

THE MAGIC OF GARY'S SCHOLARSHIP

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Roll up, roll up for the mystery tour.

Roll up we've got everything you
need, roll up for the mystery tour.

Roll up satisfaction guaranteed, roll
up for the mystery tour.

The magical mystery tour is hoping
to take you away, hoping to take
you away.¹

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INTRODUCTION

There is a poignancy to this tribute to Gary Schwartz that I have been trying to pin down ever since Dean Jonathan Varat first raised its possibility. On the one hand, celebrating Gary's scholarship is a feast, with more riches than a royal vault. I am honored beyond words to be a part of this group and pay homage to Gary's work. Yet the sorrow that we do so only after Gary's death, which prematurely concluded his career, is palpable. We celebrate

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1. THE BEATLES, *Magical Mystery Tour*, on *Magical Mystery Tour* (Capitol 1967).

the work of a virtuoso, but we do so with a grim reminder of the fragility of life.

We have lost one of the titans. When scholars of the future examine the latter part of the twentieth century, Gary Schwartz and his contributions to our understanding of tort law and the tort system will be unmatched. There may not be a Dean Prosser on the current scene, but as Charles Alan Wright wrote upon Gary's election² to the American Law Institute, Gary was "as close as anyone comes to being a Dean Prosser."³ I join the other participants in this symposium, his colleagues at this law school and university, and others who know and admire Gary and his work, as well as his students, friends, and family, in mourning this huge and premature loss.

But we also celebrate Gary's remarkable career, and I'd like to take this opportunity to provide an additional glimpse of Gary.⁴ I do so by adapting a story about Learned Hand's vision of heaven.⁵

So here is a day in the life of Gary in heaven: It starts with an early morning doubles tennis match in which Gary closes out a three-set victory with an ace on match point. Schwartz and Bill Prosser prevail over Warren Seavey and Page Keeton. Later in the morning, there's more Mitty-esque joy for Gary as his home run in the ninth inning secures a victory for his softball team, Harmless Error, in the all-Heaven Intramural Championship. The afternoon finds Gary at the seventh game of the World Series. At the top of the fourth inning, and only then, hot dogs are served to all in attend-

2. Despite being a member of the Advisory Committees for both the *Restatement (Third) of Torts: Products Liability* and *Restatement (Third) of Torts: Apportionment of Liability* beginning in the early 1990s and earlier participation in the *Reporter's Study on Enterprise Liability for Personal Injury*, Gary resisted joining the American Law Institute. When I discovered that he was not a member at some time in the mid-1990s, I asked him about becoming a member. Without stating why (and I did not pursue the reasons), Gary declined to be nominated for membership, although there is no question he would have been elected. Gary finally acceded to joining the Institute in 1998, after he had been appointed the Reporter for what was then the *Restatement (Third) of Torts: General Principles*.

3. Letter from Charles Alan Wright, President, American Law Institute, to Gary T. Schwartz, Professor, UCLA School of Law (May 15, 1998) (on file with author).

4. My thanks to Kris Knaplund, a colleague and close friend of Gary's, who provided substantial assistance in this effort to capture a bit of the personal side of Gary.

5. The earliest published version of this story that I could find is contained in a book review by Dean Harry Wellington. Harry H. Wellington, *History and Morals in Constitutional Adjudication*, 97 HARV. L. REV. 326, 334 n.10 (1983) (reviewing MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982)). Dean Wellington is not the originator. He first heard the story from Justice Frankfurter while serving as his law clerk in 1956-1957. Wellington speculates that Hand himself may have been the originator. E-mail from Harry H. Wellington, Professor Emeritus, Stanford Law School, to Michael Green, Professor, Wake Forest University School of Law (Apr. 15, 2002, 15:38:53 EST) (on file with author). Professor Gerald Gunther reports that Hand did not believe in the existence of heaven, although that does not categorically rule out Wellington's theory. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 679 (1994).

ance, and precisely at the top of the seventh, vendors distribute a beer to each fan. The game ends with Gary's boyhood team—the Cleveland Indians—prevailing over his adopted team—the Los Angeles Dodgers. Dinner is an exquisite seven-course gourmet French feast, accompanied by fine German beer, after which all pull up their chairs for a debate between Oliver Wendell Holmes and Learned Hand. The denouement of the day occurs when, fifteen minutes into the debate, Aristotle is heard to proclaim loudly: "Shut up, Holmes and Hand, I want to hear from Schwartz!"

When Dean Varat invited me to participate in this symposium, I considered what I might contribute that would be worthy of the individual we honor today. Given the breadth of Gary's interests in the fields of torts and products liability, and the range of his work from doctrine to theory to systemic analysis, virtually any torts topic written in any mode would fit neatly within some aspect of Gary's prior work. But a nasty moment of self-awareness made me appreciate that *anything* that I do independently is unlikely—to say the least—to be worthy of Gary.

As I continued to cast for a fitting topic, I recalled the suggestion, made early in my career by some unrecalled senior, that I should sit down and read all of the scholarship of a leading scholar in my field.⁶ This symposium offered, I realized, the opportunity to take up that long-ignored advice and to sit down and read all of Gary's scholarship in a concentrated sitting. Having done so, I now appreciate the wisdom of the advice, for Gary's twenty-plus years of torts scholarship contain a wealth of lessons for all who aspire to produce quality contemporary scholarship. My goal in this Article is to identify the attributes of Gary's scholarship so that we might learn from the legacy that Gary leaves us.

Thus, I have chosen to review and remark on the magnificent body of torts scholarship that Gary produced during his career. I do so without attempting to assess its impact on tort law and its intellectual development. Nevertheless, I cannot resist, at a number of turns, identifying the difference Gary's work has made in a variety of areas with which I am familiar. These observations are by no means complete or methodologically systematic, but personal and anecdotal. I also confess that this review is an affectionate one. Like all of us, Gary was human, but I leave criticism to others—and another day.⁷

6. My recollection of that advice may have been jogged by the remarks of Jane Stapleton upon Gary's death. She explained that, early in her career, her mentor, Patrick Atiyah, recommended that she read the work of a single American scholar to benefit from its insights and brilliance. That scholar, of course, was Gary. *Torts Reporter Gary Schwartz Is Dead at 61*, A.L.I. REP., Summer 2001, at 4.

7. Gary was, after all, human, and his work contains flaws and shortcomings (albeit at a diminished rate compared to most) that are inevitable for the species. Despite Gary's commitment to honesty, which I much admire, this is not the occasion for critical assessments of Gary's work.

I do not pretend that this effort will make us all into scholars of Gary's rank. Gary was blessed with a memory, analytical powers, and quickness of thought that, alas, are not widely distributed. Reading Gary's scholarship is, aside from its rewards, a humbling experience, and reading all of his work in concentrated form was beyond humbling—an experience in humility far greater than Cassiopeia's.⁸ Yet, I find Gary's work inspiring, as I hope others will as well. And many of the values that emerge from his scholarship can serve as a model for us.

What can we learn from Gary's scholarship? First and foremost, Gary loved ideas. He loved to hold them up, rotate them, examine them, and prod and probe them, before reaching a conclusion. He was as comfortable examining the ideas of an important case as he was examining those of a proponent of a Kantian vision of the tort system or an economist assessing a given tort rule in light of the theory of the second best. He also loved learning and continually branched out to other fields of law or other disciplines to inform his work.⁹ His scholarship is filled with evidence of his exuberance for ideas.¹⁰

Gary's work not only covered a vast amount of torts terrain, but it also reflects the breadth of his interests in the various forms of legal scholarship. Gary took doctrine seriously and wrote about it often. At the same time, he was interested in theory and the use of other disciplines to analyze, evaluate, and understand the law.¹¹ In his scholarship, he incorporated economics,

My impression is that there was very little criticism of Gary's work until he began work on the Restatement project. For a symposium largely devoted to critiquing his Restatement work, see Symposium, *The John W. Wade Conference on the Third Restatement of Torts*, 54 VAND. L. REV. 639 (2001).

8. Cassiopeia was a Greek goddess of considerable beauty, who, after her death, became a constellation of the same name. To teach her humility, she was placed in the sky so that her head appears to be hung. THOMAS BULFINCH, *BULFINCH'S MYTHOLOGY: THE AGE OF FABLE* 124–25 (1968).

9. A recent example: Although Gary neither taught criminal law nor did any work in that field, his most recent draft of the *Restatement (Third) of Torts* contains an extensive discussion of the comparative treatment of intent and recklessness by tort and criminal law. See *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES)* §§ 1–2 (Tentative Draft No. 1, 2001) [hereinafter Draft No. 1]. So far as I know, that is the first time in his career that Gary researched and wrote about these aspects of criminal law.

10. For examples of Gary's devotion to analyzing ideas, see *infra* Part I.A. Beyond that, Gary's enthusiasm is evident in the many footnotes in which he could not contain himself from dealing with a related, but tangential concept, explaining why (or often why not) it bore on the problem at hand. See, e.g., Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37, 70 n.194 (1986) (explaining that irrational statutes are unconstitutional and that obsolescent or stupid statutes are often circumvented but that the Uniform Commercial Code, which was the subject of discussion, did not fall into either of these categories).

11. As Richard Posner pointed out many years ago, there tends to be a substantial gulf between the doctrinal analyst and the scholar who employs social science methodology to write about law. Richard Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1122 (1981).

psychology, history, sociology, and his own form of off-the-cuff empiricism.¹² Gary was entirely comfortable in both roles, appreciating the way in which doctrine is informed by theory and vice versa. Gary was thus the ideal academic to undertake the role of restating the basic principles of tort law.

I. THE CHARACTERISTICS

The characteristics of Gary's work that I identify and discuss are by no means discrete categories. There is significant overlap and no doubt a lack of rigor in this taxonomy. Many of the examples I invoke to illustrate these characteristics could be employed for multiple purposes. Nevertheless, most of us, I contend, would appreciate and acknowledge the role that these attributes play in the best legal scholarship.

A. Intensely Analytical

The first quality that jumps out from all of Gary's scholarship is the intensity of his analysis—it permeates his work. Even a casual reader of a bit of Gary's work must appreciate the incredible depth of his analysis. This is no doubt a consequence of both his devotion to the examination of ideas and the extraordinary capacity of his mind. One beauty of Gary's depth of analysis is that it sometimes led him in new directions and to conclusions that, while quite inconsistent with existing law, were later implemented when the courts caught up with him.¹³

A wonderful example of this is Gary's analysis of the economics of contributory negligence and comparative responsibility, his first torts article.¹⁴ Gary demonstrated why there is no single rule that provides optimal deterrence: Differences in whether plaintiffs or defendants have the lower precaution costs, differences in whether the cheapest precautions are bilateral or unilateral, and the possibility of a variation on the prisoners' dilemma all contribute to this indeterminacy.¹⁵ Just when the reader thinks that he has exhausted all the possibilities, Gary explained that there is also a chronological dimension to precaution-taking and that one party may have sunk costs

Gary, while eschewing the formal, highly mathematical, and inaccessible style of some economic analysts of law, nevertheless embraced economics and other social sciences in his work.

12. For Gary's explicit acknowledgment of the need for torts scholars to educate themselves in the teachings of economics and psychology, see Gary T. Schwartz, *Directions in Contemporary Products Liability Scholarship*, 14 J. LEGAL STUD. 763, 774–76 (1985). For Gary's empirical methodology, see *infra* Part I.E.

13. See, e.g., *infra* note 189.

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

15. *Id.* at 704–09.

in precautions, while the other can only take precautions at a subsequent time. But wait, he's still not done, as he continues to pierce the inadequacies of a last-clear-chance rule because of the possibility of strategic behavior by potentially cheaper-cost-avoiding plaintiffs, information costs, and the implications of jury error.¹⁶

Gary's analysis of retroactive imposition of new tort standards also reveals the depth of his work.¹⁷ One might start from the proposition that it would be unfair to judge an entity's behavior by standards that were not in existence at the time of the conduct. Gary did, but went well beyond that initial reaction. What precisely do we mean by retroactive rules? Gary peeled away the various layers, revealing several different degrees of retroactivity that might be employed.¹⁸ He similarly peeled away the layers of what "new law" means, appreciating that new law comes in various shades. The crux of the unfairness is in dashing justified reliance on law. But tort law is continually subject to change and adjustment, and at least those entities sophisticated enough to consult tort law in ordering their affairs should appreciate both that tort law changes and that, given the history of retroactive application, the law extant at the time of the victim's lawsuit will be the applicable law. Thus, notice that the rules may change can negate a claim of reliance.

That response, as Gary notes, is not entirely satisfactory. Is it fair to say to a person, "You should understand that we have the rules by which we will judge your behavior in a computer file, but you won't find out what they are until you are sued"? But so long as the rule to be applied is one that might reasonably have been anticipated, given common law dynamism, the foregoing objection is minimized. We might call it a day at this point, but Gary didn't. He moved on to the criminal law and its requirement that appropriate notice of prohibited conduct be provided. After all, sanctions in tort law can be quite substantial, and the longest tail of tort claims—in the toxic substances arena—holds the potential for massive liability. Gary then elaborated the distinctions between criminal law and tort law, some evident,

16. *Id.* at 708–09, 709 n.52.

17. See Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 814–28 (1983).

18. Curiously, Gary neglected the symmetrical nature of the retroactivity issue. Law may change in a way favorable to those whose behavior already occurred. Does this benefit counteract the concern about law changing to that party's detriment? Gary's discussion also neglected the question of retroactive application of law after a plaintiff, as opposed to a defendant, has acted. See, e.g., *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 593–94 (Tex. 1999) (expanding victim conduct that constitutes comparative responsibility in a products liability action). Most relevant victim conduct occurs in close chronological proximity to the time of suit, thereby ameliorating this concern.

some not, that substantially weaken the case for a fair notice requirement for tort law.¹⁹

Yet here Gary demonstrates his consistent prudence and resistance to hyperbole or superficial conclusions.²⁰ Fair notice is, after all, an attractive proposition. Pragmatism may require that it be sacrificed, but only after consideration of the costs of doing so and efforts to provide whatever notice may be feasible: "Improving the quality of notice given to defendants is one of the goals toward which a civilized law of torts should strive."²¹ Finally, Gary addressed the reasons for the newly adopted law, explaining that these have a significant impact on the propriety of applying it retroactively. Throughout all of this analysis, Gary's research was wide-ranging, stunningly thorough, and illuminating.²²

Gary's discussion of the deterrence and punishment rationales for punitive damages is yet another example of the rigor of his analysis.²³ How many serious students of tort law have given up on punitive damages as an unruly snake-pit of irreconcilable provisions? Gary demonstrates, in quite convincing fashion, that punitive damages law can be best understood from a punishment perspective, which begins to explain why the economists (or those writing from that perspective) who confront punitive damages find so much wanting.²⁴ Gary then explains much that is wanting in the law, even from a punishment perspective. At least some of the prescriptions emerging from

19. The most obvious difference is that tort law has long relied on general standards that give very little guidance, *ex ante*, as to what conduct is permissible and what conduct is sanctionable. Concerns about fairness to plaintiffs is a less evident difference.

20. See *infra* Part I.B.2.

21. Schwartz, *supra* note 17, at 823.

22. In a day when online research had not yet placed a virtual law library in every office, Gary drew on scholarship dealing with retroactivity in tax law, *see id.* at 817 n.146, the entire body of case law on retroactivity of products liability decisions, *see id.* at 816 & n.139, 817 & n.143, a book about legal theory that incidentally addressed retroactivity in two pages, *see id.* at 815 n.129, several contrasting treatments of retroactivity in other areas of law or through mechanisms other than the making of common law, *see id.* at 818 & nn.146, 149, Hart and Sacks' unpublished materials on legal process, *see id.* at 822 n.165, and an unpublished manuscript on the effects of uncertainty on compliance with legal rules, *see id.* at 827 n.186.

23. Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 134-48 (1982).

24. See Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 826-28 (1989); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 76-78 (1982); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 954-56 (1998); Paul H. Rubin et al., *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179 (1997); W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 HARV. J. ON. LEGIS. 139, 163-64 (2002). Most law-and-economics scholars do recognize that punitive damages have a role to play when the incidence of claims by victims is less than the incidence of harm caused by tortious misconduct.

Gary's consideration have, in the decades since, been employed to reform the law in this area.²⁵

A final example of the extraordinary quality of Gary's analysis is his first foray into products liability.²⁶ The article, written early in the strict products liability day, was a tour de force. His treatment of design defects, warnings, and manufacturing defects reflected a lesson that was only beginning to emerge. Different kinds of defects required different treatment.²⁷

25. See DAN B. DOBBS, *THE LAW OF TORTS* § 383 (2000) (describing reforms requiring proof by clear and convincing evidence for an award of punitive damages and constitutional requirements for judicial review of jury-awarded damages that can tame the variations in the amount of the awards).

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

27. See RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, i (1965). George Priest has argued that section 402A was only intended to impose strict liability for manufacturing defects and that negligence was to remain the regime for warnings and design defect cases. See George Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2303 (1989). While design defects did not play a prominent role in the *Restatement (Second)*, that appears to be because the implied warranty law that was the source of strict liability was focused on the (mal)performance of the product rather than the source of the defect causing the mishap. Thus, many courts recognized what was in essence a malfunction theory—a product's failure to operate safely in ordinary use constituted sufficient evidence of a defect. Many of these failures were no doubt due to manufacturing defects, but the courts were unconcerned about the source of the defect. See *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501, 506 (10th Cir. 1959) (tire sold as blow-out-proof blew out); *Thompson v. Reedman*, 199 F. Supp. 120, 122–23 (E.D. Pa. 1961) (gas pedal in automobile stuck); *Vandermark v. Ford Motor Co.*, 33 Cal. Rptr. 175, 180–81 (Ct. App. 1963) (braking system permitted inadvertent activation of brakes), *vacated*, 391 P.2d 168 (Cal. 1964); *Connolly v. Hagi*, 188 A.2d 884, 888 (Conn. Super. Ct. 1963); *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449, 456 (Iowa 1961) (ten-day-old car burst into flames). At least a few cases do appear to have entailed design defects. See *McBurnette v. Playground Equip. Corp.*, 137 So. 2d 563, 564 (Fla. 1962) (sharp edge on moving vertical piece of playground equipment that amputated child's finger); *Hoffman v. Cox*, 229 N.Y.S.2d 485, 486 (Sup. Ct. 1962) (riveting tool "designed" to keep rivets from being thrown in a direction in which they posed a risk to the operator). Even the two cases that Professor Priest concedes involved design defects focus on the failure of the product to perform adequately, rather than the source of the defect, which is treated incidentally. See *Beck v. Spindler*, 99 N.W.2d 670, 683 (Minn. 1959) (house trailer that, because of poor insulation and ventilation, was unsuited for use in harsh climate of Minnesota). The second case, *King v. Douglas Aircraft Co.*, 159 So. 2d 108, 109 (Fla. Dist. Ct. App. 1964), describes the plaintiff's expert's theory as a design defect in the combustion chamber of an aircraft engine that caught fire in flight. The case is less clear in its focus on the performance of the product, but that may have been because of the evident inadequacy of a commercial plane engine that caught fire, causing the plane to crash.

All of the cases above were cited by Prosser in the Reporter's Notes to section 402A. Thus, while Professor Priest emphasizes the failure of those responsible to address design defect cases, Priest, *supra*, at 2315 n.60, it would be equally true to say that there was a similar failure to focus on manufacturing defects. With a performance-based standard, the source of the defect fades in importance. The post-section 402A aggressiveness of plaintiffs and their lawyers in employing strict liability for claims that products should be made to protect against more and greater risks, including inadvertent consumer negligent conduct and unintended yet foreseeable uses, forced courts to confront the question of how safe a product a manufacturer must design. Thus, in that sense, I find sympathy for a considerably narrower slice of Professor Priest's thesis—prior to section 402A, that question did not receive attention.

Gary quickly provided the rationale for true strict liability for manufacturing defects, while recognizing the need for some external standard for design and warnings claims. His treatment of risk-utility analysis anticipated much of the development that occurred in succeeding decades as courts grappled to find a standard to express how safe a product should be designed. He discussed the weaknesses of a consumer expectations standard: its indeterminacy, its inadequacy for obvious dangers, and its lack of clarity about whose expectations are at issue.²⁸ Yet, at the same time, he recognized the benefit of the standard for cases in which a product fails to provide any semblance of appropriate safety.²⁹ He anticipated the need for a strict products liability analog to *res ipsa loquitur*, a need that is now addressed in the *Restatement (Third) of Torts*.³⁰ Even before we went to *Beshada* and back,³¹ Gary thought about the problem of the risk that was not reasonably knowable, appreciated the difference between unknowable risks and safety technology that did not exist at the time of manufacture,³² and set forth some extraordinarily prescient ideas on these issues. Likewise, before *O'Brien v. Muskin Corp.*,³³ made it a familiar concept, Gary took on the question of categorical liability for a product, explained its significance, and expressed a cautionary opinion that has been fully borne out in the ensuing decades.³⁴ His conclusion, while passé today, struck a discordant note amidst the exuberant rhetoric of those days: "Strict products liability is a subtle rather than a sensational doctrine, as is often supposed."³⁵ Here is an extraordinarily cogent and early treatment of many of the same issues that would be debated a generation later during the drafting of the new products liability *Restatement*.

28. Schwartz, *supra* note 26, at 479–80.

29. *Id.* at 480–81.

30. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998).

31. In *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539, 546 (N.J. 1982), the court held that whether the risk of danger was scientifically knowable at the time of manufacture and sale was irrelevant in a strict products liability case. Eighteen months later, the same court limited that holding to "the [unspecified] circumstances giving rise to its holding," and provided a defense to the manufacturer who could prove that the risk was unknown at the time of manufacture. *Feldman v. Lederle Lab.*, 479 A.2d 374, 388 (N.J. 1984). Since those leading cases, most courts have either held that a plaintiff must prove foreseeability or provide defendants with an affirmative defense based on lack of knowability.

32. I have seen, over the years, a number of instances of courts and commentators who have failed to appreciate this distinction, which is often concealed when "state of the art" is invoked to describe either issue. Gary never fell into that trap, and he adeptly identified the different considerations pertaining to these two issues. See Schwartz, *supra* note 26, at 482–88.

33. 463 A.2d 298, 306 (N.J. 1983).

34. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporters' note cmt. e (1998) (explaining the paucity of authority in support of categorical liability).

35. Schwartz, *supra* note 26, at 493.

His critical analysis of *Barker v. Lull Engineering Co.*,³⁶ the California Supreme Court's first effort to provide some content to the concept of a strict liability design defect, was equally extraordinary. Focusing on the court's shifting the burden of proof for the risk-benefit alternative in a design case, Gary explained the unstated rationale.³⁷ He then critiqued the burden-shifting aspect, identified its shortcomings and ambiguities, anticipated the problems it would present in future cases, predicted how plaintiff's lawyers would respond strategically, assessed how juries would likely apply it, and in the course of his critique, explained a fundamental aspect of employing a risk-benefit test for design defects: "The heart of the problem is this: one simply cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative (including any design omission) that can serve as the basis for a risk-benefit analysis."³⁸ Many courts and commentators subsequently benefited from that observation,³⁹ yet it is still not fully appreciated by those courts that do not require proof of an alternative design as an aspect of a risk-benefit design claim.⁴⁰ Gary's critique of *Barker's* burden-shifting on the risk-benefit test without requiring plaintiffs to identify an alternative design is so persuasive that it is

36. 573 P.2d 443 (Cal. 1978).

37. Schwartz, *supra* note 26, at 464–65 (suggesting that *Barker's* shifting the burden of proof was an attempt to reduce the threshold of injury-magnitude to make a products liability claim financially viable to pursue).

38. *Id.* at 468. Gary's critique of this aspect of *Barker* was not entirely lost on the California courts. See *Pietrone v. Am. Honda Motor Co.*, 235 Cal. Rptr. 137, 142 (Ct. App. 1987) (Roth, J., dissenting).

Subsequent cases in the California Supreme Court did not present the nub of the difficulty with *Barker*: Unless the plaintiff identifies a specific alternative design, the defendant must disprove a negative—that there is no alternative design that is preferable to the existing design based on risk-benefit balancing. Presumably, this would require the defendant to propose and disprove the viability of some indeterminate number of alternative designs. In both *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994), and *Campbell v. General Motors Corp.*, 649 P.2d 224 (Cal. 1982), the plaintiffs identified alternative designs. Gary predicted that, despite the option to leave the identification of alternative designs to defendants, most plaintiffs would choose to identify and support a proposed alternative design. Schwartz, *supra* note 26, at 469.

Perhaps because it had already substantially modified *Barker's* two-prong standard for a design defect by diminishing the availability of a consumer expectations test when a consumer would not have well-formed expectations, the California Supreme Court declined an explicit invitation to modify its shifted burden of proof on the risk-benefit aspect for design defects. See *Soule*, 882 P.2d at 311 n.8.

39. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d & reporters' note § II.A. (1998) (discussing courts that have explicitly required proof of an alternative design in a design defect case); Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 VAND. L. REV. 609, 625–27 (1995); David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1661–62 (1997).

40. See, e.g., *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1331 (Conn. 1997).

unfathomable that the California Supreme Court continues to adhere to it, despite a recent opportunity to reconsider the rule.⁴¹

This discussion of the intensity of Gary's analysis could go on much longer. There is much more that emerges in each of his articles, but length, the patience of my audience, and the fact that many are familiar with his work lead me to conclude that any benefit of further evidence is outweighed by the virtue of parsimony.

Let me just add that Gary's meticulous analysis did not divert him from appreciating and capturing the forest. He was a master at synthesizing a vast body of cases or substantial academic literature, a quality that requires us temporarily to suppress the aspect of our legal training that emphasizes precision and comprehensiveness. Consider Gary's reflection on the product-defect category that is based on an inference from the product having malfunctioned: "[I]n almost all of the malfunction cases I have read, the evidence as to the possibility of secondary causes has been both limited in quantity and soft in quality."⁴² Similarly, in an article on liability insurance, Gary confronted the morass of insurance coverages and the variations in loss-rating that exist in this country.⁴³ One could have easily become mired in the details and variations. Gary explained this, revealing his meticulous inquiry on the subject. Yet, he appreciated the problematic nature of confronting all of those details in an article about the relationship between liability insurance and tort policy. Instead, Gary chose two simple models: One consisted of "flat" insurance that attempted no loss-rating (other than insuring for the same activities), and another was made up of "perfectly" rated insurance in which all in the pool posed precisely the same risk of being held liable.⁴⁴ That modeling permitted him to do exactly what he proposed to do in his article without getting caught in the morass of detail that would have detracted from his efforts.⁴⁵ Finally, consider Gary's synthesis of nineteenth-century negligence law. Gary's crisp assessment after reading nearly eight hundred tort cases spanning a century was that "the

41. See *Soule*, 882 P.2d at 311 n.8.

42. Schwartz, *supra* note 17, at 832 (citing thirty-nine cases in the course of discussing malfunction theory).

43. Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 318-21 (1990).

44. *Id.*

45. For an example of Gary's knack of accommodating very disparate views and information and putting them into a context that he and his reader could understand, see Gary T. Schwartz, *Empiricism and Tort Law*, 2002 U. ILL. L. REV. (forthcoming 2002) (characterizing conflicting views of the functioning of the tort system as "alarmist" or "reassuring" and explaining advocates for and aspects of each) (draft at 8, on file with author).

nineteenth-century negligence system was applied with impressive sternness to major industries," while noting two areas of exception.⁴⁶

B. Commitment to the Truth

We are trained as advocates, and we teach our students those skills every day. Legal advocacy tends to denigrate truth as a value, instead promoting rhetorical persuasiveness.⁴⁷ Yet scholarship is and should be a search for truth, however elusive and difficult.⁴⁸ It is tempting and easy for those of us in the legal academy to sacrifice our commitment to truth for advocacy, provocation, critique, convenience, or any of a number of other temptations. Gary's commitment to the truth, his unmitigated honesty and integrity, the objectivity, care, and precision in his work, his appreciation of contrary arguments, and his tentativeness in drawing conclusions stand as a beacon for all of us.

1. Objectivity and Lack of Bias

I have always admired the extraordinary objectivity of Gary's scholarship.⁴⁹ If Gary had a bias, readers certainly could not detect it. Gary always let his analysis take him wherever it led, without concern for the conclusions he might reach. One often finds Gary's assessment leading in one direction, when suddenly he takes a sharp turn that leads him to a different conclusion. Gary was simply not an advocate for anyone or anything save where his clear-headed analysis led him.⁵⁰

Gary's lack of bias is evident in his discussion of the treatment of pure economic loss in tort. Gary addressed the problem of asbestos remediation in buildings in which asbestos products had been installed. This raised the

46. See Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1720 (1981).

47. See Hunter R. Rawlings III, Address on Legal Scholarship at the American Association of Law Schools Annual Meeting (Jan. 6, 1988) (identifying the legal profession's commitment to persuasion as the "factor [that] works [most] insidiously against legal scholarship") (on file with author). The tension between the legal methodology of persuasion and truth is an old one that is the subject of one of Plato's dialogues in the *Gorgias*. See PLATO, *GORGAS* (Donald J. Zeyl trans., 1987); Symposium, *Rhetoric and Skepticism*, 74 IOWA L. REV. 755 (1989).

48. Tony Kronman makes the case that legal scholarship should be committed to truth, which serves as a critical counterpoint to the agnosticism, if not cynicism, toward truth bred by legal advocacy and rhetoric. "The scholar cares about truth—indeed that is what defines him as a scholar . . ." Anthony T. Kronman, *Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 968 (1981).

49. See David Feldman, *The Nature of Legal Scholarship*, 52 MOD. L. REV. 498, 503 (1989) (identifying self-conscious and reflective open-mindedness as important to legal scholarship).

50. See James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 385 (2002) (commenting on "careful and objective" character of Gary's scholarship).

question of whether suits for abatement were only cognizable in contract because they constituted economic loss. And, if so, those suits would face serious obstacles in the form of lack of privity, contractual disclaimers, and statutes of limitations. Gary appreciated that abatement could be conceptualized as a substitute expenditure to avoid harm that would clearly be tortious. Encouraging those expenditures by permitting recovery in tort would further what are plainly tort goals. Thus, the concern for safety reflected in tort law could be affirmed by permitting a suit in tort for abatement costs. A scholar with a preference for plaintiff recovery would have found this a convenient stopping point. But Gary didn't, explaining that the building owner who neglected necessary asbestos abatement would subject herself to both potential tort liability to those harmed by asbestos that went unabated and the personal risk of contracting asbestotic disease. Gary concluded that the latter incentives made dubious the need to provide a tort cause of action to protect tort law's concern with safety.⁵¹ Gary's lack of bias is revealed as well in instances in which his assessment led him to conclusions favorable to plaintiffs. In 1988, Richard Neely, a judge on the West Virginia Supreme Court, wrote a provocative book entitled *The Product Liability Mess*,⁵² that claimed that state court judges ruled in ways favorable to their resident-plaintiffs and against nonresident defendant-manufacturers.⁵³ Other scholars had jumped in with their assessment of this version of a "race to the bottom."⁵⁴ Gary disagreed that this purported phenomenon required some structural change, such as federal legislation, and pointed to several leading federal products liability cases that had expanded liability, as well as the numerous reform statutes enacted by state legislatures that limited liability, adopted new defenses, and imposed limits on damages, all of which were inconsistent with the race-to-the-bottom thesis.⁵⁵

2. Precision, Carefulness, and Rigor

Gary's attention to detail, his care, and his refusal to take shortcuts are evident throughout his work. Gary refused to be provocative for the sake of provocation, to exaggerate or use hyperbole to strengthen or reinforce a con-

51. See Schwartz, *supra* note 10, at 75.

52. RICHARD NEELY, *THE PRODUCT LIABILITY MESS* (1988).

53. *Id.* at 15.

54. See Michael W. McConnell, *A Choice-of-Law Approach to Products Liability Reform*, in *NEW DIRECTIONS IN LIABILITY LAW* 90, 92-97 (1988); cf. Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 *AM. ECON. REV.* 311, 315 (1988) (addressing state legislatures' unwillingness to adopt products liability reform legislation).

55. See Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 *ARIZ. L. REV.* 917, 932-37 (1996). Gary's conclusion, based on other concerns as well, acknowledged the advantage of uniform law but displayed substantial ambivalence about federalizing products liability law. *Id.* at 949-51.

clusion. That is not to say his work was conventional or unprovocative. In many respects, Gary's work frequently questioned the conventional wisdom and reached contrary conclusions. But Gary was always extraordinarily careful in those claims, tenaciously refusing to overstate. For example, in the mid-1980s, Gary was invited to give a talk in Australia at a conference devoted to considering the adoption of some form of no-fault scheme. Gary's role was to provide a defense of the tort system, but in his introductory remarks, he demurred. He explained that he had still not, in his own work, reached a comparative assessment of tort law and compensation schemes. His presentation and paper were circumspectly titled, *The Advantages of Tort*.⁵⁶

Similarly, after a dazzling treatment of the inadequacies of both contributory negligence and comparative responsibility for an economically efficient rule,⁵⁷ Gary carefully eschewed overclaiming: "[This] assessment does not profess to establish that a contributory negligence defense is actually inefficient. It rather suggests that the safety purposes that the defense is alleged to achieve can be achieved, at least to a substantial extent, without the defense."⁵⁸ How many scholars would have completed an analysis comparable to Gary's with the bold exclamation: "This assessment demonstrates that contributory negligence, contrary to conventional wisdom, is inefficient"?

Gary wrote not only about tort law but also about law reform and alternative systems of compensation for accidental injury. He wrote about no-fault automobile compensation plans,⁵⁹ workers' compensation,⁶⁰ and nationalized health care.⁶¹ Yet he was acutely aware, as is so often the case in discussions of law reform, that the devil is in the details. Thus, for example, in reviewing proposals for rationalizing jury awards of nonpecuniary damages, Gary spent considerable effort and analysis on the question of precisely how to provide information to jurors about other similar damage awards.⁶²

56. Gary T. Schwartz, *The Advantages of Tort*, in PERSONAL COMPENSATION FOR INJURY 70 (1985).

57. See *supra* text accompanying notes 14–16.

58. Schwartz, *supra* note 14, at 712.

59. Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611 (2000).

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

61. 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, 1347 (1994).

62. Gary T. Schwartz, *Proposals for Reforming Pain and Suffering Awards*, in REFORMING THE CIVIL JUSTICE SYSTEM 416, 418–19 (Larry Kramer ed., 1996).

3. Intellectual Honesty

Many leading contemporary torts scholars have taken firm positions as either economic instrumentalists or fairness moralists.⁶³ Gary, whose scholarship frequently took him into the eye of that storm, steadfastly refused to take sides. Yet Gary was plainly intrigued with economic analysis, comfortable with its methods, and sympathetic to the idea of employing tort law as an instrument for deterrence. Early in his career as a torts scholar, Gary wrote: "It seems clear to me that the new legal economics has deepened and enriched our understanding of the meaning and consequences of the law; certainly, it has become a guiding force in my own current scholarship efforts."⁶⁴

Gary thus might well have chosen to devote himself to applying law-and-economics methods to assess tort problems. He didn't, and I believe the reason is that he thought that tort law could be neither explained nor justified on pure efficiency grounds. True to his training as a lawyer, Gary was a skeptic, and when he examined the claims of the committed law-and-economics scholars who wrote about tort law, he found much to which he could not subscribe. Thus, throughout his career, Gary refused to commit to any of the meta-theories of tort law, believing that none could fully account for or determine what tort law is about.⁶⁵ Gary was not only skeptical about overarching explanatory theories, he refused to accept conventional wisdom

63. For a catalogue of them, see Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802-08 (1997). Of course, there are many torts scholars and some quite renowned ones, such as Jeff O'Connell, Steve Sugarman, and Bob Rabin, who don't fit into either of these two molds.

64. Gary T. Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799, 800. Gary continued: "All of this notwithstanding, the sweeping claims so often made on behalf of this new economics leave me with significant reservations. This article will suggest that there is an element of justice, relevant to law, which the economic writings have overlooked." *Id.* Gary's commitment to norms congenial to economic analysis is revealed in much of his analysis, in which he naturally lapses into a risk-benefit framework for evaluating some aspect of the law. See, e.g., Schwartz, *supra* note 61, at 1341-49 (evaluating retention of the collateral source rule with a right of subrogation by the collateral source, by comparing deterrence gained by holding a tortfeasor liable for full damages with the transactional costs of subrogation). To be sure, Gary often addressed corrective justice implications, but that tended to be in articles in which he was explicitly assessing some area of tort law in light of the two dominant theories of the day.

65. While Gary found economic efficiency personally more intriguing, his work consistently gave equal respect to each of these competing visions of tort law. Typical was his approach in an article about liability insurance and whether it was inconsistent with the goals of tort law: "[T]his Article will largely adhere to a policy of open-mindedness or agnosticism as to the actual objectives of tort law. That is, the Article will not profess to determine whether the best justification for tort rules comes from principles of fairness, from expectations of deterrence, or from some combination of both." Schwartz, *supra* note 43, at 314-15. Some may see this as a failing of Gary's. On the contrary, my view is that Gary appreciated that he would not persuade those who were entrenched on either side and that his scholarship would be richer and of greater benefit if it spoke to both of the dominant schools of torts scholarship.

until he had satisfied himself that it met his rigorous standards. When it did not, Gary was honest in his assessment; he frequently explained why he disagreed with many of the leading torts scholars of the day, including many participating in this symposium.⁶⁶

By refusing to commit himself to a single school, Gary was able to explore the extent to which various pieces of tort law are better understood as driven by concerns for economic efficiency, corrective justice, or some other policy.⁶⁷ Gary's work displays an extraordinary open-mindedness about whether a given rule is better explained by an economic or fairness theory of tort law. Unlike Judge Richard Posner, who has virtually never found a tort rule that was not efficient,⁶⁸ Gary had no stake in where his thinking led. Thus, in his assessment of the impact of liability insurance—an institution that is as well established and accepted today as any tort rule—Gary concluded that liability insurance is more easily justified from a corrective justice perspective than from an economic one.⁶⁹

66. See, e.g., Schwartz, *supra* note 59, at 620–22 (criticizing a proposal for elective no-fault automobile insurance authored by Jeffrey O'Connell as failing to take adequate account of adverse selection and motorists' taste for compensation being provided by a wrongdoer); Gary T. Schwartz, *The Economic Loss Doctrine in American Tort Law: Assessing the Recent Experience*, in CIVIL LIABILITY FOR PURE ECONOMIC LOSS 103, 126–27 (Efstathios K. Banakas ed., 1996) (finding Robert Rabin's explanation for excluding economic loss from tort liability "unsatisfying" and noting that it relies on the disproportion between culpability and harm but that tort law frequently imposes liability disproportionate to wrongdoing and that, with some frequency, economic loss is quite modest and constrained); see also *infra* text accompanying notes 71, 73, 123, 124.

Gary's devotion to accuracy led him to criticize the broad claims of others that, while plausible and convenient to their argument, failed his exacting standards. Jeffrey O'Connell's claim that many auto accidents are not the result of reprehensible conduct was met with Gary's meticulous research and report that modestly careless behavior like momentarily taking one's eyes off the road is responsible for a very small percentage of fatal accidents, while drunk driving is involved in approximately half of all fatal highway accidents. See Schwartz, *supra* note 56, at 72.

67. Henderson, *supra* note 50, at 388 (observing that Gary "self-consciously avoided ideological commitments" to preserve his ability to remain an objective critic).

68. I confess to rhetorical excess in the text. Judge Posner does not claim that all tort rules are efficient, "only that most are." WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 312 (1987). At the same time, his explanation for those rules that are not efficient is randomness borne of judicial independence, a causal relationship that is not self-evident, and a quality—independence—that, given the precedence of legislation over common law, is circumscribed.

Judge Posner's efforts to find efficiency in the current system are revealed in his treatment of liability insurance. He concedes that liability insurance reduces the deterrent effect of tort law. Nevertheless, insurance provides some additional deterrence through the payment of insurance premiums and reduced activity levels, because those who would not be financially responsible in the event of an accident without liability insurance are deterred at least somewhat and all who are risk-averse are better off for having liability insurance. Thus, he concludes that despite its general blunting of deterrence, liability insurance is not necessarily "an inefficient system of accident control." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 221–22 (5th ed. 1998). For a critique of the positive economic theory of tort law and its inadequacies in explaining the structural aspect of tort law, see JULES L. COLEMAN, *RISKS AND WRONG* 374–85 (1992).

69. See Schwartz, *supra* note 43, at 363–65.

Another aspect of Gary's honesty is apparent in his willingness to confess that an area or body of literature is too opaque, confusing, or baffling to parse.⁷⁰ And when Gary didn't know something and either couldn't find out or didn't have the requisite skills to make an assessment, he said so.⁷¹ Gary would not brazen through such situations, pretending to have absorbed, to have understood, or to know; he preferred to state candidly his difficulties with the area and how he proposed to proceed given that constraint. False pride was not a problem that infected Gary's work. When Gary truly didn't know or have some insight to offer, he was quick to acknowledge it.⁷²

Gary's primary effort to synthesize the economic and corrective justice theories of tort law reveals that the claims of absolutists on each side of the heated theoretical debate about the essence of tort law cannot be correct.⁷³ Tort law is *at least* some combination of deterrence and justice concerns and cannot be captured with any single theoretical explanation. As John Rawls has uncompromisingly claimed, "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."⁷⁴ Gary's effort to construct a *single* mixed theory may not have captured the day. Indeed, given his predisposition against meta-theory, I am surprised that he couched his effort as constructing a single mixed theory, rather than as mixing theories, as the title of his article suggests.⁷⁵ Nevertheless his explanation of how corrective justice can peacefully coexist with deterrence, indeed, even find it attractive, has persuaded Ernie Weinrib, the leading and purest corrective-justice theoretician of the day, to acknowledge that "proponents of corrective justice can accept Gary's affirmation of both corrective justice and deterrence."⁷⁶

70. See, e.g., Schwartz, *supra* note 17, at 814 (commenting on the "endlessly deep and bafflingly multidimensional" nature of retroactivity literature).

71. See, e.g., Schwartz, *supra* note 45 (draft at 2-3).

72. See Schwartz, *supra* note 10, at 65 (identifying but declining to offer a view on the academic debate over whether contracts of adhesion are undesirable phenomena to which courts should readily entertain challenges or, on the other hand, reflect efficient choices, constrained by the market and competition).

73. See Schwartz, *supra* note 63, at 1802-11.

74. JOHN RAWLS, *A THEORY OF JUSTICE* 30 (1971).

75. Gary does suggest a mixed theory but, at the same time, expresses his uncertainty as to its shape. The conclusion to his article reveals that he was not attempting to synthesize a single theory but rather to argue that both deterrence and corrective justice can and do play a part in tort law, and that they can coexist with each other in that role. Schwartz, *supra* note 63, at 1833-34.

76. Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 626 (2002). Weinrib previously had little good to say about deterrence as an aspect of tort law. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 38-43 (1995). To be sure, Weinrib was addressing whether deterrence can justify imposing tort liability, rather than whether corrective justice can comfortably accept deterrence as a consequence. For an effort to construct an economic theory of negligence that includes fairness (which is not entirely congruent with corrective justice), see Henrik Lando, *An Attempt to Incorporate Fairness into an Economic Model of Tort Law*, 17 INT'L REV. L. & ECON. 575 (1997).

C. Intellectual Energy

My favorite example of Gary's intellectual energy is his comprehensive examination of the critical question of whether the tort system actually deters socially undesirable conduct.⁷⁷ That issue is of central importance to the now-familiar economic analysis of tort law. The positivist economic claim for tort law—that it is constructed so as to maximize economic efficiency—rests on a deterrence foundation.⁷⁸ For far too long, the law-and-economics literature merely assumed and asserted that imposing liability on an actor or denying recovery to a victim creates incentives toward socially optimal care. Often those employing economics to examine tort law and to criticize aspects of it do so on quite marginal matters that depend on the assumption that if we just get tort law “right,” it can provide precise deterrence calibrated to ensure that accident costs and accident-prevention costs are minimized.⁷⁹ At the other end of the spectrum, those who advocate replacing tort law with some type of compensation scheme and other critics of the law-and-economics approach frequently argue that tort law provides little or no useful deterrence.⁸⁰

Bits and pieces of evidence on this question exist, but far less than the number of intuitions that have fueled scholarly positions.⁸¹ In the end, this is an extraordinarily difficult empirical question to examine,⁸² and one that

77. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994). Another excellent effort to address this issue is DONALD N. DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW* (1996).

78. See, e.g., LANDES & POSNER, *supra* note 68, at 4.

79. See, e.g., William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1713–15 (1992).

80. See, e.g., Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 816–17 (1990); Geoffrey Palmer, *The New Zealand Experience*, 15 U. HAW. L. REV. 604, 609 (1993); John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1833–34 (1987); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 559–01 (1985). A different critique, but one nevertheless fatal to a deterrence effect for tort law, is the claim that potential enterprise defendants can render themselves judgment-proof through various financial arrangements. See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 14–38 (1996). If Professor Lynn LoPucki is correct, whenever these arrangements are invoked by a potential defendant, that entity can operate without concerns about incurring the costs of tortious conduct. For a rebuttal to Professor LoPucki's provocative claims, see Steven L. Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 STAN. L. REV. 1 (1999).

81. One side of the situation is well-captured by Professors Steven Shavell and Louis Kaplow, who observed recently: “[C]onsider tort-related deterrence of harm. Although we do see some mention of this factor, one is struck by the casual character of discussion about it and by the frequency with which one encounters essentially conclusory statements, such as that tort law simply does not deter.” Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1098 (2001). They could have made the same observation about others' casual and conclusory observations to the contrary. See, e.g., sources cited *infra* note 122.

82. Experimental studies with random assignment are obviously impossible. Even observational studies are difficult because of the number of variables that affect the frequency of accidents

is complicated by a number of factors, including liability insurance, regulation, nonlegal incentives for care, information availability, the imprecision of the negligence standard,⁸³ and psychological biases.⁸⁴ It is also a question that, as Gary appreciated, cannot be answered categorically. One must carefully disaggregate the issue across the broad spectrum of activities and actors whose liability is governed by tort law.⁸⁵ Tort incentives will operate differently on an automobile driver who inadvertently exposes herself and her family (as well as others) to danger than they will on the manufacturer of a dangerous piece of industrial machinery.⁸⁶ Gary confronted these differences in his deterrence article, which stands today as one of the most intelligent, comprehensive, realistic, and nondogmatic assessments of the role of tort law in providing appropriate incentives for deterring dangerous activity.

The article is not only a measured, intelligent piece of work, but is also notable for the effort Gary made to gather all the bits and pieces of evidence regarding the deterrent effect of tort law. He marshaled a vast array of evidence, often from obscure sources, on deterrence for a variety of different torts spheres, from railroad workers to chemical drain cleaners, and offered a thoughtful assessment of the implications of that evidence.⁸⁷ Not content with the variety of domestic studies, Gary roamed to Canadian studies and their findings regarding the effect of no-fault auto compensation schemes on

and difficulties in identifying some and measuring others. Longitudinal studies based on a change in a relevant variable—that is, moving from a fault system to a no-fault system—are subject to the problem that other relevant variables may change during that same time period. See generally STEVEN GARBER, *PRODUCT LIABILITY AND THE ECONOMICS OF PHARMACEUTICAL AND MEDICAL DEVICES* 95–104 (1993) (measuring conduct foregone because of tort law incentives is impossible and attributing precaution-taking behavior to those incentives is quite difficult); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2431 (2000).

83. Or as Oliver Wendell Holmes put it, its “featureless generality.” OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 111 (Little, Brown & Co. 1950) (1881).

84. Before it became popular to apply cognitive psychology to problems such as the deterrent effect of tort law, Gary recognized the importance of psychology to assumptions about the deterrent effect of tort law. See Schwartz, *supra* note 14, at 713–19. In the early days of law and economics, Arthur Leff wrote that other disciplines, including psychology, might inform the efforts of those working in the field. See Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 470–74 (1974). Today, exploration of behavioral economics and its implications for law is a flourishing scholarly enterprise. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

85. Gary's appreciation for avoiding the sin of painting with too broad a brush—a manifestation of overclaiming and provocation—is also revealed in his confrontation with the issue of tort recovery for economic loss. He began that article by preaching the importance of recognizing economic loss as a mélange of distinct legal problems that require independent contextual assessment and answers. Schwartz, *supra* note 10, at 38.

86. See Schwartz, *supra* note 14, at 711–12, 713–19 (explaining why inadvertent risky behavior persists, that it differs from behavior that consciously makes choices in advance about risk levels, and that avoiding personal injury to oneself provides greater incentives for care than any financial incentives provided by the tort system); see also Schwartz, *supra* note 10, at 49 n.60.

87. See Schwartz *supra* note 77, at 390–430.

the rate of motor vehicle injuries.⁸⁸ Moreover, he read these reports carefully, analyzing whether the soft data supported the author's conclusions and whether it had implications for the deterrence question Gary was investigating.⁸⁹ He also explained how liability insurance costs can provide a measure of deterrence by regulating the level of activity, thus acting similarly to a rule of strict liability.⁹⁰

Gary concluded that while the economic assumption of precise deterrence cannot be justified, "there is evidence persuasively showing that tort law achieves something significant in encouraging safety."⁹¹ His comprehensive research, meticulous assessment of the evidence, and unimpeachable objectivity produced a piece of scholarship that is the most respected and accepted assessment of tort law's deterrent effect extant. Not only does Gary provide a convincing case that tort law does provide a measure of deterrence, but his work also cautions against fine-tuned reforms that might, in theory, provide some marginal additional measure of deterrence. The world and human behavior are simply far too messy to believe that fine-tuning based on economic modeling will improve incentives in the fashion desired.⁹²

Gary's intellectual energy is evident not only in the difficulty of the research which he undertook, but also in his willingness to take on virtually any topic within the broad fields of torts or compensation systems. Gary believed that the core of tort law is physical injury—personal injury and property damage. This view led to the scope of the *Restatement (Third)* project for which Gary served as the Reporter.⁹³ Most of his scholarly work is addressed to that subject, and yet Gary investigated other areas of tort law with enthusiasm when the opportunity arose. Although it was the only occasion in which he considered harm to the interest in privacy, Gary contrib-

88. See *id.*

89. Thus, he pointed out a discontinuity between a conclusion and its discussion in a Rand study by George Eads and Peter Reuter about the role of products liability law in encouraging safer products. See *id.* at 407–08 (discussing GEORGE EADS & PETER REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* (1983)). I still recall being puzzled when reading that study and attempting to sort out its meaning for deterrence because of the discontinuity that Gary so quickly put his finger on.

90. *Id.* at 381.

91. *Id.* at 423.

92. Gary's depth of analysis is also evident in this article. Gary went on to examine whether the deterrence benefits of the tort system are worth its costs. Marshalling a variety of empirical data, Gary compared the costs of accidents that had been prevented by the existence of tort liability (for example, by comparing accident rates before and after adoption of a no-fault system) with the costs of maintaining the tort system. Yet, Gary appreciated and pursued an additional aspect of cost—the costs of accident avoidance, which, while socially desirable, are nevertheless a real societal cost and must be included in any effort to determine whether the costs of the tort system are worth its accident-avoidance benefits. *Id.* at 436.

93. Draft No. 1, *supra* note 9.

uted to a symposium in 1991 to celebrate the one-hundredth anniversary of Warren and Brandeis's famous article⁹⁴ on the tort law of invasion of privacy.⁹⁵ Gary's single work in this field is no less analytical, meticulously researched, insightful, and carefully thought through than his work in the more familiar personal injury area. His examination of whether the false light tort implicates privacy interests or some other interests reveals an author who is deeply engaged in his subject.⁹⁶

D. Work Ethic and Intellectual Curiosity: Scholarship as Self-Education

Gary was a prodigious researcher and scholar. He was a voracious reader of cases—I can't count the times that in conversation Gary would refer to a new important case of which I was unaware or an old obscure, but nevertheless significant, case. As anyone who has read his work on the development of negligence in the history of tort law appreciates, Gary enthusiastically took on research projects that required huge investments in reading cases.⁹⁷ Gary was also an avid consumer of legal scholarship. Gary read carefully what others wrote and took it seriously.⁹⁸ And he read work that had little or no utility to his then-current research projects. I will always recall the gracious note I received from him shortly after I had published a book about the Bendectin litigation. He had read the book, as his comments revealed, yet toxic substances litigation was one of the very few areas of tort law to which Gary never devoted himself.⁹⁹

Gary's curiosity, work ethic, and integrity were such that he did not recycle prior work or write derivative articles.¹⁰⁰ Gary researched, explored,

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

95. Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885 (1991).

96. See *id.* at 897–901.

97. See Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 642 (1989) (research included reading every case between 1790 and 1860 in three jurisdictions); Schwartz, *supra* note 46, at 1719 & n.14 (research entailed reading every tort case during the nineteenth century in two jurisdictions, a total of 770 cases); see also Schwartz, *supra* note 10, at 58 (reporting on one hundred product liability cases for economic loss read to determine whether and why implied warranty would not provide an adequate remedy). When I assisted in cleaning Gary's office after his death, I found reams and reams of duplicated cases filed and stored in virtually every cranny of his office. These were all cases that related to his then-current scholarly effort, Draft No. 1, *supra* note 9.

98. See, e.g., *infra* note 175.

99. Gary did tangentially address some of the causal questions that arise in toxic substances cases in his survey of the legal aspects of tobacco litigation. See Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 131, 132–34 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

100. Two qualifications are necessary, and Gary would have insisted on them given his commitment to accuracy. In 1986, Gary wrote an article for a symposium on tort law in the *San Diego*

and wrote on a topic, and then he was done with it. His refusal to double dip is well revealed in two short commentaries he wrote in 1985, one about torts scholarship¹⁰¹ and the other about products liability scholarship.¹⁰² Both were, to be sure, commentaries about separate symposia in different journals. Nevertheless, there is not a hint of overlap in anything Gary wrote in those two pieces, despite the obvious overlap in the subject matter and despite their chronological proximity. There were just too many torts subjects that Gary wanted to explore to waste time on areas that he had already addressed.¹⁰³

Gary's unwillingness to reuse prior work is the more notable given his numerous opportunities to do so and the pressures on a busy, fully committed scholar. He was routinely invited to contribute to the leading torts symposia until his death in July 2001. While many of those symposia addressed specific areas of tort law, many of the topics dovetailed with at least some prior work of his. In 1983, the *New York University Law Review* sponsored a symposium on the effect of the passage of time on products liability. Gary had, a few years earlier, written a broad-ranging article about products liability. In it, he considered a tantalizing hint in *Barker v. Lull Engineering Co.*, that liability might be imposed even if the risk of harm was not known or knowa-

Law Review. Gary wrote about economic loss and tort law, addressing both an important California case that recognized a cause of action for negligent infliction of economic loss and the economic loss doctrine in products liability. Schwartz, *supra* note 10, at 39–40. Gary chose the topic because he had also been invited to a conference in England, where the question of recovery of economic loss in tort law receives greater attention than in the United States. At the second conference, Gary's article was reproduced, with suitable revisions for a European audience. Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and Products Liability*, in *THE LAW OF TORT: POLICIES AND TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS* 83 (Michael Furmston ed., 1986). Gary subsequently wrote two additional pieces about economic loss, both in response to invitations to contribute to conferences or publications in Europe. Gary T. Schwartz, *American Tort Law and the (Supposed) Economic Loss Rule*, in *THE FRONTIERS OF TORT LIABILITY: PURE ECONOMIC LOSS IN EUROPE* (Mauro Bussani & Vincent Valentine Palmer eds., forthcoming); Schwartz, *supra* note 66. Each of the latter two articles, while drawing on his earlier work, are different from those efforts and from each other in their coverage and thrust.

Gary also wrote two articles about the historical development of tort law in this country. Schwartz, *supra* note 46; Schwartz, *supra* note 97. The second effort invoked virtually none of his prior article on the subject, save for its thesis. Rather, the second article expanded his base of research to three other jurisdictions, in an ongoing debate with Lawrence Friedman and in response to criticism that the states he had examined in his earlier work were not representative. See Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 686 n.161 (1983); see also Robert L. Rabin, *The Torts History Scholarship of Gary Schwartz: A Commentary*, 50 UCLA L. REV. 461, 463 (2002) (characterizing Gary's two historical articles as a "matched pair").

101. Gary T. Schwartz, *Tort Scholarship*, 73 CAL. L. REV. 548 (1985).

102. Schwartz, *supra* note 12.

103. Gary's inquiring mind is evident in the numerous places in his work where he identifies interesting questions about tort law that he subsequently pursued. See *infra* note 123.

ble at the time of manufacture.¹⁰⁴ Gary surely could have reworked or pursued his thinking from his earlier piece.¹⁰⁵ Instead, he chose a number of different issues, such as the fairness of imposing newly enhanced tort standards of liability on conduct that had already occurred, and the standard by which older products should be judged when they fail to perform, including the role of repose statutes in terminating potential liability after the passage of a specified period from time of manufacture.¹⁰⁶

Gary devoted his scholarly career to tort law, but the breadth of his subjects is inspiring.¹⁰⁷ Scholarship in the tort field today is enormously specialized, with both substantive and methodological subschools. Gary had a finger (or toe) in virtually every one of the diverse substantive areas of torts scholarship extant today.¹⁰⁸ He regularly invoked economics, moral theory, psychology, and comparative perspectives in his work. One also often finds him ranging beyond tort law to bring perspectives from other areas of law to bear on the tort topic that he was pursuing.¹⁰⁹ Gary understood that an important benefit of scholarship is the self-education that it provides. The breadth of his scholarship and the absence of duplication reveals a scholar

104. Of course, the extent to which a risk is unknowable is a function of the research efforts expended. In theory, at least, a negligence standard applied to research efforts should produce an optimum amount of information about product risks. As Gary appreciated, the ability of the tort system to apply a negligence standard to manufacturer research efforts conducted many years or decades previously is dubious, not to mention that the transaction costs entailed in pursuing such an inquiry can be significant. See Schwartz, *supra* note 12, at 774 & n.68; Schwartz, *supra* note 26, at 486–87.

105. Similarly, Gary was invited to a conference in Israel and asked to address modern directions in legal scholarship. Given his familiarity with many of the existing strands of torts scholarship, Gary could easily have discussed one or more of them. Instead, he used the occasion to explore the newly emerged feminist scholarship about tort law. See Gary T. Schwartz, *Feminist Approaches to Tort Law*, 2 THEORETICAL INQUIRIES L. 175, 178 (2001).

106. I do not mean to suggest that Gary's research was not informed by his prior work. Gary's work frequently revealed views that he had earlier expressed and used the work of others that he had already employed. But in every case, Gary was pushing the envelope, interested in pursuing some new idea in whatever project in which he was engaged.

107. See Rabin, *supra* note 100, at 461.

108. The breadth of the subjects that Gary chose to address is inspiring: uninsured motorist insurance, reform of pain and suffering damages awards, the history of the development of negligence as the standard of liability, the tort of invasion of privacy by portraying someone in a false light, and punitive damages, among others. No subject was too arcane or uninteresting for Gary to pursue with his remarkable scholarly skills. See *supra* text accompanying note 97 and *infra* text accompanying notes 123, 187–189.

109. See e.g., Draft No. 1, *supra* note 9, § 1 cmt. a (contrasting criminal law notions of intent with tort law treatment of intent); Schwartz, *supra* note 10, at 40–50 (discussing contract law relating to third-party beneficiaries); Schwartz, *supra* note 63, at 1811–15 (explaining the comparative harmony of deterrence and retribution in criminal law by contrast with conflict among tort theorists of economic and corrective justice schools).

who took every opportunity to educate himself through his research efforts.¹¹⁰

Gary took tort doctrine seriously, but he also pursued tort theory. He took both very seriously and successfully synthesized the two in much of his work.¹¹¹ Two years after his tour de force on strict products liability doctrine in the *California Law Review*,¹¹² Gary took on the question of the ethical merits of strict liability. By that point in his career, Gary was persuaded that what pockets of strict liability existed were just that—pockets of exceptions to a universe that otherwise employed negligence as the basis for liability.¹¹³ Even in the late 1970s, Gary was skeptical that strict products liability would establish a beachhead for expanding enterprise liability or even that it would become a substantial pocket of strict liability in the torts landscape. Beyond products, he saw the other areas of strict liability as quite modest exceptions to the universality of negligence.

So Gary felt compelled to confront the leading tort theorists of the day who championed strict liability. At the time, Richard Epstein had advocated a rule of strict liability based on common sense notions of causation,¹¹⁴ and George Fletcher was championing a rule of strict liability for those who imposed nonreciprocal risks on others.¹¹⁵ In his assessment of these proposals, Gary showed how Epstein's strict liability theory was permeated with negligence concepts, including common understandings of causation.¹¹⁶ Most nonlawyers think of the cause of an accident and incorporate notions of responsibility when identifying this cause, making it closely resemble liability based on fault.¹¹⁷ Epstein also relied on noncompliance with highway rules to determine which automobile "caused" which accidents, thereby im-

110. Although I never had the opportunity to take or sit in on Gary's classes, one can readily see how his scholarship enriched his teaching. Reading his analysis of which rule would best encourage potential plaintiffs and defendants to take precautions, one can virtually imagine a Socratic dialogue (well, it probably turned into a monologue at some point) on the deficiencies of each rule. See Schwartz, *supra* note 14, at 704–10.

111. Throughout his career, Gary repeatedly demonstrated his commitment to taking doctrine seriously and to parsing carefully judicial opinions. For examples of his engagement with tort case law, see Schwartz, *supra* note 10; Schwartz, *supra* note 17, at 828–42; and Schwartz, *supra* note 46. Indeed, Gary's final, major project involved the synthesis of case law since 1964 in the core areas of tort law. See Draft No. 1, *supra* note 9.

112. Schwartz, *supra* note 26.

113. See generally Henderson, *supra* note 50, at 388–389.

114. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

115. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

116. Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 992–1000 (1981).

117. See ARNO C. BECHT & FRANK W. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* 20 (1961); H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 23–29 (2d ed. 1985). Rarely do we state that a fire was caused by the presence of oxygen and some flammable material, yet those causes are as necessary as the smoker who carelessly leaves a burning cigarette in a sofa. A leading epidemiology text provides a similar observation:

porting negligence per se into his "strict liability" system.¹¹⁸ In addition to revealing the significant strains of negligence employed by both Fletcher and Epstein, Gary engaged in his typical hard-headed assessment of these two efforts to justify a norm of strict liability. In one passage, Gary took on the matter of when risks are nonreciprocal: What if one driver is driving a modern, behemoth of an SUV, while another is driving a compact car?¹¹⁹ Both are driving and imposing similar risks of an accident, but the SUV threatens to cause considerably greater harm. Would strict liability be imposed on all SUV drivers involved in accidents with smaller automobiles? What if the smaller automobile were a minivan? A pickup? Gary thus provides a convincing critique of the incompleteness of Fletcher's otherwise intriguing idea. More importantly, here is Gary switching gears completely and moving from a thorough, trenchant review of products liability doctrine to a critique of two tort theorists advocating regimes of strict liability.

Gary's assessment of liability insurance and its fit with tort goals also reveals an author who expended extraordinary time and energy researching and understanding broad swaths of the contemporary insurance landscape—not only liability insurance—but first-party insurance as well.¹²⁰ Gary was plainly taking the opportunity not only to write an article but also to enrich his own understanding of insurance and its relationship with tort law. Indeed, one finds in many of Gary's earlier pieces ruminations about a tangential topic that show up later in a full-fledged investigation of the area.¹²¹ Gary's intellectual curiosity ran full-time.

Gary also believed that we could learn much from other legal systems. He was not a declared comparativist, and he never devoted an entire article

A common characteristic of the concept of causation that we develop early in life is the assumption of a one-to-one correspondence between the observed cause and effect. . . . Thus, the flick of a light switch appears to be the singular cause that makes the lights go on. There are less evident causes, however, that also operate to produce the effect: the need for an unspent bulb in the light fixture, wiring from the switch to the bulb, and voltage to produce a current when the circuit is closed.

KENNETH J. ROTHMAN & SANDER GREENLAND, *MODERN EPIDEMIOLOGY* 8 (2d ed. 1998).

As Gary put it: "The ordinary language of causation, as parsed above, thus turns out to be impressively sensitive to considerations of a negligence sort." Schwartz, *supra* note 116, at 997 (footnote omitted).

118. Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 180 (1974).

119. See Schwartz, *supra* note 116, at 990 n.137.

120. Schwartz, *supra* note 43, at 313–14.

121. Gary's fascination with vicarious liability and its hybrid of strict liability and negligence was displayed in a number of his early torts articles. See, e.g., *id.* at 324 n.53; see also *id.* at 339 n.119, 364–65 (commenting on the different views about the deterrent effect of tort law, a subject Gary wrote about four years later). This interest came to fruition in Gary T. Schwartz, *The Hidden and Fundamental Issue in Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739 (1996).

to a comparative analysis. Yet, Gary frequently sprinkled his work with nuggets and insights gained from other countries' legal systems.¹²²

The broad range of Gary's interests is revealed in his confronting uninsured motorist insurance. Invited to make a presentation about tort reform, Gary sought out a subject that was outside the mainstream of tort reform proposals and hence unexamined. He also searched for a topic that was sufficiently interesting to justify exploring it. Appreciating that the intersection of tort and insurance law had long been neglected in academia, Gary settled on the matter of uninsured (and underinsured) motorist plans, a topic that, as he explained, had generated but two major law review articles in over thirty years of existence.¹²³ Another fine example of his capacity to find intellectual challenge in areas that many of us might dismiss as uninteresting, trivial, and even desolate is his work on strict liability for dangerous animals. Gary himself once dismissed this subject as of "trivial consequence" and of no relevance to the larger body of tort law.¹²⁴ However, strict liability for dangerous animals is not nearly as trivial as Gary initially thought and sorting the many diverse strands of that law and making sense of it was a project that he undertook as the Reporter for the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*. For anyone who is tempted to dismiss this area as unchallenging, uninteresting, and inconsequential, a brief foray into Gary's discussion of the rules relating to liability for livestock, the interests accommodated, the tradeoffs that exist, and the significance of these rules to ranchers and farmers who live in proximity to

122. Schwartz, *supra* note 59, at 617 nn.19–21 (reporting on automobile no-fault systems in Israel and Canada); Schwartz, *supra* note 14, at 717 n. 94 (explaining that mindless but risky conduct cannot be affected by liability rules and referring to English law that holds that momentary inadvertence is not a defense in suits for occupational injury); Schwartz, *supra* note 43, at 314 n.5, 319 & nn.27, 29; Schwartz, *supra* note 61, at 1346 (discussing the treatment of collateral sources in other countries); Gary T. Schwartz, *A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 OHIO ST. L.J. 419, 440–42 (1987) (explaining differences in tort systems that permit auto liability insurers in England and Australia to offer policies with unlimited coverage) [hereinafter *Reformulating Uninsured Motorist Plans*]; Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 28 (Peter W. Huber & Robert E. Litan eds., 1991); Schwartz, *supra* note 116, at 992 n.155 (explaining postrevolutionary USSR's adoption of a strict cause-based system of liability and the resistance such a rule generated, resulting in movement toward a fault-based system).

123. See *Reformulating Uninsured Motorist Plans*, *supra* note 122, at 421. This was the first of Gary's explorations in the area of insurance law. See also Gary Schwartz, *Insurance, Deterrence and Liability*, in 2 *THE NEW PALGROVE DICTIONARY OF ECONOMICS AND THE LAW* 335, 335–39 (Peter Newman ed., 1998); Schwartz, *supra* note 43. Gary was sufficiently intrigued with insurance law and convinced of its importance to tort law and theory that he had planned on exploring it further by teaching a course in insurance law during the fall of 2002.

124. Schwartz, *supra* note 116, at 970.

each other will quickly reveal the error of that view.¹²⁵ Gary could find intellectual challenge in almost any nook or cranny of tort law, and he pursued those challenges with all of his considerable skills.

E. Curiosity About the Real World

Gary's curiosity about the real world and his commitment to attend to it is revealed in virtually all of his scholarly work. Gary cared about the rule of law and its effect on society, whether good, bad, or indifferent, and in everything he wrote, he expended considerable energy on those matters. In addition, however, Gary was interested in how the real world worked because he believed this understanding could inform and improve his scholarship. His commitment to that ideal and his pursuit of it reveal considerable investment by Gary and substantial payoffs.

Much of Gary's early work is sprinkled with instances of his inquiring, in nontraditional ways, about some state of affairs in the world.¹²⁶ Most notable was Gary's reliance on the telephone to talk to people who had relevant information about the work he had in progress.¹²⁷ Sometimes Gary pursued sources well beyond what one usually finds in footnotes in legal scholarship.¹²⁸ In some of his later work, Gary made substantial use of journalistic-like techniques to inform his scholarship.

The best example of Gary's commitment to unraveling the facts is his superb case study of the Ford Pinto case, *Grimshaw v. Ford Motor Co.*¹²⁹ The facts of that case are familiar: In order to save a few dollars on its gas tanks in the Pinto, Ford did a cost-benefit analysis and decided that it would be cheaper to design the fuel tank in a way that created a risk of fire. Ford calculated that it would be better off by paying the liability claims, as these costs were less than the amount saved by utilizing the cheaper (and less safe)

125. Draft No. 1, *supra* note 9, § 21. Gary's treatment of animals other than livestock is no less impressive for his ability to seek out the challenge in the subject and sort it out. *See id.* §§ 22–23.

126. *See, e.g.,* Schwartz, *supra* note 17, at 812 n.114 (discussing an interview with an actuary at the Insurance Services Office on changes in the ratio of product liability insurance premiums to sales over time); Schwartz, *supra* note 26, at 440 n.43 (correcting the facts contained in the court's opinion in *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978), based on an interview with one of the parties' attorneys); *Reformulating Uninsured Motorist Plans*, *supra* note 122, at 423 & n.36.

127. I would estimate that Gary's articles contain on average approximately half a dozen footnotes with citations to telephone interviews that Gary had conducted to discover some bit of data, medical or insurance practice, information about a litigated case, or other relevant fact. The article in which this practice is most prevalent, reflecting Gary's appreciation that there was much to know about how insurance actually works, is *Reformulating Uninsured Motorist Plans*, *supra* note 122, at 423 n.36, 427 n.51, 436 n.98, 440 n.123.

128. *See, e.g.,* Schwartz, *supra* note 43, at 325 n.55 (citing monograph on aviation insurance).

129. 174 Cal. Rptr. 348 (Ct. App. 1981).

fuel tank design.¹³⁰ When a teenage passenger in a Ford Pinto suffered terrible injuries in a collision that caused a fire in the Pinto, his \$2.5 million compensatory award and \$125 million in punitive damages thrust the *Grimshaw* case into the public spotlight.¹³¹

Gary peeled away much of the misconception about that case—his labeling it as a myth seems just right, given the substantial misunderstanding about important aspects of the case and the intensity of public attention to that skewed version of the case.¹³² Gary dispelled these misunderstandings about the *Grimshaw* case by going beyond the traditional research materials and reading the transcript of the six-month trial¹³³ and conducting what appear to be extensive telephone conversations with several lawyers, a journalist, and National Highway Traffic Safety Administration (NHTSA) officials who were involved in the case.¹³⁴ Gary didn't just read the transcript. He read it carefully enough that he could assert that "in the entire *Grimshaw* record there is not a shred of evidence that directly deals with the question of what ordinary consumers expect about their gas tanks."¹³⁵

Putting together data from NHTSA on automobile fatalities and car registration data, Gary demonstrated that, rather than being uniquely dangerous, the Pinto was about in the middle of all subcompacts in its fatality rate.¹³⁶ True to his commitment to precision and accuracy, Gary also reports that the Pinto did have a problem in one narrow respect—its rear-end design for fire hazards—a problem that was counterbalanced by other features that produced the overall middling fatality rate.

Gary then seized the opportunity to confront a critical tension between the law and public opinion. This discord raises serious questions about the use of cost-benefit analysis with juries in personal injury and wrongful death

130. The inherent contradiction in Ford being held liable for failing to take precautions that were not cost-justified did not escape Gary. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1021 n.25, 1037 (1991).

131. Is Your Car Safe? 60 Minutes, vol. 10, no. 40, at 7 (June 11, 1978), cited in W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY 841 (2d ed. 1989); Roy J. Harris, Jr., *Why the Pinto Jury Felt Ford Deserved \$125 Million Penalty*, WALL ST. J., Feb. 14, 1978, at 1.

132. Briefly, the Ford report was not about the design feature of the fuel tank at issue in *Grimshaw*. Instead it concerned the costs and benefits of a proposed regulation addressing fuel leakage in rollover accidents. Ford's report to NHTSA presented a cost-benefit analysis of the regulation for all auto manufacturers and found that the costs would exceed the benefits by some \$85 million, employing \$200,000 as the value of a life lost in an accident. See Schwartz, *supra* note 130, at 1020–22.

133. The plaintiff's attorney who tried *Grimshaw* recalls that it took approximately six months. Telephone interview with Lynn Moen, assistant to Mark Robertson, plaintiff's attorney in *Grimshaw* (May 2, 2002). *Grimshaw* was, Gary reports, apparently the longest trial in Orange County history. See Schwartz, *supra* note 130, at 1058.

134. Schwartz, *supra* note 130, at 1015 n.5, 1023 n.36, 1024 n.41, 1027 n.53.

135. *Id.* at 1058.

136. *Id.* at 1028 n.62.

cases. Before the problem of incommensurability became popular,¹³⁷ Gary addressed the conundrum that cost-benefit analysis, when employed in tort cases involving personal injury, poses the knotty matter of comparing limbs and lives against dollars.¹³⁸ Yet public outrage over the perception that Ford did precisely that in designing the Pinto reveals the disconnect between the law and public views. Gary also pointed out the way in which the structure of a lawsuit, with an identifiable victim who, as in the *Grimshaw* case, had suffered devastating personal injuries intensifies the conflict, and did so before hindsight bias became a popular academic subject.¹³⁹

Thus, Gary insisted on telling the Ford Pinto story as it was, not as it was popularly understood. The actual facts submerge the central problem for which the case has come to be understood: a car manufacturer balancing lives against dollars for safety improvements and imposing that choice on unsuspecting consumers (and passengers). Often, Ford was damned further on the claim that all of this was done to enhance its profits. Gary's extensive research efforts, commitment to the facts as they were, judicious reassessment of the case, and dazzling analysis reveal a far different situation than we initially believed.¹⁴⁰ But Gary was not content merely to peel away the layers and lay bare the Pinto case. He then went on to confront the central conundrum for which that case had come to stand, recognized the unlikelihood of conforming public perceptions to the demands of risk-benefit analysis in personal injury litigation, and proceeded to consider the appropriate legal response. Gary rejected his own primary proposed reform as administratively unwieldy, dismissed a secondary proposal as problematic for other substantive reasons, and ultimately recommended a modest regulatory reform. Finally, he explained how a felicitous concurrence of several weaknesses in the system, while not ideal, may constitute a reasonable state of affairs, revealing many of the qualities that suffuse all of his scholarship: analysis, integrity, curiosity, insight, judiciousness, energy, and exertion.

137. See, e.g., Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 686. There are economists who have attempted to develop measures for the value of a life for several decades, employing a variety of methodologies. See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994). For a survey of the methodology and literature in the value-of-life field, see generally VALUING LIFE: PUBLIC POLICY DILEMMAS (Steven E. Rhoads ed., 1980) and W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* 51-74 (1992).

138. Judge Guido Calabresi and Phillip Bobbitt describe this as a "tragic choice": having to confront the reality that there is a price on an item we would like to treat as priceless. GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 144 (1978).

139. See, e.g., Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post-Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89 (1995); Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 LAW & HUM. BEHAV. 501 (1996).

140. And than some still believe. See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1409, 1436 (1993).

F. Extraordinary Insight

One example will suffice to show that Gary's work contains extraordinary insights.¹⁴¹ In 1993, Gary wrote a chapter in a book about cigarette policy that was co-edited by Bob Rabin and Steve Sugarman.¹⁴² Gary wrote about the legal issues in the tobacco litigation that had already taken place and might take place in the future. In a relatively short survey that reviewed thirty years of tobacco litigation and the broad range of legal issues implicated in those suits, Gary turned to failure-to-warn claims and the impact of the Supreme Court's then-recent decision in *Cipollone v. Liggett Group, Inc.*¹⁴³ The Court held in *Cipollone* that the initial version of the Federal Cigarette Labeling and Advertising Act,¹⁴⁴ enacted in 1965, which mandated certain warnings about the dangers of smoking on cigarette packages and in cigarette advertising, did not preempt any state tort law claims. However, the Court held that a 1969 amendment to the act¹⁴⁵ did preempt any state tort claim based on the inadequacy of the federally mandated warnings.¹⁴⁶

To this day, *Cipollone* has been widely understood as preempting all claims based on inadequate warnings on cigarette packages or in cigarette advertising after 1969.¹⁴⁷ Gary, however, in his first reading¹⁴⁸ of *Cipollone*, realized something that dozens of courts, numerous commentators, and even the lawyers in *Cipollone* had not.¹⁴⁹ The preemption provisions in the act

141. Gary's insight bubbles throughout his work. Two wonderful instances are contained in a very short commentary about reform of nonpecuniary damages. See Schwartz, *supra* note 62, at 420–21 (criticizing a proposal to improve jury awards of nonpecuniary damages by providing juries with information about prior awards by juries in similar cases, because that data would omit cases that settle after trial and awards set aside as excessive on appeal, and also explaining how the proposal would distort incentives for repeat players in settlement and appeal decisions).

142. Schwartz, *supra* note 99.

143. 505 U.S. 504 (1992).

144. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–41 (2000)).

145. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331–1341 (2000)).

146. *Cipollone*, 505 U.S. at 530–31.

147. See Michael D. Green, *Cipollone Revisited: A Not So Little Secret About the Scope of Cigarette Preemption*, 82 IOWA L. REV. 1257, 1261–65 & nn. 31–34 (1997).

148. I report this because Gary and I once had a conversation about this question, and at that time he told me that this aspect of *Cipollone* dawned on him in his first reading. I recall that conversation well, because it was only after a dozen or more readings of *Cipollone* and substantial work on a chapter for a monograph about employing supply-side strategies to control cigarette smoking that I achieved a similar understanding.

149. The structure of the Court's opinion fed the misunderstanding by focusing on the amended language and its preemptive effect and then proceeding to identify the claims that were not preempted by the amended language. Omitted in that discussion is any claim based on the inadequacy of post-1969 warnings, which, of course, had not been raised by the plaintiff.

are contained in two different sections, one governing cigarette packages, the other cigarette advertising and promotion. The amended language that led the Court to conclude that inadequate warnings claims were preempted after 1969 was contained only in the section governing advertising and promotion. But the language in the original act about cigarette packages *remained identical in the 1969 version of the act*.¹⁵⁰ Thus, as Gary appreciated, unless the cigarette package can be characterized as part of the advertising or promotion,¹⁵¹ tort claims based on inadequate warnings on cigarette packaging are not preempted by the 1969 amendment.

G. Healthy Skepticism

Gary was a skeptic, unwilling to accept a claim without examining it carefully. Gary's was a healthy skepticism, borne of faith in objective realities and value-free judgments. That skepticism requires reasons and explanations, of which there are better and worse. While he never commented on it in his writing, he had little sympathy for the extreme skepticism of those who insist that all reality is socially constructed and the legal scholars who pursue similar themes.¹⁵²

Despite his intrigue with economic analysis and its deterrence underpinnings, Gary was very careful to separate the persuasive from the questionable, and he frequently criticized the claims of law-and-economics scholars. In his first torts article, Gary examined contributory and comparative negligence, then in the midst of transition from the former to the latter. Examin-

150. This is best illustrated by a side-by-side comparison of the 1965 and 1969 language:

	1965 Act	1969 Act
Packaging Language	(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.	(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
Advertising and Promotion Language	(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.	(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

151. Gary characterized *Cipollone* as ambiguous because of this possibility. The difficulty with this interpretation is that it renders superfluous the language in subsection (a) about preempting state law with regard to cigarette package warnings. *But see Wright v. Brooke Group Ltd.*, 114 F. Supp. 2d 797, 826–27 (N.D. Iowa 2000) (addressing claim that post-1969 package warnings are inadequate and holding that they are preempted by *Cipollone*).

152. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

ing the justifications for any defense based on plaintiff's conduct, he rejected the standard economic justification of the day that this defense provided incentives for victim care.¹⁵³ "There is inadequate reason," Gary wrote, "to believe that any contributory negligence rule is a good idea in safety terms; the traditional rule, moreover, appears to be a distinctly bad idea."¹⁵⁴ Ultimately, Gary concluded that the comparative negligence rule was best justified by fairness considerations.

Gary also was immune to the bandwagon effect. True to his refusal to accept rhetorical claims or received wisdom, Gary insisted on hard-headed analysis before accepting what others were proclaiming. In the early days of strict products liability, when courts were filled with the rhetoric that a given doctrine "rang of negligence" and therefore would not be employed in this new world of strict liability,¹⁵⁵ Gary was analyzing the difference between the two regimes and concluding that the differences, as we have all come to appreciate with time, are quite marginal.¹⁵⁶ In a day when loss-spreading rhetoric was fueling the strict products liability revolution, Gary took a bye. He labeled the justification "promiscuous" and explained that if taken seriously, it would lead not to (even a true) strict liability regime, but

153. See Schwartz, *supra* note 14, at 704–27. For the standard economic treatment of contributory negligence as creating incentives for victim safety, see LANDES & POSNER, *supra* note 68, at 40 n.10, 75–76; POSNER, *supra* note 68, at 185–92; John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 323–24 (1973); Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 653–54 (1985); and David Haddock & Christopher Curran, *An Economic Theory of Comparative Negligence*, 14 J. LEGAL STUD. 49, 52–54 (1985). For a recent economic analysis that ignores the role of nonfinancial incentives for self-care, despite citing Gary's article, see OMRI BEN-SHAHAR & OREN BAR-GILL, *THE UNEASY CASE FOR COMPARATIVE NEGLIGENCE* (John M. Olin Center for Law & Economics, Paper No. 02-003, 2002), at http://papers.ssrn.com/paper.taf?abstract_id=314902.

In 1986, in the third edition of his book, Judge Posner nodded in the direction of this criticism, acknowledging that damages may not provide full compensation for personal injuries and that potential victims may therefore have an unspecified "incentive" to take care even if tort law does not sanction their unreasonable behavior. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 185 (3d ed. 1986). He observes that this incentive may not apply to property damage but then proceeds to analyze rules of contributory and comparative negligence, ignoring his grudging concession. Similarly, Steve Shavell recognizes that if victims "would not or could not be fully compensated for . . . serious personal injury or death," they would have an incentive to take care independent of tort law. STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 11 n.9 (1987). However, like Judge Posner, he then proceeds to analyze contributory and comparative negligence on the basis of victim deterrence. *Id.* at 14–16, 18, 85.

154. Schwartz, *supra* note 14, at 721; see also *Economics, Wealth Distribution, and Justice*, *supra* note 64, at 801 (expressing his intellectual sympathy for the emerging law-and-economics work, but observing that "economists have been guilty of some overreaching in their statements on behalf of the explanatory power of basic economic concepts").

155. See, e.g., *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162 (Cal. 1972); *Glass v. Ford Motor Co.*, 304 A.2d 562, 564–65 (N.J. Super. Ct. Law Div. 1973); *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 899 (Pa. 1975).

156. See Schwartz, *supra* note 26, at 459–464.

to a no-fault compensation scheme similar to that adopted in New Zealand.¹⁵⁷

Gary's work in the products liability arena reflects both his skepticism about the conventional wisdom and his extraordinary insight.¹⁵⁸ Gary appreciated, before most observers, that strict products liability was not the revolution that many thought it was during its nascent days.¹⁵⁹ Several years before George Priest declared, somewhat extravagantly, that this movement toward enterprise liability was a "conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system,"¹⁶⁰ Gary expressed his view that while liability was expanding, it was occurring within the domain of negligence law, which remained (and would continue to be) the dominant basis for determining tort liability.¹⁶¹ Gary appreciated, as most did, that the "strict" in strict products liability was not liability based on causation: The defect requirement substantially moderated anything that might approach a true strict liability rule.¹⁶² Much of strict products liability was built on negligence concepts and the predominant nonreasonableness standard—consumer expectations—was drawn from long-standing sales law. Finally, Gary confronted the true strict liability imposed for manufacturing defects. Here, again, Gary was unwilling to accept the customary wisdom, and he explained that while strict liability was being imposed, there was a strong probability that the defect was the result of manufacturer negligence. Moreover, requiring a plaintiff to prove negligence in such cases would produce a substantial number of false negatives—plaintiffs who would lose when they should have won because of their inability to meet the burden of proof.¹⁶³ Thus, to the extent there was any real "strict" in modern products liability law, it was because of the small proportion of manufacturing defect cases that did not entail negligence by the manufacturer. Thus, strict prod-

157. *Id.* at 445.

158. See Schwartz, *supra* note 116, at 963–64.

159. Schwartz, *supra* note 26, at 493. For a more recent concurrence with Gary's assessment, see G. Edward White, *The Unexpected Persistence of Negligence, 1980–2000*, 54 VAND. L. REV. 1337, 1344 (2001).

160. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL. STUD. 461, 461 (1985). For a more recent paean to a broad rule of strict liability, see Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1273–77 (1997).

161. See Schwartz, *supra* note 26, at 493–96.

162. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 879 (Alaska 1979) ("Strict liability will not impose legal responsibility simply because a product causes harm."); Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 33 (1973); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 13 (1965).

163. Gary was well aware of the role that *res ipsa loquitur* could play in ameliorating this problem, but also appreciated and explained why it was not entirely satisfactory. Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1739 n.2 (1996).

ucts liability was not, in Gary's view, a first step toward the broader development of enterprise liability.

Gary's conceptualization of strict products liability law as fitting comfortably within the negligence universe of tort law has considerable salience beyond academics debating the tension between strict liability and negligence. Gary addressed these issues in a period of time when courts were struggling to come to grips with the limits and content of this "new" strict products liability. If liability was new and stricter, then it must be different from negligence. Some courts reflexively rejected rules employed in negligence cases because strict products liability and negligence are, after all, different or, as one court put it, "antithetical" to each other.¹⁶⁴

Gary's skepticism, along with his integrity and extraordinary analysis, frequently led him to disagree with and criticize the work of courts and other scholars.¹⁶⁵ Despite his affinity for economics as a tool to understand and inform tort law, he frequently expressed his disagreement with the law-and-

164. See *Caprara v. Chrysler Corp.*, 417 N.E.2d 545, 550 (N.Y. 1981) (explaining that the rule barring the introduction of evidence of post-accident repairs does not apply in a strict liability action because it is "antithetical" to liability based on negligence); see also *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162 (Cal. 1972) (eliminating "unreasonably dangerous" from jury instruction because it is "an element which rings of negligence"); *Johnson v. Hannibal Mower Corp.*, 679 S.W.2d 884, 885 (Mo. Ct. App. 1984) (holding state-of-the-art evidence inadmissible in a strict products liability case because such evidence bears on only the reasonableness of a manufacturer's conduct, not the defectiveness of a product); *Majdic v. Cincinnati Mach. Co.*, 537 A.2d 334, 339 (Pa. Super. Ct. 1988) (holding that the customary practice in the industry bore on the reasonableness of the manufacturer's conduct and thus was inadmissible in a strict products liability suit).

165. See, e.g., Schwartz, *supra* note 14, at 703 n.36 (critiquing law-and-economics scholars for ignoring the role that socialization and psychology may play in human behavior with regard to precautions against harming others out of a sense of morality or altruism and without regard to liability rules); Schwartz, *supra* note 45 (taking issue with two defenders of the tort system who claim that the system is characterized by underenforcement rather than overclaiming) (draft at 10-13); Schwartz, *supra* note 43, at 335-36 (expressing and explaining his disagreement with a number of scholars critical of liability insurance as inconsistent with tort law and its concern with fairness); Schwartz, *supra* note 105, at 208-09 (criticizing feminist tort scholars for failing to examine the larger body of historical literature about tort law and available empirical data relevant to their claims, and for asserting inadequate grounds in support of certain arguments); Gary T. Schwartz, *Medical Malpractice, Tort, Contract, and Managed Care*, 1988 U. ILL. L. REV. 885, 906-07 (criticizing the treatment of medical malpractice in a book authored by Richard Epstein as incorrect on factual aspects, inadequate in research, inaccurate in its treatment of doctrine, unilluminating, failing to account for recent changes in the delivery of health care, and consisting largely of a rehash of an article Epstein published over twenty years earlier, but praising the remainder of the book as quite valuable); Schwartz, *supra* note 46, at 1774-75 (concluding that several legal history scholars' claims that the establishment of negligence as the basis for liability in the nineteenth century was to provide a subsidy to emerging industry "are either false or misleading" and remarking on substantial evidence he found that was inconsistent with the positivist claims of economics scholars); Schwartz, *supra* note 26, at 450 (critiquing Professor Fuller's claim that design defect claims are unmanageable in litigation because of their polycentric nature).

economics analysts.¹⁶⁶ When writing about vicarious liability, Gary found himself at odds with Landes and Posner's assessment of a case, *Kumkumian v. City of New York*,¹⁶⁷ in which the New York Court of Appeals employed the last clear chance doctrine to permit the estate of a decedent who had negligently fallen on a subway track to recover against the city.¹⁶⁸ The train's brakeman had three times failed to notice the victim on the tracks after a tripping device stopped the train because it detected the victim's presence. Each time the brakeman restarted the train, which then ran over the victim three times, killing him.¹⁶⁹ Landes and Posner found the use of last clear chance consistent with the positive economic theory of tort law, which posits that tort law provides rules that are economically efficient.¹⁷⁰ Gary pointed out that, while the brakeman may well have been the better cost avoider as compared to the decedent, the suit was against the brakeman's employer and based on vicarious (and therefore strict) liability.¹⁷¹ Not only had Landes and Posner failed to appreciate that, but the case is inconsistent with the positive theory because standard economic analysis requires that strict liability be coupled with a rule of contributory negligence, at least when potential victims can take precautions to avoid harm as in the *Kumkumian* case.¹⁷² In short, while the estate might recover from the brakeman, consistent with economic efficiency, the estate should not recover against a faultless employer, a matter that Gary explained had escaped Landes and Posner's analysis.

Given his commitment to care in drawing conclusions, I think I detect a note of pleasure in his bursting the bubble of those who employed provocation and exaggeration in their work.¹⁷³ Gary was as comfortable criticizing the excesses of the right as he was of criticizing the left for the same sins.¹⁷⁴ With his extraordinary memory, tenacity, and his scrupulous attention to

166. See, e.g., Schwartz, *supra* note 56, at 75 (describing as "quite silly" much economic analysis that attempts fine-tuning of our legal system to provide greater efficiency); Schwartz, *supra* note 14, at 721 (expressing disagreement with economic analysts who claim that contributory negligence is necessary to provide incentives for appropriate care by potential victims).

167. 111 N.W.2d 865 (N.Y. 1953).

168. See Schwartz, *supra* note 163, at 1743-44.

169. 111 N.E. 2d 865, 866 (N.Y. 1953).

170. LANDES & POSNER, *supra* note 68, at 196.

171. Schwartz, *supra* note 163, at 1743.

172. See SHAVELL, *supra* note 153, at 40. This analysis continues the pattern of ignoring the incentives that already exist for a potential victim to avoid personal injury, regardless of liability rules. See *supra* notes 153-154 and accompanying text.

173. See, e.g., Schwartz, *supra* note 77, at 381 (critiquing the claim by George Priest that modern tort law approaches nearly absolute liability).

174. See Schwartz, *supra* note 45 ("I find generally unfortunate the alarmist view [about the tort system] and the extent to which it has influenced both public opinion and political debate. Nevertheless, I am far from adequately consoled by the reassuring view [of the tort system].") (draft at 9).

the work of others, he sometimes reported unacknowledged inconsistencies in another author's position.¹⁷⁵ Yet here again, Gary displayed traits from which we can learn. Gary always remained civil and nonpolemical. Confident in his analysis and explanation, Gary never felt the need to resort to rhetoric, personal attacks, or hyperbole in his critiques. And while Gary was forthright in his criticism, he was never dismissive and always displayed respect for the work he was criticizing.¹⁷⁶

H. Open-Mindedness

While Gary's work led him to a number of conclusions about modern (and historical) tort law, he always remained willing to reexamine those ideas. Indeed, one finds in Gary's scholarship confessions that he has reconsidered a previously expressed position or has discovered additional concerns that he had neglected previously.¹⁷⁷

Gary's sense of humor is revealed in the most recent instance of his reconsideration of a prior view. In the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*, Gary wrote that some scholars have argued that the standards for what constitutes contributory negligence and negligence should be kept separate.¹⁷⁸ The argument is that one creating unreasonable risks to others is more culpable than a person engaging in behavior that merely poses unreasonable risks to oneself. The latter conduct may be foolish, and this may justify the law taking it into account, but it is of a different kind from behavior that benefits oneself but poses greater risks of harm to others. Gary then goes on to explain that, with some frequency, a victim's unreasonable behavior will also pose risks to others, as is frequently the case with motorists, just as a defendant's conduct may pose risks to him or herself. Moreover, the jury can account for the difference between actions that impose risks on others and those that expose only oneself to risk

175. See, e.g., Schwartz, *supra* note 17, at 823 n.171 (explaining the inconsistency between Justice Roger Traynor's opinion in *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944), that trumpeted adopting strict products liability to guide manufacturer behavior and a later article on retroactivity, Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 545-46 (1977), in which Traynor stated that tortfeasors ordinarily take no account of changes in tort law).

176. Thus, while criticizing Marshall Shapo's representational theory for the concept of defectiveness as too evanescent to supply a useful standard in many circumstances, Gary expressed his admiration for a "marvelously rich monograph." Schwartz, *supra* note 26, at 476 n.241; see also Schwartz, *supra* note 105 (giving careful and respectful attention to feminist scholarship on tort law, while pointing out its shortcomings).

177. Schwartz, *supra* note 17, at 850 (expressing doubts about a previous recommendation that the burden of proof on defects for older products be ratcheted to clear and convincing evidence as an alternative to a statute of repose).

178. Draft No. 1, *supra* note 9, § 3 reporters' note cmt. b.

in its allocation of comparative responsibility for the accident. These arguments were sufficient to convince Gary, as he put it, that the scholars championing the separatist view "are mistaken."¹⁷⁹ The reader doesn't have to look very far to see that the single scholar of the view to which Gary cited was himself in his article on contributory and comparative negligence.¹⁸⁰ What Gary omits from the self-criticism is that he made precisely the same counterpoint in the original article.¹⁸¹

I. Originality

Originality is an important, if too rare, quality for scholarship. Gary's originality was a function of many of the early qualities already mentioned: intense analysis, skepticism about conventional wisdom, dedication and hard work, prodigious research, and an insightful mind. At the same time, Gary's honesty, integrity, and rigor were such that he never overstated his conclusions. Honest originality is the best form of originality, a value that Gary appreciated and adhered to. Every one of Gary's torts articles contained new ideas, but I limit myself to two examples.

Gary's skepticism, precision, push-the-envelope analysis, and insights come together in a portion of his case study on the Ford Pinto.¹⁸² A first-cut economic approach might have been that the Pinto was responsive to consumers' desire for a light-weight, economical car. Those consumers would appreciate that such a vehicle would not have the same degree of safety as a larger, more expensive one. Yet surely consumers were unaware of the specific design choice involving the fuel tank. Thus, a market analysis is unable, Gary wrote, to justify the Pinto's fuel tank design, and criticism of the Pinto was fed by the public perception that Ford had "imposed" this risk on

179. *Id.*

180. Schwartz, *supra* note 14, at 722–23.

181. *Id.* at 723. Gary may have intended a more nuanced criticism of his earlier work. In the original article, he argued, quite reasonably, that tort law should not take into account the risk posed to others by a victim's behavior that also poses risks to himself. His argument was that tort law does not impose liability for risk-taking behavior that does not cause harm. Thus, the fact that a victim exposed others to a risk of an accident that did not occur should not be considered in determining the victim's comparative fault for the accident that did occur. *Id.* at 724. As Gary subsequently accepted, however, both components of risk are relevant to the reasonableness of a victim's behavior, even if one component did not ultimately cause any harm. Thus, a blaster who carelessly leaves explosives in a crowded market is more culpable than one who leaves the same explosives in a remote area, even if each blaster's negligence harms only a single victim. See Kenneth W. Simons, *Contributory Negligence: Conceptual and Normative Issues*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 461, 477–78 (David G. Owen ed., 1995). Moreover, the sort of metaphysical cabining that the separatist view would require would be confusing to implement with a jury.

182. Schwartz, *supra* note 130, at 1046–47.

unknowing purchasers.¹⁸³ This led Gary to a novel and not unimportant point: Warnings (or information) that might enhance consumer choice are consigned to a narrow slice of the products liability arena.¹⁸⁴ Expanding the use of warnings, at least for major products such as automobiles, could enhance the efficiency of the market and deflect at least some of the moral outrage over risks imposed on consumers.¹⁸⁵ Indeed, to take Gary's idea one step further, we might have manufacturers disclose the value of life that they used in making safety-design choices.¹⁸⁶ With such information disseminated and available for consumers making comparisons among, say, vehicles, we might deflect some of the public outrage that emerged in the wake of the *Grimshaw* case.

Permit me one more example of Gary's originality. Uninsured motorist coverage, a piece of automobile liability insurance, is a generally neglected subject in the academy,¹⁸⁷ although it is of significant practical importance given the incidence of under- and uninsured motorists. Gary's assessment of uninsured motorist insurance is a typical hard-headed Schwartzian effort that produced recommendations contrary to long-standing provisions in these insurance policies. Gary explained why those policies are too driven by tort law and not enough by insurance policy.¹⁸⁸ First-party insurance for

183. *Id.*

184. Specifically, products with unavoidable risks. See RESTATEMENT (SECOND) OF TORTS, § 402A cmt. k (1965).

185. Schwartz, *supra* note 130, at 1047.

186. There are substantial difficulties in implementing both Gary's suggestion that greater information be provided to enhance consumer decisionmaking in purchasing durable goods and the idea of providing value-of-life information. Gary appreciated and addressed the former and is not responsible for the latter. See *id.* at 1055–57.

187. The notable exception is my former, late colleague, Alan Widiss. See ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE (rev. 2d ed. 1999).

188. *Reformulating Uninsured Motorist Plans*, *supra* note 122, at 421–24. Gary's argument that consumers would not prefer coverage for pain and suffering in their uninsured motorist policies is critiqued in Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1862–67 (1995), as a part of their work defending enterprise liability and the utility of tort law as an insurance mechanism, including compensation for pain and suffering. I do not view my mission in this Article as defending Gary against all criticism. But I can't resist responding to Croley and Hanson's claim that the existence of uninsured motorist coverage—in essence first-party insurance—for pain and suffering is an example of consumer preference for insurance for pain and suffering. *Id.* That claim is significantly weakened, as Croley and Hanson acknowledge in a footnote, by the fact that uninsured motorist coverage (and its terms) was developed by the insurance industry as part of an effort to forestall greater regulation in the post-World War II period when automobile ownership was growing rapidly. *Id.* at 1867 n.274; see also 1 WIDISS, *supra* note 187, § 1.14, at 18. Nevertheless, Croley and Hanson point to the very high rate of consumers who purchase uninsured motorist coverage, even in states that do not require it, as evidence of a preference for insurance for pain and suffering. Croley & Hanson, *supra*, at 1865. Because of standardization of insurance policies, a consumer's choice is to purchase uninsured motorist coverage with coverage for pain and suffering or to give up all such coverage. Consumers do not have a choice about the terms in the uninsured motorist coverage that they purchase. See generally ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW

all elements of tort damages includes duplicative insurance coverage (for medical expenses), coverage of nonpecuniary damages that are otherwise generally not purchased in first-party insurance policies, and coverage for punitive damages that Gary uncharacteristically labeled as "bizarre," but only after an explanation fully justifying that conclusion.¹⁸⁹

CONCLUSION

I know that I have not fully captured the brilliance of Gary's scholarship. Gary's work is more nuanced, insightful, breathtakingly analytical, wise, and revealing than I have been able to capture in this effort. The only way to appreciate his magic is to read his scholarship, and I wholeheartedly recommend that course to all new to the academy who teach, research, or are interested in tort law.

I fear that I have also not even accomplished what I set out to do: extract guidance from Gary's scholarship for young scholars who are newly embarking on these journeys or even for more mature scholars in need of some fertilization or modeling. So much of what made Gary's scholarship special were the extraordinary qualities of his mind: a steel-trap intellect, a blazingly analytical mind, an extraordinary memory, and an ability to extract

§ 2.8, at 118–29 (practitioner's ed. 1988). That consumers continue to purchase it at a high rate may, aside from the effects of ennui or the status quo, mean only that they prefer the entire package of coverage to nothing at all, even though a preferable choice would be to eliminate coverage for pain and suffering. Of course, the possibility of this form of coverage emerging if there were significant consumer demand for it undercuts the foregoing argument. One person familiar with insurance issues nationwide informs me she knows of no state in which an uninsured motorist policy covers pecuniary loss only. Telephone Interview with Ruth Gastel, Vice-President for Issues Analysis, Insurance Institute of America (Mar. 19, 2002). Given the somewhat obscure way in which various insurance policies are drafted and approved by state insurance departments, I'm not confident that a well-functioning market exists in that arena. Thus, in my home state, insurers are only permitted to offer one form of uninsured motorist coverage and the terms of the coverage must be identical for all insurers. Telephone Interview with Helen Best, Property & Casualty Insurance Analyst, North Carolina Department of Insurance (Mar. 19, 2002). One feature of uninsured motorist coverage that exists, but appears clearly contrary to consumers' interest, is medical insurance, given the widespread first-party health insurance that already is in place. For a motorist with health insurance that contains a subrogation clause for any tort recovery, why would that motorist purchase any medical coverage in the uninsured motorist policy, if given a choice?

189. *Reformulating Uninsured Motorist Plans*, *supra* note 122, at 428. Gary's views on uninsured motorist policies including punitive damages resonated with the insurance industry—although I do not have evidence that they were responsible for changing its practices. A number of policies written beginning in the 1990s reveal a change in language from coverage for all "damages" uncollectible from an uninsured motorist to coverage for "compensatory damages." See 2 ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE app. A, at 102 (Arkansas), 113 (Colorado), 118 (Delaware), 122 (District of Columbia), 127 (Florida), 168 (Maryland) (rev. 2d ed. 2000). Earlier policies from the 1980s reveal that at least Delaware and Maryland changed from covering all damages to covering only compensatory damages during the 1980s. *Id.* at 321 (Delaware), 336 (Maryland).

the essence of a complicated body of evidence. Few in the academy are equally blessed. Yet, Gary had other worthy attributes that we can all emulate: an unflagging commitment to the truth and a refusal to engage in provocation for its own sake, a healthy skepticism and a willingness to engage in honest disagreement and criticism, civility in doing so, precision and attention to detail, an unrelenting penchant to find empirical and other nonlegal materials bearing on a topic, a commitment to self-education, and a strong work ethic. I come away from this tour of Gary's work humbled, yet exhilarated by the standard that Gary set for all of us.

I can't resist concluding with a poignant anecdote that reveals both Gary's work ethic and his love of the scholarly enterprise. In late July 2001, Gary had completed his radiation treatments and was awaiting a conference with his physicians to assess the success of his treatments and make recommendations for any further treatment. On the last night of his life, Gary gathered materials in his study, sat on his sofa with his dictaphone, and worked to complete an article for a symposium in which he had participated at the University of Illinois. Gary died in the early morning hours of July 25, 2001, while engaged in the activity that he so much enjoyed and performed so superbly.¹⁹⁰ I join with the many others who will miss him and his work, consoled, however, by the extraordinary legacy that he has left us.

190. Telephone Interview with Ken Schwartz, Gary Schwartz's brother, (Mar. 11, 2002).