Torts Teaching: From Basic Training to Legal-Process Theory: Dominick Vetri, *Tort Law and Practice*

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I. INTRODUCTION

When I was preparing to launch my career as a torts professor at the University of Denver College of Law in the fall of 1964, I found a rather thin menu of casebooks from which to choose. However, the editors of these tomes were towering figures in the field, a fact that more than made up for (and perhaps explained) the paucity of available teaching materials. The list included Prosser and Smith,[1] perfectly straight-forward in its approach and burnished by the recognition that its lead editor was the most influential torts scholar of the day;[2] Seavey, Keeton, and Keeton,[3] leavening a stolid devotion to the case method with an occasional and, for its day, innovative use of cartoons;[4] Green et al.,[5] with opinions and text uniquely paraded in factual categories such as public-service companies[6] and horse-and-buggy traffic;[7] Shulman and James,[8] notable for employing a workers' compensation opinion as its engine[9] and consigning intentional torts to the caboose;[10] and the "new kid on the block," Gregory and Kalven.[11]

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1. WILLIAM L. PROSSER & YOUNG B. SMITH, CASES AND MATERIALS ON TORTS (3d ed. 1962).

2. For an account of William L. Prosser's impact on the development of tort law, see G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY Ch. 5 (1980).

3. WARREN A. SEAVEY, PAGE KEETON & ROBERT E. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS (1964).

4. *Id.* at 7 (W. of S. swinging his hatchet); 355 (Mrs. Palsgraf and her daughters); and inside back cover (the "torts mountain").

5. LEON GREEN ET AL., CASES ON THE LAW OF TORTS (1957).

6. *Id.* at Ch. 5.

7. *Id.* at Ch. 9, § 1.

8. HARRY SHULMAN & FLEMING JAMES, JR., CASES AND MATERIALS ON THE LAW OF TORTS (1952).

9. SHULMAN & JAMES, *supra* note 8, at 1 (citing Ives v. S. Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911) (holding the New York workmen's compensation act unconstitutional)).

10. *See* SHULMAN & JAMES, *supra* note 8, at Ch. 8.

Prosser and Smith would have been the safest selection, its heavily-edited cases faithfully tracking the leading treatise in the field,[12] and its avowed aim to "be all things to all men,"[13] underscoring, perhaps unconsciously, that torts teaching was still pretty much a fraternity, and at the same time reflecting a marketing strategy the success of which would be difficult to criticize. Seavey and the brothers Keeton offered raw material for a "hide-the-ball" Socratic approach to the subject, as well as the only available teacher's manual.[14] Green featured what in my judgment was the most interesting selection of cases, both on their facts and in the variety of issues they raised, but making sense of the arrangement of the opinions seemed beyond the reach of one not schooled in the fundamentals of legal realism.[15] Shulman and James provided a unique focus on tort law as a mechanism for distributing losses,[16] but by the mid-1960's, the materials had become woefully out of date. Gregory and Kalven, a *soi-disant* "casebook with a view,"[17] had the most contemporary feel to it, as well as rich chapters on personal-injury damages[18] and defamation.[19] As happens, I suspect, with most novices, I chose to go with the casebook that first exposed me to torts, Seavey, Keeton, and Keeton (although I eventually used the crucible of the classroom to test all but one of the original "fab five").

The panorama began to change in 1971 with the appearance of the Franklin and Rabin book,[20] which rotated the torts world on a California/New York axis, and over the next three decades a new gen-

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11. CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS (1959).

12. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (3d ed. 1964).

13. PROSSER & SMITH, *supra* note 1, at x.

14. WARREN A. SEAVEY ET AL., NOTES FOR INSTRUCTIONS FOR USE WITH CASES ON TORTS (1957).

15. For an instructive analysis of legal realism as embodied in the writings of Leon Green, see Allen E. Smith, *Some Realism About a Grand Legal Realist: Leon Green*, 56 TEX. L. REV. 479 (1978).

16. This reflected the approach to torts taken by Fleming James, Jr. For an analysis of the impact of James on the development of tort theory, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 470–81 (1985).

17. GREGORY & KALVEN, *supra* note 11, at vii.

18. *See id.* at Ch. 7. This chapter was notable for its thoroughness and the seriousness with which it treated a subject often relegated to the periphery of the torts course.

19. *See id.* at Ch. 13. The materials on defamation provided wonderfully instructive coverage of the historical evolution of the tort. For insight into what motivated the comprehensiveness of this chapter, see Harry Kalven, Jr., *Torts Casebooks on Parade: The Authors Meet the Users*, 25 J. LEGAL EDUC. 4, 16 (1973) ("The reason there is so damn much about defamation in our casebook is: I *like* it!").

20. MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES (1971).

eration of torts teachers brought forth new materials offering a panoply of fresh approaches and divergent viewpoints. It was as though legal publishers had resolved to heed Chairman Mao's deathless dictum about "[l]etting a hundred flowers blossom."[21] Today, the newcomer to torts confronts a cornucopia of casebooks,[22] and adventurous souls have the opportunity not only to use modern photocopying technology to assemble their own original materials, but also to mix and match opinions and text culled from various existing casebooks.[23] Those who feel the need to switch casebooks every few years in an effort to keep their pedagogy fresh (and I include myself in this group) must struggle with the same embarrassment of riches.

It was in the course of my meanderings through the torts-casebook landscape that I came upon Professor Dominick Vetri's entry in the field.[24] The quality that first attracted me was the way it fashioned a user-friendly introduction to the study of law, to the uniqueness of the common law, and to the centrality of process. The book demonstrated an unusual sensitivity to the bewilderment of beginners and made a special effort to anticipate their needs and concerns. Yet what made Vetri's approach particularly intriguing was that it managed to play not only to nervous neophytes, but also to students in need of intellectual challenge. It did so by raising issues that stretched their minds by making them contemplate a larger canvas and think even more analytically than they would in striving to master basic tort doctrine and theory. The book's duality gives it a unique stamp and will provide the focus of this review.

II. TORTS FOR TOTS

Tort law has traditionally served as a teething ring for first-semester, first-year students, who must, in the first weeks of the course, learn how to appreciate the importance of procedure, hone in on the operative facts of a case, frame issues with precision, distinguish holding from dictum, and analyze the reasons underpinning a judicial decision. Normally, the torts course pursues these goals in the context of opinions dealing with intentional torts[25] because of their

21. MAO TSE-TUNG, QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG 302 (1966) (the "Little Red Book"). Law publishers, however, clung stubbornly to their habit of attaching useless indices at the end of their casebooks.

22. I count eighteen on my office shelves.

23. The West Group offers the customized publishing of materials selected from West and Foundation Press casebooks. *See* Letter from Alice Mitchell, Custom Publishing Coordinator, West Group, to Law Professors (Feb. 26, 2001) (on file with the author).

24. DOMINICK VETRI, TORT LAW AND PRACTICE (1998).

25. *See, e.g.*, VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS Ch. 2–3 (10th ed. 2000).

relative simplicity. Vetri's resort to negligence cases as an introductory vehicle[26] gave me momentary pause, but the clarity with which he presented the materials convinced me that at the outset of their exposure to the subject, students could grab hold of the concept of negligence and even begin to run with it.

Opening the course in this way acts as a partial antidote to the current tendency at many institutions, including my own, to reduce the number of hours devoted to the first-year torts course. Where time is at a premium, it seems to me to make scant sense to spend several weeks on the minutiae of battery, assault, false imprisonment, trespass, and related privileges and then have to race through, or omit altogether, some of the more significant aspects of negligence and strict liability.

Indeed, Vetri's inclusion of boxed summaries and flow charts at strategic points in the text,[27] "putting-it-all-together" and accomplishment notes at the end of every chapter,[28] and an ample supply of practice problems[29] does much more than help students through the subtleties of the subject (and thereby reduces the risk that they might fall by the wayside in the early weeks of the course). It also furnishes a welcome counterweight to the pressures that seek to push students into the panic-purchasing of commercial study aids.

Commercial study aids sit like uninvited guests at the banquet table, and legal academics tend to ignore them, perhaps in the hope that they will go quietly away. Yet study aids remain a fact of law school life, so much so that each year they seem to multiply like weeds after a summer rain. Moreover, study aids assume a variety of communicative forms—such as flashcards, charts, audio cassettes and interactive software—that go far beyond the paperback book or booklet and feature not only course outlines, but also case briefs, sample questions and answers, and assorted memory aids.[30]

In a 1989 *Washington Monthly* article criticizing the shallowness and misguidedness of study aids, Daniel Pink noted, "After spending upwards of $20,000 a year to learn to think like lawyers, students could be plunking down an extra 12 bucks to defeat the entire pur-

26. VETRI, *supra* note 24, at Ch. 1 ("An Overview of Negligence Law").

27. *E.g.*, *id.* at 285 (duty flow chart), 605 (elements of assault).

28. *E.g.*, *id.* at § 2.07 ("Putting Breach of Duty Analysis Together"), 353 (accomplishment note on vicarious liability).

29. *E.g.*, *id.* at 352.

30. I do not intend my criticism of "spoon-feeding" materials to apply to readings designed either to expose readers to the varieties of thinking about tort law or to enrich their understanding of the subject in other ways. An excellent example of the former is ROBERT L. RABIN, PERSPECTIVES ON TORT LAW (4th ed. 1995); the best exemplification of the latter is KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW (1997).

pose."[31] Although his numbers need updating, the basic point remains valid. Experience suggests, however, that nervous 1Ls will remain vulnerable to the blandishments of publishers who play on their insecurities, to the advice they receive from purportedly knowledgeable upper-class students, and to the highly competitive environment of law school.

By including guideposts, bare-bones outlines, and summaries, the Vetri book offsets the pressures pushing students to purchase study aids. The presentation of basic concepts in a solid foundation created by the casebook's editor not only serves to reduce jitters, but also it assures both the relevance and the accuracy of these building-block materials. At the same time, this approach enables and encourages students to pursue issues more deeply. In feeling more comfortable with the basic concepts of tort law, students may be more easily persuaded to undertake the conversion of the bare-bones outlines in the casebook into points of departure for the exploration of more challenging pathways.

What can assist the instructor in efforts to broaden the scope of the course beyond the confines of doctrine is the attention Vetri pays to the torts process. While his is not the first casebook with this as a major focus, the attention he pays to legal-process concerns that can provide a theme for the course gives the casebook its intellectual rigor.

III. TORTS FOR GROWN-UPS

The process issues raised by Vetri have their roots in what has come to be known as legal-process theory, a jurisprudential movement emerging from teaching materials developed by Harvard Law School Professors Henry M. Hart, Jr. and Albert M. Sacks,[32] with important contributions from their colleague Lon L. Fuller.[33] An important feature of legal-process theory was its careful focus on the processes by

31. Daniel Pink, *Law School Lite*, WASH. MONTHLY, Nov. 1989, at 20.

32. The Hart & Sacks materials remained unpublished for decades although they formed the basis for courses offered at the Harvard Law School and other institutions. One professor described feeling "a slight thrill as I held a copy of the famous book that never became a book—as if I had in my hands a *samizdat* or an artifact." Anthony J. Sebok, *Reading* The Legal Process, 94 MICH. L. REV. 1571 (1996). The material did not find its way between hard covers until 1994. HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994). On the history of legal-process theory, see William N. Eskridge, Jr., & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031 (1994).

33. For a discussion of Fuller's influence on Hart, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HART & SACKS, *supra* note 32, *at* li, lxxxiii. For an intellectual biography of Fuller, see ROBERT S. SUMMERS, LON L. FULLER (1984).

which courts developed and applied common law, and the relative institutional competence of individuals, courts, legislatures, and agencies to perform law-making and law-applying functions.[34]

In one respect, all torts casebooks have included opinions that specifically touch upon one aspect of legal-process theory, the interplay between courts and legislatures, since it lies at the essence of the doctrine of negligence per se.[35] The methods utilized by courts to decide whether to adopt and apply as a measure of ordinary care the dictates of a statute, ordinance or administrative regulation not on its face applicable to negligence actions constitute one example of how courts make indirect use of legislative or administrative pronouncements, a subject treated in the Hart and Sacks materials.[36] Hence, torts teachers have always dealt consciously or unconsciously with this legal-process issue.

The first torts casebook to go beyond negligence *per se* in reflecting legal-process theory was Seavey, Keeton, and Keeton, which included a section exploring the relative roles of courts and legislatures in serving the common law's competing demands for stability and change.[37] The cases selected here dealt directly with the judicial overruling of prior case law and incidentally with a particular type of indirect influence cast by statutes on the common law,[38] which are matters developed at some length in the Hart and Sacks materials.[39] It is probably a safe guess that the editor responsible for introducing the courts versus legislatures theme into the book was Robert E. Keeton, who had previously addressed the problem of judicial overruling in an

34. Legal-process theory's seminal contribution derived from the original insights it offered about the modern regulatory state and the sources and legitimacy of the legal ordering that governed it. *See generally* Daniel B. Rodriguez, *The Legal Process Movement*, *in* 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1578-80 (2d ed. 1999).

35. *See, e.g.*, PROSSER & SMITH, *supra* note 1, at 222–48; SHULMAN & JAMES, *supra* note 8, at 225–38.

36. *See* HART & SACKS, *supra* note 32, at 468–73. Other points in a torts course where discussion of the indirect use of statutes might be inserted include the relevance of statutory rape criminal statutes to the application of the defense of consent in battery actions, as well as the possible effect of statutes criminalizing failures to aid strangers in peril on claims that courts should recognize a tort duty in these kinds of cases.

37. SEAVEY, KEETON & KEETON, *supra* note 3, at Ch. 9, § A.

38. *See* Cohen v. Kaminetsky, 176 A.2d 483 (N.J. 1961) (overruling prior decisions holding driver liable to guest passenger only for willfully or wantonly inflicted injuries and imposing a duty of reasonable care owed by driver to guest passenger); *see also* Spanel v. Mounds View Sch. Dist. No. 621, 118 N.W.2d 795 (Minn. 1962) (overruling governmental tort immunity). In *Kaminetsky*, the court cited a legislative repeal of a statutory exclusion removing guest passengers from the protection of a law providing for claims against uninsured motorists as a factor supporting its decision to overrule precedent and impose a duty of ordinary care on motorists for the protection of guest passengers.

39. *See* HART & SACKS, *supra* note 32, at 576–84 (overruling common law precedent), 468–73 (indirect effect of statutes on development of common-law rules and doctrines).

article[40] and later revisited the theme in a monograph[41] (both of which revealed the influence of his Harvard confreres Hart, Sacks and Fuller).[42]

Legal-process concerns, especially as articulated by Fuller, have also animated the Henderson and Pearson torts casebook (aptly titled *The Torts Process*), which first appeared in 1975.[42] Thus, the treatment of whether or not to recognize a tort duty of due care to rescue strangers in peril draws heavily on Fuller's distinction between the morality of duty (setting the basic requirements of social living) and the morality of aspiration (setting goals of excellence),[44] which though not specifically mentioned in the Hart and Sacks casebook, falls within the parameters of the latter's preoccupation with determining how to put proper restraints on judicial law-making.[45] In a 1973 article arguing for the recognition of limits on the scope of tort liability for the negligent or defective design of products, Henderson invoked Fuller's concept of polycentricity or the interconnectedness that makes it impossible to resolve one issue without affecting a host of related others to such an extent that resolution of the issue through adjudication is undesirable.[46] Polycentricity is mentioned *en passant* in Hart and Sacks[47] and, not surprisingly, is featured prominently in the Henderson and Pearson casebook.[48]

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40. *See* Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 462 (1962).

41. *See* ROBERT E. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW Ch. 1–4 (1969).

42. In his 1962 article, Keeton cited HART & SACKS, Keeton, *supra* note 40, at 470 n.17, 481 n.43, as well as the work of Fuller, *id.* at 470 n.16. Keeton's continuing preoccupation with legal process themes is illustrated by a later article on the availability of punitive damages in wrongful death actions. *See* Robert E. Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 2 (1978) (examining the phenomenon of interstitial law-making by courts when they fill in statutory lacunae).

43. JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, THE TORTS PROCESS (1975). Another noteworthy feature of the casebook was its innovative use of problems.

44. *See id.* at 499–500 (citing LON L. FULLER, THE MORALITY OF LAW 5-6 (rev. ed. 1969)). To illustrate the distinction, Fuller uses an analogy drawn by Adam Smith, who likened the morality of duty to the rules of grammar and the morality of aspiration to the standards for recognizing excellence in literary composition. *See id.* at 6.

45. *See* HART & SACKS, *supra* note 32, at 640–47.

46. James A. Henderson, Jr., *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). Fuller's use of the notion of polycentricity as an argument for judicial self-restraint was not published in final form until 1978, shortly after his death. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); *see also* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Model's of Litigation*, 75 B.U. L. REV. 1273, 1314–20 (1995) (discussing Fuller's conception of polycentricity).

47. *See* HART & SACKS, *supra* note 32, at 647.

48. *See* HENDERSON & PEARSON, *supra* note 43, at 650. For other articles by Henderson applying the jurisprudence of Fuller to tort law, see James A. Henderson, Jr., *Expanding the Neg-*

However, Vetri's is the first torts casebook to facilitate an extensive consideration of aspects of legal-process theory developed in Hart and Sacks. It does so in large part within the precincts of an excellent chapter on duty,[49] an element of the negligence formula seldom given its proper due in torts teaching materials.[50]

Courts are occasionally called on to decide whether or not to recognize obligations or defenses where none had existed before or where prior holdings had refused to recognize them or to modify or eliminate obligations or defenses created by prior judicial holdings. This raises a fundamental legal process issue: what factors may a court properly weigh in reaching such a decision? Moreover, under what circumstances might it be appropriate for a court to give dispositive weight to its conclusion that the legislature would be the appropriate institution to make the change sought by one of the parties to the litigation? Vetri encourages discussion of these questions at various points in his duty chapter.[51]

The chapter begins with Cardozo's opinion in *MacPherson v. Buick Motor Co.*,[52] which imposes a duty of due care on the assembler of a new automobile for the benefit of consumers who might suffer harm because of the assembler's failure to exercise adequate precautions. The case enables the teacher to illustrate how a distinguished jurist utilized (some might say manipulated) precedent in a creative way to make what in effect became new law,[53] an exercise that recalls the way Hart and Sacks employed the opinion.[54] In addition, Vetri poses the question whether the decision in *MacPherson* caught the Buick Motor Company unfairly by surprise,[55] also an issue raised by Hart & Sacks.[56]

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ligence Concept: Retreat from the Rule of Law, 51 IND. L.J. 468 (1976); see also James A. Henderson, Jr., *Process Constraints in Torts*, 67 CORNELL L. REV. 901 (1982).

49. *See* VETRI, *supra* note 24, at Ch. 3.

50. One notable exception is MARK F. GRADY, CASES AND MATERIALS ON TORTS Ch. 4 (1994).

51. *See* VETRI, *supra* note 24, at Ch. 3.

52. 111 N.E. 1050 (N.Y. 1916). *MacPherson* normally makes its appearance in the products liability chapter of torts casebooks. *E.g.*, RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 722 (7th ed. 2000).

53. *See id.* at 179–80.

54. *See* HART & SACKS, *supra* note 32, at 545. Spotlighting *MacPherson* as an exemplification of common-law reasoning from precedent is neither recent nor unusual. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 7–19 (1949); *see also* EDGAR BODENHEIMER, JOHN BILYEU OAKLEY & JEAN C. LOVE, AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM 94–109 (2d ed. 1988).

55. VETRI, *supra* note 24, at 181.

56. HART & SACKS, *supra* note 32, at 556–57. An interesting discussion point here is the extent to which attorneys representing habitual defendants should anticipate changes in settled

In a note following *MacPherson*, Vetri suggests that. in addition to precedent, public-policy factors might also have supported the holding of the case, and he sets out a list of factors, including deterrence, fairness, ease of administration, loss allocation, and consistency with legislatively established policy as embodied in existing statutes.[57] He touches lightly on these factors in his treatment of duty to rescue[58] and then goes back to them in more detail after his presentation of *Rowland v. Christian*,[59] the California decision imposing on possessors of land a duty of ordinary care for the protection of entrants.

This material opens up the possibility of examining descriptively how common-law judges go about making law and normatively if and how they should perform this task. The use of policy factors has roots in legal realism. Indeed, Leon Green was perhaps the first to invoke them systematically in the context of tort law.[60] Hart and Sacks takes a more cautious tack here. The editors consider judicial law-making by asking whether the opinion in *Roberson v. Rochester Folding Box Co.*[61] correctly refused to recognize a common-law right to privacy and to grant monetary and injunctive relief to the plaintiff for the use of her likeness without consent to promote the sale of flour.[62] The editors of the casebook appear to be sympathetic to the creation of the new tort. In giving their approval, the editors nod toward the arguments of Samuel D. Warren and Louis D. Brandeis in Warren and Brandeis's famous article advocating recognition of a right to privacy and identifying from prior decisions a fundamental principle that protects the inviolate personality of the individual.[63] Also, the editors suggest both that the right might have derived from "definite and provable patterns of popular conduct"[64] and a "general community understanding with respect to the rightness or wrongfulness of appropriating a person's photograph without leave for commercial gain"[65] and that it might have been implied from the "shared purposes of the members of the

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common law doctrines or rules, and how they should channel such anticipation into practical advice for their clients.

57. VETRI, *supra* note 24, at 180.

58. *Id.* at 196.

59. 443 P.2d 561 (Cal. 1968), *in* VETRI, *supra* note 24, at 213.

60. *See* Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928).

61. 64 N.E. 442 (N.Y. 1902), *in* HART & SACKS, *supra* note 32, at 435.

62. *Id.*

63. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

64. HART & SACKS, *supra* note 32, at 453

65. *Id.*

community" (a Fuller notion).[66] Hart and Sacks' emphasis on careful reasoning from basic principles and norms does not eliminate the risk that judges might head down the fabled "slippery slope" and end up deciding cases on the basis of their personal policy preferences.[67]

Vetri points out this possibility in a succinct "Note on the Sources of the Common Law" at the end of the chapter, where he ties together the theme of judicial law-making with a synthesis of various jurisprudential approaches to the question of the nature of law.[68] Without encumbering his discussion with labels, he describes the substance of formalism, legal realism, legal-process theory, and critical legal studies in an effort to provoke thought about what restraints affect judges as they exercise their law-making function.[69]

At the close of his section on limited duty for negligently inflicted emotional harm, Vetri deals with the related problem of overruling precedent.[70] Since the demands of the doctrine of stare decisis require a further finding to the effect that the net gains to be derived from disturbing settled law outweigh any negative effects that overruling might produce, it is not enough for a court to conclude that a prior decision had been incorrectly decided or that, if the case had come up as a matter of first impression, the court would decide it in a different way. Vetri presents the various considerations that a court should consider when making this balance,[71] and these considerations are consistent with the treatment of overruling in Hart and Sacks.[72]

Placing the overruling issue in the same chapter with material dealing with how courts decide cases of first impression makes good sense because of the obvious link between the two. Vetri permits the instructor to revisit the issue and test student comprehension of it by

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66. *Id.* It is curious that the editors did not mention natural law and the protections afforded to personal privacy by the United States Constitution, justifications given for the holding in *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905), which was the first American decision to recognize a right to privacy in tort. For a comprehensive treatment of the right to privacy tort in teaching materials influenced by HART & SACKS, see PAUL J. MISHKIN & CLARENCE MORRIS, ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW Ch. 2 (1965).

67. Indeed, it is likely that Samuel D. Warren, whose article was instrumental in persuading courts to recognize a right to privacy in tort, was in fact motivated by his own peculiar attitudes about privacy. *See* James H. Barron, *Warren and Brandeis,* The Right to Privacy, 4 *Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875 (1979).

68. VETRI, *supra* note 24, at 278–82. For a different perspective criticizing legal process theory for the restraints it would place on judges faced with law reform issues, see Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229 (1981).

69. For an excellent and comprehensive treatment of common law law-making, see MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988).

70. VETRI, *supra* note 24, at 252–55.

71. *Id.*

72. *See* HART & SACKS, *supra* note 32, at 568–70.

including *Hoffman v. Jones*,[73] the path-breaking Florida decision overruling precedent and replacing contributory negligence with comparative fault, in a later chapter on defenses and immunities.[74]

The question of relative institutional competence is a fundamental concern of legal-process theory.[75] However, there is a difficulty raising it with first-semester, first-year students, who are in the throes of a struggle to understand the judicial process and have had little or no exposure to the legislative process. Hence, making meaningful comparisons between the two institutions can be problematic.

The one obvious moment in the torts course when this might be raised is in connection with the common-law rule providing that compliance with a statute, ordinance, or administrative regulation is not due care per se, but only some evidence from which a jury might infer reasonable conduct.[76] The complexities of the issue come to light even more sharply in the product liability context with debate about whether compliance with product safety regulations promulgated by a federal agency should relieve manufacturers from liability.[77] Unfortunately, there is too much here for first-year students to handle reasonably.

In one of the notes after *Rowland*, Vetri opens the floor to a discussion of whether courts should undertake the reform of common law rules and doctrines or whether the task should be left to legislatures.[78] In opening this discussion, Vetri gives the instructor an opportunity at least to flag this classic legal-process concern.[79]

IV. CONCLUSION

The Vetri casebook represents an interesting and thoroughly worthwhile effort to permit instructors to reach both ends of the class curve. The learning aids located at strategic points in the text provide important substantive and psychological help for those finding it diffi-

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73. 280 So. 2d 431 (Fla. 1973), *in* VETRI, *supra* note 24, at 531.

74. *Id.*

75. *See* HART & SACKS, *supra* note 32, at 112, 158–67. On the importance of this concept to the formulation of a modernized legal-process theory, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

76. The rule is tersely stated in VETRI, *supra* note 24, at 106 n.10.

77. For thorough coverage of the issue, see Symposium, *Regulatory Compliance as a Defense to Products Liability*, 88 GEO. L.J. 2049 (2000).

78. *See* VETRI, *supra* note 24, at 218 n.3.

79. Hart and Sacks raise the issue in the context of the dissenting opinion of Mr. Justice Brandeis in *International News Service v. Associated Press*, 248 U.S. 215 (1918) (Brandeis, J., dissenting). HART & SACKS, *supra* note 32, at 536. However, contrary to their usual practice, the editors surprisingly offer no extended commentary on the factors Brandeis lists as supporting judicial deference to legislatures.

cult to catch on to the uniqueness of the study of law, while the editor's occasional forays into legal-process theory should invigorate those in need of intellectual challenge. At the same time, the mass of students between the two extremes can be made to feel more comfortable with the basics of tort law and less hesitant to take an occasional plunge into deeper waters with their more adventurous classmates.