

REMEMBERING GARY SCHWARTZ

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I first encountered Gary Schwartz as a legend. In the summer of 1963, word quickly spread from Cambridge to the rest of the country where I and the other members of the Harvard Law School Class of 1965 awaited our first-year grades with fear and trembling. The word was that Gary had earned the highest marks in our class.

Like the other three-quarters of the class who had not been assigned to Gary's section, I did not know him. Indeed, I had never even heard of him—something that will surprise no one who experienced the anonymity of the school in the early 1960s. But in the way that callow, ambitious, and impressionable students think about such things, I was in awe of him. Evidently, many others in our class felt the same way. So discomfited was Gary by our new, envious, even worshipful attentions to him that he decided to distance himself from us by taking a leave from Harvard during our second year, returning to graduate with the class of 1966.

Not until much later did I actually get to know Gary. We met through some mutual friends, including Dan Givelber, Steve Engelberg, and Ellen Ellickson. Gary's conversational style immediately marked him not only as a formidable mind but also as a charming, endearing, intriguing, and eccentric individual. Speaking in his sharp, resonant voice with a precision unusual even in our profession, Gary came at every subject—tort theory, legal history, the latest case law, the Los Angeles Dodgers, politics, his research, and faculty gossip—with the same odd but appealing mixture of humor, insight, and bemused detachment that all who knew him will recognize.

But it was only in the early 1980s when Gary spent some time at Yale Law School that I learned what all the fuss had been about. He was then working on his important series of articles about the history of American tort law,¹ articles that challenged the views of Mort Horwitz² and others³

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1. Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); see also Gary T. Schwartz, *Weaver v. Ward*, 74 TEX. L. REV. 1271 (1996).

2. See generally, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

3. See generally, e.g., Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

about the relative significance of negligence, strict liability, and no-liability regimes, views that had become the conventional wisdom in the academy. Gary's demonstration that tort liability was surprisingly robust in at least some states at a time when contributory fault, assumed risk, and other common law defenses had supposedly minimized it, attracted immediate attention among torts scholars and remains seminal. His work on the persistence of the fault principle⁴ likewise provided a needed corrective to the false prophets of strict liability's triumph.

This genre of Gary's work, as well as his earlier article on contributory negligence⁵ and his later ones on the *J'Aire Corp. v. Gregory*⁶ and *Pinto*⁷ cases, cemented Gary's reputation. Among tort scholars, Gary's work was always regarded with great respect, but it occasionally elicited a dash of condescension and even mild mockery owing to the fact that he took tort doctrine more seriously than perhaps any other leading scholar. This charge was certainly true, and Gary was proud to affirm it. No contemporary scholar could match Gary's comprehensive mastery of the evolving torts case law. This, along with his peerless intellectual and moral fastidiousness, his genuine interest in the process of judicial lawmaking, his fidelity to the spirit of the judges and scholars of the past, and his selfless commitment to serving the profession, made him everyone's obvious first choice as the Reporter for the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*.⁸ Indeed, had the American Law Institute not had Gary Schwartz available to perform this task, it would have had to invent someone just like him—an impossibility. As a member of the advisory committee to the ALI on this project, I have vivid memories of Gary in the Reporter's seat, where he presided for hours on end over our drafting and deliberations with stunning erudition, analytic logic, sound judgment, and good humor.

But to admire Gary merely as a brilliant reader, contextualizer, and explicator of cases is to miss much more that he contributed to the field. Although he was not drawn to grand theory, he nested his explorations of specific doctrines and institutions of tort law in middle-level theories whenever he thought this linkage could yield propositions or insights that could

4. This was a central theme in several of his articles. See, e.g., Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981).

5. Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697 (1978).

6. 598 P.2d 60 (Cal. 1979); see Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37 (1986).

7. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981); see Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

8. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001).

be usefully generalized. These included not just law and economics, which he often dissected and deployed, but also ethics, corrective and distributive justice, and “mixed theories,” to which this most sophisticated of scholars was naturally drawn.⁹ This is most evident in his excellent article on tort liability insurance,¹⁰ which is the first reading I would assign to one interested in the subject.

Anyone who has ever organized a conference on tort doctrine, policy, institutions, and reform—domestic or comparative—knows how essential it was to secure Gary’s participation. He was the academic equivalent of the utility infielder, willing and able on a moment’s notice to play any position with consummate skill and intelligence. His frequent flyer balance must have been immense. On the day before he suffered the terrible disability that presaged his untimely death, I was with him at such a conference at the Brookings Institution. There, as at many other tort law conferences we attended together, he was the utterly lucid expert, the indispensable scholarly resource, the subtle legal analyst, the engaged listener, the patient teacher, the masterful synthesizer, and the sensible reformer.

These last two talents deserve separate mention. Gary possessed an uncommon ability to synthesize complex bodies of tort law, an enormously useful contribution to the work of courts, scholars, practitioners, and policymakers. In this connection, I think especially of his work on product liability,¹¹ on the tortured history of tobacco litigation,¹² on the economic loss doctrine,¹³ and of course his reports for the ALI.¹⁴ Each of these articles, like the one on insurance, is perhaps the first source I would recommend to one interested in learning about the subject.

Gary was also a committed reformer, though a reformer very much in the incrementalist tradition. He harbored no illusions about the ease of moving from normative theory to remedial prescription and then to policy implementation in the real world of inertial politics, limited information, institutional complexity, bureaucratic resistance, and hard-to-control juries. As much as anyone in the field, he appreciated that it is far easier to identify problems with the status quo than actually to improve on it. His articles on

9. E.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

10. Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

11. E.g., Gary T. Schwartz, *Understanding Products Liability*, 67 CAL. L. REV. 435 (1979).

12. E.g., Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 131 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

13. E.g., Gary T. Schwartz, *The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience*, in *CIVIL LIABILITY FOR PURE ECONOMIC LOSS* 103 (Efstathios K. Banakas ed., 1996).

14. E.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Council Draft No. 3, 2001).

the uninsured motorist problem,¹⁵ pain-and-suffering awards,¹⁶ national health insurance,¹⁷ and workers' compensation abuses¹⁸ exemplify this refined reformism, pursued at a level of detail at which few other first-rate scholars operate. And his fine comparative tort law work,¹⁹ on which others are probably more qualified to comment, should be seen as Gary's effort to overcome the tyranny of the familiar in order to expand our understanding of which legal changes and tort policy tools are both institutionally feasible and potentially beneficial.

Gary was a torts scholar's torts scholar. This is perhaps the highest compliment that one academic can pay to another, and it would please him greatly. I like to think that Gary is up in some lecture hall in the sky discoursing in his inimitable style on *Weaver v. Ward*²⁰—and smiling.

15. Gary T. Schwartz, *A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 OHIO ST. L.J. 419 (1987).

16. Gary T. Schwartz, *Proposals for Reforming Pain and Suffering Awards*, in REFORMING THE CIVIL JUSTICE SYSTEM 416 (Larry Kramer ed., 1996).

17. Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339 (1994).

18. Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983 (1993).

19. E.g., Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 28 (Peter W. Huber & Robert E. Litan eds., 1991).

20. *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616).