

THE DAUNTLESS GARY SCHWARTZ

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Why did news of Gary's malignant brain tumor (and, a few months later, of his death) trigger such an outpouring of affection? Partly it was the breadth and depth of Gary's intellectual talents. He could expound with verve and insight on the joint and several liability of tortfeasors, the history of federal highways, school finance in California, the latest Robert Altman film, the aesthetics of Keith Wilkes's jump shot, and the merits of knocking with ten early in a game of gin. Partly it was the quality of Gary's character. As a torts teacher he had to deal with the concept of malice, but he personally was incapable of that emotion. His integrity and loyalty were total. At first meeting, you knew that you could count on him. In these brief remarks, however, I'll stress another of Gary's exceptional qualities: his mettle. He had an irrepressible urge to take on new challenges. He usually sought companions for his varied adventures and, given his energy and good humor, never lacked for them.

Gary and I first became friends in the fall of 1961 at Oberlin College. He then was a senior, one year ahead of me. We chanced both to eat our meals at the larger and livelier of Oberlin's two co-ops, Grey Gables, a wood-frame dining hall for seventy students (both male and female, an Oberlin tradition since 1837). Chip Planck, the elected Work Coordinator at Grey Gables, was responsible for assigning the co-op's members to dining hall tasks. Able to discern comparative advantages, Chip saw that Gary could contribute more if assigned to making the daily announcements during the noon meal than, say, to helping with the dishwashing (never Gary's strongest suit). Gary seized on Chip's conferral of these regular opportunities to perform before fellow diners. Into the conventional stream of daily announcements about campus events and co-op matters, Gary began to insert selected national news items, intellectual asides, and carefully crafted witticisms. His noontime monologues—invariably delivered in stentorian fashion—contributed mightily to the vibrant life at Grey Gables. Gary's success in this standup role no doubt whetted his later appetite to perform before law students.

Over the next twenty years Gary and I proceeded on much the same career path, with Gary usually one step ahead. (I don't recall consciously

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following his lead, but, as we say in Torts, *res ipsa loquitur*.) In the early 1960s the Oberlin graduates with the greatest options typically enrolled in Ph.D. programs. Gary, ever the adventurer, elected instead to go to law school, narrowly preferring to enroll at Harvard rather than at Chicago, which had offered him a full ride. As an Oberlin senior the next year, I too opted for law school. When I telephoned Gary for advice about the relative merits of Harvard and Yale (then the slightly more offbeat option), he disclosed the startling news that he was seriously considering transferring to Yale. Never a self-aggrandizer, Gary added that he probably would be happier at Harvard if he were doing better in his studies. Doing better? Gary would finish his first year at Harvard ranked first in his class, a result that, unfortunately for me, quashed his interest in transferring south. Despite his achievements, however, Gary never found peace at Harvard. Discontent with the *Harvard Law Review*, he was a key co-founder of the *Harvard Civil Rights-Civil Liberties Law Review*, an alternative outlet for student energies.

During and after law school Gary and I both became absorbed with urban problems, one of the great causes of the last half of the 1960s. In 1967-1968 Gary clerked for Judge J. Skelly Wright, who put him to work on an influential opinion that dismantled on equal protection grounds the student-tracking system used in the public schools of Washington, D.C.¹ By then I also was living in Washington. The two of us were mutually supported by a social network consisting of old Oberlin friends and a variety of newly minted lawyers. To relieve the stress of our daily labors in downtown offices, we would meet in the evening at a Dupont Circle or Mount Pleasant restaurant, and on summer Sundays convene at Hearst Playground for a spirited game of softball. Gary, who could consistently use his two-handed backhand to hit cross-court winners in tennis, loved the challenge of softball, although it was not his best sport. As he once put it years later after a UCLA-USC law faculty softball game, "There are few pleasures that can compare to hitting a hard line-drive to left field."

Soon after his clerkship with Judge Wright, Gary was working for John Robson, the Under Secretary of the newly formed Department of Transportation. This helped qualify Gary to enter the law-teaching market as an expert in urban law, an embryonic field suited to his pioneering instincts. Although Gary lacked California connections, he eagerly accepted a teaching offer from UCLA and moved across the continent. A year later, touting myself as a housing expert, I followed suit and began teaching at the other terminus of the Santa Monica Freeway, at USC.

1. See *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

Starting out, Gary and I both taught courses in Urban Government, using Michelman and Sandalow's brilliant new casebook.² Within a year or two, however, our respective academic deans—John Bauman was the key figure at UCLA, I believe—separately asked us to teach a section of a first semester course that they regarded as a high curricular priority. Torts! Who could resist the pleasure of teaching beginning law students graphic cases that posed basic issues of culpability. For Gary, of course, the invitation to teach Torts proved to be life-shaping. Although he would maintain his interest in Urban Government throughout his career, by the mid-1970s he had shifted most of his scholarly energies to issues of personal injury.

On our many social occasions together during the 1970s, Gary and I would try to puzzle out the complexities of tort doctrine. Gary found particularly muddled and unprincipled the doctrinal requirement that a defendant owe a particular plaintiff a "duty of care." On this issue Gary regarded Judge Andrews's dissent in the famous *Palsgraf v. Long Island Railroad Co.*³ as far more persuasive than Judge Cardozo's majority opinion. In Gary's view, when a railroad sets out scales in one of its stations (or takes any other affirmative act), it has "a duty to the world" to set them out nonnegligently. Perhaps the railroad should not be held liable to someone injured as a result of a bizarre concatenation of events (as Mrs. Palsgraf was), but then a doctrine other than duty—most likely, proximate cause—would better guide judges and juries to the proper resolution of the case.

Over the course of the next quarter-century Gary published numerous pathbreaking articles on the history and structure of tort law. If in 2002 law professors were to award prizes for lifetime achievements in various fields, Gary would be the favorite in his generation to win the Oscar in Torts. In the late 1990s Geoff Hazard, the Director of the American Law Institute, sought a Reporter to direct work on a new Restatement of Torts that would address fundamental principles of liability for physical harm.⁴ Gary was obviously the person best qualified for the job. He was preeminent in the field and also possessed personal traits ideal for a Reporter: clarity of expression, reliability, integrity, fair-mindedness. Gary pondered whether to accept Geoff's offer. The clincher for Gary, I suspect, was that the project was destined to be highly controversial. It would place the Reporter in the cross-hairs of a large number of vociferous and irreconcilable academic and practi-

2. FRANK I. MICHELMAN & TERRANCE SANDALOW, *GOVERNMENT IN URBAN AREAS* (1970). Gary appraised the book in the *Harvard Law Review*. Gary T. Schwartz, *Government in Urban Areas*, 84 HARV. L. REV. 516 (1970) (book review).

3. 162 N.E. 99 (N.Y. 1928).

4. The project came to be called *Liability for Physical Harm (Basic Principles)*. In a Restatement project the Reporter serves as the primary researcher and drafter.

tioner critics. How could a man of adventure turn down such an opportunity?

In his early drafts of the new Restatement, Gary strove, along with other objectives, to cabin the relevance of the notion of a duty of care. Defenders of the conventional duty doctrine subsequently challenged Gary's analysis in sharply worded articles published in a *Vanderbilt Law Review* symposium.⁵ When I sought Gary's reaction, he responded with characteristic good humor: "As they say in Hollywood, 'at least the critics spelled my name right.'" The Restatement has yet to appear in final form. I trust that ALI participants will strive to make it a fitting memorial to its departed architect.

In June 2001, a few weeks after Gary had undergone massive surgery to remove his malignant brain tumor, I flew to Los Angeles to see him. The grapevine had reported that he was seriously debilitated as a result of daily radiation treatments and receiving round-the-clock care from a live-in health aide. As prearranged, I arrived at his house in Kenter Canyon at about 10:00 A.M. on a Saturday. I anticipated that my old friend might be in pajamas and robe, capable of little more than conversation and some hands of gin. Gary greeted me at the door smiling and fully dressed. "I hope you don't have plans for lunch," he said. "I've made reservations for the two of us at the restaurant at the Getty. For a museum, the food's not bad, and the air may be good enough today to see to Catalina." And off we went.

5. Symposium, *The John W. Wade Conference on the Third Restatement of Torts*, 54 VAND. L. REV. 639 (2001). The specific articles on duty are Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751 (2001), John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence*, 54 VAND. L. REV. 657 (2001), David Owen, *Duty Rules*, 54 VAND. L. REV. 767 (2001), Robert L. Rabin, *The Duty Concept in Negligence Law*, 54 VAND. L. REV. 787 (2001), and Ernest J. Weinrib, *The Passing of Palsgraf*, 54 VAND. L. REV. 803 (2001).