the impression that this cause of action implicates traits traditionally associated with women that also have been considered less admirable, such as being weak, emotional, or impressionable. [111] For instance, the notes are full of cases in which women plaintiffs appear stupid or overly sensitive. The casebook editors ask whether protection should be afforded to the "hypersensitive or idiosyncratic plaintiff" and offer the "early landmark case" of an "eccentric old woman [who] believed that a pot of gold had been buried in her backyard and was con-

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108. "An AT&T security supervisor from New York," the plaintiff's supervisor in "AT&T's Washington, D.C. office," and a "Chesapeake and Potomac security officer [from] a C&P facility in Maryland . . . who had the actual authority to recover the equipment" seem to have spent the better part of a day recovering one piece of equipment. *See* W. Prosser, *supra* note 1, at 42. Much mentioned in the text is lost on students principally, I think, because they believe the plaintiff is a "bad actor". Moreover, the failure to afford students an appreciation that the workplace can warrant special consideration in tort law is not rectified, and may be exacerbated, by the mental distress case of Harris v. Jones, 281 Md. 560, 380 A.2d 811 (1977), *excerpted in* W. Prosser, *supra* note 1, at 61, discussed *infra* notes 120-23 and accompanying text.

109. *See* 560 P.2d 851 (Colo. 1977), *excerpted in* W. Prosser, *supra* note 1, at 46.

110. *Compare* the plaintiff's conduct in *Enright*, W. Prosser, *supra* note 1, at 46, *with* the plaintiff's behavior in *Faniel*, mentioned *supra* note 106.

111. The independent cause of action for mental distress only has been recognized in the second half of the twentieth century. For that history and analysis of the tort, see Givelber, *The Right To Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982).

stantly digging for it."[112] Defendant buried a pot containing "other contents where she would dig it up," and when she did, had her "escorted by a procession in triumph to the city hall, where she opened the pot under circumstances of extreme public humiliation . . . which apparently further unsettled her reason."[113] Indeed, pregnant women are mentioned in the casenotes no less than three times as the special beneficiaries of this tort,[114] thus evoking William Blackstone's infamous pronouncement: "even the disabilities [like merged legal identity] which the wife lies under are the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England."[115] The principal cases are similar, if less obvious. Thus, the woman plaintiff in *Slocum v. Food Fair Stores of Florida*,[116] who alleges that she suffered grave emotional distress when a grocery store clerk said "you stink to me", seems to be pursuing frivolous or vindictive litigation and to be unduly sensitive or overeacting. Moreover, one note following the case accentuates its trivial nature by quoting Judge Magruder's famous proposition that a "certain toughening of the mental hide is a better protection than the law could ever be" against the irritations of daily life.[117] Correspondingly, the next principal opinion, *Lipman*,[118] with its gratuitous invocation of women on pedestals to protect the indefensible behavior of the male plaintiff who provoked the railroad conductor,[119] disparages women, the mental distress cause of action, and litigants who pursue such claims. But even the succeeding principal decision, *Harris v. Jones*,[120] in which plaintiff clearly was pursuing a valid claim, can leave inaccurate impressions. In *Harris*, the plaintiff employee sued his employer, General Motors and his supervisor, who mimicked the employee's stuttering in the workplace more

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112. *See* W. Prosser, *supra* note 1, at 67 n.8. The case is Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

113. *See* W. Prosser, *supra* note 1, at 67 note 8. Other examples of weak or gullible women plaintiffs are in *id.* at 53 note 2; 66 at note 4D.

114. *See* W. Prosser, *supra* note 1, at 54 note 7B; 67 note 7; 69 note 2.

115. W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Sec. 443 (1765-69).

116. *See* W. Prosser, *supra* note 1, at 54.

117. *See* W. Prosser, *supra* note 1, at 56 note 2, *citing* Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

118. *See* 106 S.C. 151, 93 S.E. 714 (1917), *excerpted in* W. Prosser, *supra* note 1, at 57.

119. For more discussion of *Lipman*, see *supra* notes 31-32 and accompanying text.

120. *See* 281 Md. 560, 380 A.2d 611 (1977), *excerpted in* W. Prosser, *supra* note 1, at 61.

than 30 times during five months.[121] Even when the plaintiff was more deserving and stated two classic examples—abuse of a relationship involving power and exploitation of a special susceptibility—of conduct usually considered to satisfy the extremely outrageous behavior element of the cause of action, the plaintiff lost, because he failed to prove that he had suffered severe emotional distress.[122] The opinion thus can downplay the central significance to the cause of action of extremely outrageous conduct and the two situations mentioned immediately above[123] as well as the importance of the employment relationship to mental distress and other intentional tort cases,[124] while discrediting the mental distress cause of action. In short, the message conveyed is that mental distress litigation is disfavored: you sissy girls just need a tougher mental hide or tough guys do not bring mental distress suits.

It is important to understand, however, that there are different ways to conceptualize the mental distress cause of action, its purposes, and elements.[125] The mental distress tort currently is being applied to an ever-widening ambit of circumstances.[126] Integral to this expansion, and the essence of the cause of action in many situations, are the ideas of power, its possession by parties to relationships, and rectifying relative imbalances of power.[127] These considerations have important implications for women who traditionally have possessed less power in relationships fundamental to them: employment and the family. Thus, mental distress and the other intentional tort causes of action might be viewed as mechanisms that could contribute to the em-

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121. *See id.*

122. *See id.* The casebook mentions the two classic examples in the notes following *Harris*, *see* W. Prosser, *supra* note 1, at 65-67.

123. The thesis of Professor Givelber's recent article is that extremely outrageous conduct is the essence of the mental distress tort and that when plaintiff proves that element courts will find that a cause of action has been made out even if severe mental distress has not been proved. *See* Givelber, *supra* note 111.

124. *See supra* notes 105-08 and accompanying text.

125. I rely substantially in this paragraph, and in my teaching of this material, on Professor Givelber's perceptive article, *supra* note 111.

126. For this proposition and an analysis of the circumstances, see Givelber, *supra* note 111. The *Prosser* casebook does provide a shorter enumeration, *see* W. Prosser, *supra* note 1, at 65-67 notes 3-8.

127. *See* Givelber, *supra* note 111. The *Prosser* casebook does allude to these ideas, but the treatment is not very explicit and it is buried in the notes. *See* W. Prosser, *supra* note 1, at 65-66 note 3.

powerment of women.[128] Illustrative of most of these concepts is the developing line of cases which treats sexual harassment of women in the workplace as a mental distress tort.[129] Inclusion of one of these cases or data on sexual harassment would be valuable, although numerous ideas mentioned above can be discussed in the classroom by assigning Professor Givelber's article on mental distress or excerpts from Professor MacKinnon's book on sexual harassment or using the existing casebook materials.[130] For example, the notes following *Harris* in *Prosser* lend themselves to such treatment.[131] To the editors' statement that the "mere solicitation of a woman to illicit intercourse" does not state any cause of action and Magruder's observation that "there is no harm in asking",[132] one foil is whether those ideas apply when the solicitor is a male faculty member or supervisor and the person solicited is a female student or employee.[133]

B. Privileges To Intentional Torts

In *Prosser, Wade, and Schwartz*'s block of material on privileges or defenses to intentional torts, women parties appear less frequently than in the chapter on affirmative causes of action governing intentional torts to persons. Moreover, the material on privileges has certain difficulties examined above, such as disproportionate use of masculine pronouns,[134] and a few new ones. However, the information on consent is first and most comprehensive, while that material and the component on discipline

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128. I realize that the cause of action may not contribute to women's empowerment and even may legitimize the continuing domination some women experience while serving only to isolate others. I have said that this may well be true for wives accorded intentional tort causes of action against their husbands. *See* Tobias, *Interspousal Tort Immunity in Montana*, 47 Mont. L. Rev. 23, 37 (1986). *Accord* C. MacKinnon, *supra* note 3; Olsen, *supra* note 17, at 1537-38, 1559-60.

129. *See* Givelber, *supra* note 111, at 66-67; Schneider, *The Dialectic of Rights and Politics: Perspectives From The Women's Movement*, 61 N.Y.U. L. Rev. 589, 643-49 (1986). For a trenchant criticism of this approach, finding it inadequate to sexual harassment as gender-based discrimination, see C. MacKinnon, *supra* note 3. For a recent illustrative case, see Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986).

130. *See* Givelber, *supra* note 111; C. MacKinnon, *supra* note 3.

131. *See* W. Prosser, *supra* note 1, at 65-67.

132. *See id.* at 65 n.1, *citing* Magruder, *supra* note 117, at 1035.

133. The *Prosser* materials permit discussion of abuse of relationship, power, and susceptibility, all of which are significant to the mental distress tort.

134. The material includes difficulties examined both in the first section of this Article and the initial subsection of this part. For examples of continuing problems with use of masculine pronouns, see W. Prosser, *supra* note 1, at 119-21 notes 4, 6, 8.

implicate the most significant gender issues. Therefore, those two parts of the chapter on privileges warrant close scrutiny here.

1. *Consent*

The six principal cases on consent comprise a curious contingent. Half of the cases were brought by male plaintiffs for injuries they suffered when participating in sporting events, while the other three were pursued by women plaintiffs against male physicians for administering medical treatment to which the females allegedly did not consent.[135] Because the three doctors appear to have had "good intentions", in the sense of wishing to confer benefits on the plaintiffs, and because the physicians secured "good results" for their patients,[136] the women may seem petty or their suits appear frivolous, if the females' actions are not placed in context. Thus, in *O'Brien v. Cunard Steamship Co.*,[137] the plaintiff was one of a group of 200 immigrant women who failed to protest the vaccinations which permitted them to enter the United States. She seems meek, submissive and ungrateful, unless one appreciates certain facts in the record on appeal:

> The plaintiff was 17 years old and travelling to the United States with her father and her brother in steerage. She had never before been away from home and had never, during the voyage, been separated from her father and brother until just before the vaccination procedure, when the steerage passengers were separated by sex and herded off to different parts of the ship. [She testified] that she held back till the last because she was afraid to go up, when there was no mark on her arm; that . . . there was no means of exit except where the surgeon stood; that when she got downstairs there was no means of getting away; the doctor was on the landing, and she could not go

135. *See* W. Prosser, *supra* note 1, at 97-112.

136. The medical treatment was successful in that it achieved therapeutic results that the doctors desired, but the treatment was administered in ways the women contended were unauthorized.

137. *See* 154 Mass. 272, 28 N.E. 266 (1891), *excerpted in* W. Prosser, *supra* note 1, at 97.

> up . . . .
>
> The injury of which the plaintiff complained was the eruption of blisters over her entire body, which she argued was caused by the vaccination.[138]

Correspondingly, in *Mohr v. Williams*,[139] the woman who filed a battery action against her physician for not securing her consent to operate on her left ear, although he operated successfully on that ear and had consent to operate on her right ear, appears to be unfairly pursuing a highly technical, and perhaps unwarranted, lawsuit, until readers comprehend that this is one of the first cases upholding a patient's right to autonomy in the face of medical paternalism.[140] Similarly, in *De May v. Roberts*,[141] the woman, who sued her sick and overworked doctor for permitting a young, unmarried, male stranger to be present at her childbirth, but without whose presence the physician might have been absent, seems ungrateful. This is true, unless one understands that *De May* is the seminal case recognizing a cause of action for invasion of the right to privacy, a right that has assumed great importance to women especially in areas involving reproductive freedom.[142] Thus, the primary difficulties with the principal cases are problems of omission or failure to denote context.

Although such difficulties may be hard to avoid in casenotes, problems of commission also appear. It is interesting that, but unclear why, so many of the unauthorized operations were

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138. These facts are not in the excerpt of the opinion included in the casebook. They are in J. Henderson & R. Pearson, SUGGESTIONS FOR TEACHERS USING *The Torts Process* Second Edition at 2-3 (1981).

139. *See* 95 Minn. 261, 104 N.W. 12 (1905), *excerpted in* W. Prosser, *supra* note 1, at 100.

140. Nonetheless, the plaintiff still may appear ungrateful and her suit technical. The doctor operated on the patient's left ear to save her the expense, danger, and trauma of being anaesthetized again, while the plaintiff's recovery ultimately was reduced from $14,000 to $39 because the operation was successful. The casebook does mention that *Mohr* is a leading case but treats it in ways that obscure its historical significance and context. *See* W. Prosser, *supra* note 1, at 103 note 3.

141. *See* 46 Mich. 160, 9 N.W. 146 (1881), *excerpted in* W. Prosser, *supra* note 1, at 105.

142. The tort cause of action for invasion of privacy differs from, but contributed to, the "constitutionalization" of the privacy concept in cases such as Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1965).

performed on women.[143] Moreover, although the grouping of note cases involving women with those involving minor children or individuals otherwise incapable of protecting themselves may be simple inadvertance, that fact makes it no less demeaning.[144] Similarly troubling is the note which observes that "generally, a competent adult can consent for *himself*" but specifically asks whether a "husband's consent [should] be necessary for a physician to perform a hysterectomy or other sterilizing operation on his wife" or for the wife to have an abortion.[145] Most problematic, however, are numerous notes which appear suggestive, almost prurient. The "magnetic healer" and salesman of artificial limbs who induce women to expose themselves and the woman who consents to sexual intercourse in return for money paid with a counterfeit bill minimally advance substantive understanding, degrade women, and distract attention from, and even trivialize, issues important to women.[146]

2. *Discipline*

This component combines certain of the worst aspects witnessed above. Even if the continuing practice of grouping females with children is ignored, the information provided is too little, too late. It omits the rich history of women's rights in the law and the importance and prevalence of intentional torts in the family, especially the ubiquitous nature of wife battering and the heinous activity of marital rape.[147] The material af-

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143. *See, e.g.*, W. Prosser, *supra* note 1, at 103 notes 3, 5; 107 note 7. Perhaps women were the victims of medical paternalism more than men who were more willing to object to medical treatment.

144. *See, e.g.*, W. Prosser, *supra* note 1, at 103-04 notes 2-9 and *compare id.* at 112 note 3. *with* the principal case, Hudson v. Craft, 33 Cal. 2d 654, 204 P.2d 1 (1949), *excerpted in* W. Prosser, *supra* at 109, in which the 18 year old boy sought protection from his own incapacity or inability to appreciate the consequences of being paid to box in a prize fight. It is interesting to note, however, that the treatises on women are located between those on children and the insane in most law libraries.

145. *See* W. Prosser, *supra* note 1, at 104 note 8. One way that this may be offset is by asking whether the wife's consent is necessary for her husband's vasectomy.

146. *See* W. Prosser, *supra* note 1, at 106 notes 2, 3 and 5. Similar to these examples is note 3A at page 112, stating that a "competent adult woman cannot maintain an action for her own seduction when she has consented [and that] defendant's overpowering personality or extraordinary powers of persuasion are not tantamount to 'duress' that would nullify consent."

147. The information provided is in W. Prosser, *supra* note 1, at 138-40. For earlier discussion of the remaining ideas in this sentence, see *supra* notes 11-19, 21-23, 43-50, 94

forded is so cryptic, collapsing into two sentences three hundred years of legal history significant to women, that the information may serve primarily to obscure or confuse.[148] It may leave a mistaken impression by: first, stating that at some indefinite, implicitly antediluvian, date in the past, husbands were privileged to discipline their wives; second, citing to an 1824 case; and third, remarking that wives can recover in states where spouses can sue each other for personal torts.[149] The material can convey the impressions that interspousal immunity for intentional torts and wife battering are dead issues or the unfortunate products of a bygone era, although tort immunity still survives in numerous jurisdictions while an incredible number of wives are beaten by their husbands during marriage.[150] Finally, if the significant omission of information important to women were not enough, the editors add insult to injury, reminding readers that sexism is ever with us, by characterizing the "persistent legend that the husband was privileged to beat [his wife] with a stick 'no thicker than his thumb' [as] a gentle rule for the preservation of family peace and harmony."[151]

III. The Future Of Gender Issues And *Prosser, Wade, And Schwartz*

It would be presumptuous to offer much more in the way of possible changes in the *Prosser* casebook than has been suggested explicitly or implicitly in the analysis above.[152] Moreover, there will be time enough, once the eighth edition is in print, to discuss and debate certain gender issues implicated by, and that transcend, the use of *Prosser, Wade, and Schwartz*. Nonetheless, some issues warrant brief examination here, because they are so important or because they will remain applicable regardless of how *Prosser* is revised.

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and accompanying text.

148. For earlier discussion of these ideas, see *supra* notes 21-23, 43-50 and accompanying text.

149. *See* W. Prosser, *supra* note 1, at 140.

150. For analysis of jurisdictions that retain interspousal immunity for intentional torts, see Tobias, *supra* note 128, at 29-34. For data indicating how the *Prosser* materials can obscure the statistical realities of wife battering, see *supra* note 94 and accompanying text.

151. *See* W. Prosser, *supra* note 1, at 140. For historical treatment of "domestic chastisement", and "gentle restraint", *see* Marcus, *supra* note 94, at 1658-60.

152. These suggestions appear in the first two sections of this paper.

A. A Last Word About Changes In The Casebook

I must admit to considerable ambivalence about altering the casebook.[153] It may be preferable to retain some of the material presently included, because the information seems to lend itself to effective treatment or provides "grist for the mill". For instance, some material appears so blatant or absurd that gender bias is obvious, while additional material that is less clear may illustrate nicely how gender issues can be subtle and complex.[154] Of course, I am making some assumptions about what happens in the classroom and about readers of the casebook that may be debatable or perhaps unwarranted,[155] and these lead in turn to the following discussion.

B. The *Prosser* Casebook and Gender Issues In the Classroom

I am keenly aware that it is one thing to analyze a casebook in light of gender issues and quite another to raise and explore those issues in the context of teaching and learning from that casebook in the classroom. Nonetheless, both efforts have cer-

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153. I also do not underestimate the difficulty of producing a casebook that would treat more efficaciously the gender issues discussed above. The general problems of editing and updating a comprehensive casebook in a fast-changing area like torts are substantial. More specifically, I concur with Professor Frug that "editors could conscientiously eliminate all instances of female degradation in their casebooks and still produce books that would affect readers' views about gender and that would be subject to multiple interpretations because of readers' gender attitudes." Frug, *supra* note 2, at 1069. I also agree that it "would be unrealistic and unfair to advocate abandoning this casebook on the grounds of my discussion." *Id.* at 1135. What is needed is constructive interchange both about how this and other casebooks might be revised and used in ways that raise gender issues and reduce gender bias.

154. For examples so blatant or absurd that gender bias is obvious, see the discussions of *Lipman*, *supra* notes 31-32 and accompanying text; of *Weathers*, *supra* notes 33-34 and accompanying text; and of "domestic chastisement", *supra* note 151 and accompanying text. If for some reason the gender bias does not seem obvious, attention can be drawn to the examples in numerous ways. To the Southern women on pedestals in *Lipman*, one response is "horses sweat, men perspire, and ladies glow." To the women shopping all day and buying nothing in *Weathers*, one response is "shop, shop, shop 'till you drop, drop, drop". To the characterization as a gentle rule for preserving family harmony the husband's privilege to beat his wife with a stick no thicker than his thumb, one response is "it depends on which end of the stick you find yourself".

155. For example, I may be too generous in my assumption that students will appreciate that certain material is sexist. Thus, it may be preferable to eliminate some material, lest certain readers have their sexist predilections reaffirmed. For a perceptive analysis, describing a range of readers with differing perspectives on gender issues, *see* Frug, *supra* note 2, at 1071-74.

tain commonalities: complexity, subtlety and delicacy. Of overriding significance for me, however, is the concept of context. For example, I never discuss comprehensively all of the material analyzed in the first two sections, varying what is examined and how it is treated from year to year, depending on numerous considerations, such as the perceived depth of student interest. Thus, when a student asks why Mr. Hill sues for the assault to Mrs. Hill,[156] that can serve as an opportune occasion for a brief discussion of the common law disabilities imposed on wives. I also attempt to be sensitive to the dynamics operating in the classroom and to use cautiously my "silver bullets", because it seems to me that there can be too much of what I consider to be a good thing and that there is considerable risk of trivializing important gender issues.[157] Moreover, I know that all faculty members have considerable power over students and that certain faculty may have or choose to exercise more such authority than others.[158] I try to be sensitive to that power and not to use the authority in the classroom context.[159] As with the *Prosser* casebook, I find instances of blatant or overt sexism in the classroom relatively rare. Furthermore, when these situations do arise, they typically elicit such derision or even laughter from most students that it is unnecessary for the instructor to say anything. Most problematic, however, is how to detect and respond to subtler forms of gender bias that surface less clearly, if at all.[160]

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156. *See supra* notes 14-17 and accompanying text.

157. For instance, *Prosser's* material on battery includes two note questions in which men touch women in ways that appear unauthorized and, thus, batteries. *See* W. Prosser, *supra* note 1, at 30 note 3; 31 note 6. But one seems so obvious and the other so silly that I treat them briefly, if at all, so as not to detract from more important material, such as that on wife battering or the *Prosser* material on assault, discussed *supra* notes 94-101 and accompanying text.

158. For instance, tenured faculty probably could treat some gender issues in certain ways that untenured faculty might not dare, or care, to treat them. Indeed, legion are the true stories that women faculty tell and are told about women faculty: 'she won't teach rules;' 'she does not discuss doctrine;' 'she always is talking about social policy, women's issues or, worst of all, feminism'. For helpful discussion of such faculty power, or lack thereof, and its implications for faculty generally and women faculty specifically, *see* Frug, *supra* note 2, at 1135-40.

159. I try to be especially careful that students do not feel bludgeoned, embarassed, or ridiculed, saving my criticism for the authors of opinions. It also is important to remember that some students will consider a faculty member a role model, making faculty behavior and fair treatment of students as important as the substantive material conveyed.

160. Much of this is quite delicate. For example, how can gender issues be raised

Finally, there are numerous teaching techniques, of varying degrees of complexity and subtlety, that can be employed in using the *Prosser* casebook. For instance, women can be substituted in the casebook's note questions or in hypotheticals or examples employed in class, while some teachers have compiled materials raising gender issues that can be used as a supplement to *Prosser, Wade, and Schwartz*,[161] as can the new work discussed next.

C. The Implications Of Feminist Jurisprudence For Tort Law

There recently has been much valuable work in numerous areas that has important consequences for tort law. For example, during the 1980's many helpful contributions have been made to the understanding of women's legal and non-legal history and the Married Women's Acts.[162] Some of this material can be integrated easily and beneficially into the discussions of intentional torts and other areas.[163] Correspondingly, I have

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with people who have divergent perspectives on these issues in ways that are not threatening, encourage candid discussion, and which raise the consciousness of those involved? Another way in which these issues can be delicate is that they involve not only gender but sex or reproduction. Some students may feel embarassed or uncomfortable about discussing reproductive freedom, Dalkon Shields, DES or the "vesico-vaginal fistula which permitted urine to leak from plaintiff's bladder into the vagina," mentioned in Scott v. Bradford, 606 P.2d 554 (Okla. 1979), *excerpted in* W. Prosser, *supra* note 1, at 197. Equally problematic is that some students may find certain materials humorous, or even titillating. For instance, Sapp's offer to "fix Mrs. Hill's clock" can have a decidedly modern and suggestive ring, *see supra* text accompanying note 98, while the "magnetic healer" or seller of artificial limbs, *see supra* text accompanying note 146, may appeal to the prurient instincts of some. If such issues arise or play out in these ways, the effects can be harmful, or even disastrous. Moreover, a sense of timing, balance, proportion and good judgment are valuable but sometimes difficult to achieve.

161. *See, e.g.*, J. Love, *Teaching Torts: A New Perspective Selected Cases And Articles* (Jan. 1987)(on file with author). *Cf.* Finley, *Laying Down The Master's Tools: A Feminist Re-Vision Of Torts*, 1 Yale J. of L. & Feminism (1988) (discussion of numerous cases that can be used in a torts course to illustrate gender issues). Examination drafting affords another opportunity for raising gender issues or employing women characters to good effect.

162. Helpful contributions to the understanding of women's legal history are M. Grossberg, Governing the Hearth: Law and the Family in Nineteenth Century America (1985); E. Pleck, Domestic Tyranny: The Making of Social Policy Against Family Violence From Colonial Times To the Present (1987); M. Salmon, Women and the Law of Property in Early America (1986). For helpful contributions to understanding of non-legal history, *see* the sources cited in Chused, *supra* note 18, at 1360 n.2. For discussion of the Married Women's Acts, *see* the sources cited *supra* note 18.

163. *See, e.g.*, *supra* Section II of this article. There also has been valuable work that has given new meaning to old ideas. One example is recent development of the concept of a woman's right to self-defense against men who physically threaten them. *See* Schneider, *supra* note 129, at 604-10. This idea can be discussed effectively when

been able to incorporate and use effectively in certain substantive fields, work that considers those areas practically and theoretically, such as Professor MacKinnon's classic study of sexual harassment of women in the workplace.[164] Moreover, some work that is more theoretical seems particularly appropriate to discussions of alternatives to tort law which arise throughout the course,[165] although inclusion of the material may well be warranted at other junctures.[166]

CONCLUSION

The *Prosser, Wade, and Schwartz* casebook always has been a thought-provoking vehicle for raising issues of gender in tort law. Regardless of how the eighth edition is revised, this aspect of the casebook is unlikely to change. The challenge for the future is how to use *Prosser* in ways that most efficaciously raise consciousness about issues of gender and reduce sexism. I have attempted to open discussion and trust that others will contribute to future debate.

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considering the analogous privilege of self-defense to intentional torts.

164. *See* C. MacKinnon, *supra* note 3.

165. Professor Finley's, "responsibilities" analysis is a particularly cogent example. *See* Finley, *Transcending Equality Theory: A Way Out Of The Maternity And The Workplace Debate*, 86 COLUM. L. REV. 1118 (1986). Moreover, her forthcoming work which considers torts from a feminist perspective promises to be very valuable. *See* Finley, *supra* note 161.

166. More thought needs to be given to including this material in the classroom. The type of legal work I have in mind is exemplified by efforts such as S. Estrich, REAL RAPE (1987); C. MacKinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) and Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986). The implications of non-legal work for tort law should be explored as well. For instance, what implications might the ideas of Simone de Beauvoir, Michel Foucault, or Carol Gilligan have? *See* S. De Beauvoir, THE SECOND SEX (1952); M. Foucault, POWER/KNOWLEDGE (1980); C. Gilligan, IN A DIFFERENT VOICE (1982).