THE TORTS HISTORY SCHOLARSHIP OF GARY SCHWARTZ: A COMMENTARY

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This Article examines the historical scholarship of Gary Schwartz, spanning the Industrial Revolution to the late twentieth century. Schwartz set out to show that the fault principle had far deeper historical roots, both before and during the Industrial Revolution, than prominent American tort scholarship recognized—and correspondingly, that late twentieth-century tort law developments in many ways reinvigorated the judicial impulse towards a pervasive negligence system for unintentional harm. I argue that although Schwartz read the historical record correctly for the most part, the fault principle appears less robust than his reading would suggest—throughout the nineteenth century, and to a somewhat lesser extent, in the twentieth century as well—when assessed in the context of a wide array of no-duty and limited-duty rules that he never felt entirely comfortable embracing.

INTRODUCTION

During his distinguished career, Gary Schwartz treated every aspect of the torts domain as fair game for his boundless intellectual curiosity. He felt equally at home exploring foundational ethical and economic underpinnings of tort law, addressing doctrinal issues ranging from products liability to false light privacy, and examining perspectives on the tort system including federalism, insurance, and vicarious liability.[1]

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1. *See, e.g.*, Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (exploring tort law's ethical and economic underpinnings); Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796 (1983) (evaluating the desirability of retroactive rules in products liability); Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885 (1991) (critiquing the false light privacy doctrine); Gary T. Schwartz, *Considering the*

It seems highly revealing, then, that when Schwartz was asked to participate in a "favorite case" symposium in 1996[2]—at a relatively late stage in his career—he chose *Weaver v. Ward*,[3] an English case from 1616, acknowledged today, if at all, entirely for its ambiguous historical evidence on the guiding principle of tort liability for unintentional physical injury. When pressed to identify and discuss a single favorite case, Schwartz turned—without hesitation, I would guess—to his long-standing scholarly preoccupation with the history of tort law. It is this prominent strand in his creative work that I will explore and critique in my contribution to this symposium dedicated to his memory.

Weaver v. Ward addresses the question of whether an action in trespass can stand on the plaintiff's claim, without more, that he was injured by the defendant's discharge of his musket and plaintiff's consequent injury. The court dismissed without elaboration the defendant's plea that the harm occurred accidentally by misfortune and against his will—indicating, as Schwartz suggests, an attraction to a norm of strict liability.[4] At the same time, however, the court also points out that the accident did not appear to have been inevitable or without negligence.[5] This ambiguity over the relationship between strict liability and negligence, which occasioned so much of Schwartz's earlier work on the history of tort law, continued in 1996—some fifteen years after he first explored that very relationship in depth—to exercise a fascination for him.[6]

Ambiguity over doctrinal standards aside, Schwartz's treatment of *Weaver* is also revealing as a microcosmic view of his earlier-adopted methodology as a tort historian. He begins with a close reading of the case.[7]

Proper Federal Role in American Tort Law, 38 ARIZ. L. REV. 917 (1996) (evaluating the propriety of federal intervention in the tort area); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990) (exploring the impact of tort liability insurance on tort law's fairness and deterrence goals); Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739 (1996) (critiquing various justifications for the doctrine of employer vicarious liability); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (critiquing the economic analysis of tort law). These references are representative only and do not comprehensively illustrate the full range of Gary Schwartz's work. In addition, I have omitted citation to the articles of his that I discuss in detail in this Article.

2. Symposium, *Favorite Case Symposium*, 74 TEX. L. REV. 1195 (1996). For Schwartz's contribution, see Gary T. Schwartz, Weaver v. Ward, 74 TEX. L. REV. 1271 (1996).

3. 80 Eng. Rep. 284 (K.B. 1616).

4. *Id.* at 284. In the original Latin, in the case, the defendant's demurrer argument reads "casualiter & per infortunium & contra voluntatem suam." *Id.*

5. *Id.*

6. Schwartz's initial historical venture, in fact, has a very useful summary analysis of the leading authorities on pre-industrial-era English tort law and includes a brief reference to *Weaver v. Ward*. *See* Gary T. Schwartz, *Tort Law and the Economy in the Nineteenth Century: A Reinterpretation*, 90 YALE L.J. 1717, 1722–27 (1981).

7. Schwartz, *supra* note 2, at 284.

Then he opens up the inquiry to contextual considerations by reference to the demands of English military service and the state of musket making in the early seventeenth century—tying these considerations into a very modern speculative note about the prospects, if the case had arisen now, of recovering against the manufacturer and/or the military for their contribution to the injured recruit's plight.[8]

These are key themes in Schwartz's approach to the history of tort law. In particular, he inquired, how prominent are the strands of strict liability and negligence in the development of liability for accidental harm? And what does socioeconomic context provide in the way of explanation for the contours of accident law? And finally, although not touched upon in his brief *Weaver* essay, what does the intellectual and political climate of the times contribute to our understanding of the dynamics of tort law?

In this Article, I expand on these themes before offering my own critique of Schwartz's views. Schwartz set out to show that the fault principle had far deeper historical roots, both before and during the Industrial Revolution, than prominent tort scholars had recognized—and correspondingly, that late twentieth-century tort law developments in many ways reinvigorated the judicial impulse towards a pervasive negligence system for unintentional harm. I will argue that Schwartz read the historical record correctly, for the most part. But I will also argue that throughout the nineteenth century, and to a somewhat lesser extent, in the twentieth century as well, the fault principle appears less robust than his reading would suggest when assessed in the context of a wide array of no-duty and limited-duty rules that he never felt entirely comfortable embracing.

I. NINETEENTH-CENTURY AMERICAN TORT LAW REVISITED

Two in-depth studies of nineteenth-century state supreme court decisions serve as the foundation for Schwartz's historical work. In 1981, he published *Tort Law and the Economy: A Reinterpretation*[9] in the *Yale Law Journal*, and almost a decade later, in 1989, he authored *The Character of Early American Tort Law*[10] in the *UCLA Law Review*. These two articles are a matched pair in a substantial sense, because they both are meant to assess the prominence of the negligence principle in nineteenth-century American tort law as revealed by a comprehensive reading of state supreme court decisions. For the Yale piece, Schwartz read every nineteenth-century tort opin-

8. *See id.* at 1273–74.

9. *See* Schwartz, *supra* note 6.

10. *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989).

ion handed down by the New Hampshire and California Supreme Courts.[11] And following up in the UCLA paper, he read every supreme court opinion decided from the beginning of the nineteenth century to 1860 in South Carolina, Maryland, and Delaware.[12] Quite consciously, the latter paper was meant to fill some of the methodological gaps in the initial work.[13] There were virtually no California decisions before 1860, which led Schwartz to survey some additional states for the period 1800 through 1860. And in adding two mid-Atlantic states (Maryland and Delaware) and a southern state (South Carolina), he was looking for more pervasive geographical coverage, by supplementing his earlier selection of New England and Western states.[14]

These methodological choices are not unassailable. One can question, for example, the choice of California, not simply based on its nonexistent American history for the first half of the century, but also for its relatively late coming to industrialization even thereafter.[15] Similarly, it is not self-evident why one would choose the mid-Atlantic and southern states that he selected. Apparently, Schwartz felt that New York, Massachusetts, and Pennsylvania had been overemphasized in the work of earlier tort historians.[16] But that is not an entirely conclusive explanation for the choices he did make. More centrally, of course, one can take issue with relying exclusively on supreme court opinions as a basis for conclusions about the governing legal norms. But I will save that more fundamental criticism for more detailed consideration in a later part of this Article.[17]

Whatever selection-bias-based methodological reservations one might have, a close reading of his careful and fair-minded analysis of the judicial opinions—broken down by subcategories to analyze major clusters such as textile cases and a variety of railroad injury scenarios; marked by qualification when worker injuries and government-generated harms fail to fit his robust-negligence thesis—leaves one, in my view, with the sense that he has

11. *See* Schwartz, *supra* note 6, at 1719–20.

12. *See* Schwartz, *supra* note 10, at 642–43.

13. *Id.* at 642.

14. *Id.* at 643.

15. On the late development of industrialization in California, dating its advent to the early twentieth century, see WALTER LICHT, INDUSTRIALIZING AMERICA 117 (1995). This proposition has to be qualified, however, by taking note of the much earlier development of the extractive industries and the coming of the transatlantic railroad, both of which can be traced to the period after the Civil War. *See* David Inger, *The Industrial Far West: Region and Nation in the Late Nineteenth Century*, 69 PAC. HIST. REV. 159, 167–78 (2000). Schwartz explained his choice of California, as follows, "[B]ecause it is my state, because it has long been an important state politically and economically, and because its judiciary has been so influential in the elucidation of tort doctrine in the twentieth century." Schwartz, *supra* note 6, at 1719.

16. Schwartz, *supra* note 6, at 1719 n.11.

17. *See infra* Part III.

done a persuasive job of canvassing the judicial reception of strict liability and negligence in American courts during the nineteenth century. Moreover, the selection-bias problem must be kept in perspective. While there were surely influential judges in the nineteenth century, no state court judiciary is likely to have felt beholden to another, given the existing norms of state sovereignty. Nor would any particular configuration of states be likely to seem compellingly representative in an era of rapid but diffuse industrial and social transformation.

Turning from methodology to substance, Schwartz's principal point was to correct what he viewed as substantial errors in the historical record. His target was the "industry subsidy" school of historical analysis, most prominently represented by Morton Horwitz, Lawrence Friedman, and to a lesser extent, Charles Gregory, who argued that nineteenth-century tort law reflected a major retreat from uncompromising strict liability to a weak negligence principle as a means of subsidizing (that is, promoting) the growth of infant industry.[18] In Schwartz's view, the industry subsidy position could not withstand a close reading of the case law.

The Yale paper sets out to establish that the subsidy thesis was wrong on both counts. With respect to strict liability, his close reading of the case law relied on by Horwitz—outside the ambit of Schwartz's two-state survey—finds a lack of support for any such principle in the pre-industrial era, and this is confirmed when he turns to the New Hampshire cases decided from 1800 to 1850.[19]

Most critically, as the industrial age dawns, Schwartz's reading of the case law indicates a strong commitment to a robust negligence principle, and a correspondingly notable reluctance to find contributory negligence as a matter of law—which would have diluted the force of the negligence principle as applied to defendants.[20] The UCLA paper serves as an interesting complementary piece at this point in the analysis. For in that supplementary

18. *See* Schwartz, *supra* note 6, at 1717–18 nn.1–9. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 409–27 (1973); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (Stanley N. Katz ed., 1977); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951). Schwartz is careful, in this initial articulation of their views, and later as well, to indicate distinctions among them. For example, he points out that Horwitz regards tort law as having been "solidly in place" by 1800 whereas Friedman does not see tort as having emerged as a distinct area until the mid-nineteenth century. Schwartz, *supra* note 6, at 1720 n.16.

19. *See* Schwartz, *supra* note 6, at 1727–34. California, of course, offers no evidence on this point, because it did not become a state until the end of this period. Seeking to identify the still earlier roots of emerging industrial-era tort law, in his background survey of pre-industrial England, Schwartz makes mention of *Weaver v. Ward*. *Id.* at 1722–27. Schwartz's citation of this case might be seen as a precursor to his "favorite case" analysis of it fifteen years later. *See supra* text accompanying notes 2–8.

20. Schwartz, *supra* note 6, at 1756–67.

study of state court decisionmaking, Schwartz finds many instances of courts using conceptual categories like the special obligations of common carriers to locate liability in a zone somewhere between negligence and strict liability—negligence plus, one might say.[21]

With the conspicuous exception of worker injury cases, Schwartz concludes that when incaution resulted in injury, nineteenth-century courts—at least those he studied—were intent upon requiring industry to pay its way. And that sense of judicial resolve translated into a strong version of the negligence principle.[22]

How, then, can one explain the prominent exception of injuries on the job, where the "unholy trinity" of defenses—assumed risk, contributory negligence, and the fellow servant rule—apparently bore out the proposition that employer responsibility for fault was substantially diluted? Confronted with this seeming anomaly in his initial Yale study—which, as I will indicate later, he tried to account for in the UCLA paper—Schwartz's reaction says a lot about his scholarly temperament:

> It is said that historians can be divided into "lumpers and splitters." Lumpers want "to put all the past into boxes. . . . [They] do not like accidents; they would prefer to have them vanish." Splitters, by contrast, like "to point out divergences, to perceive differences. . . . They do not mind untidiness and accidents in the past; they rather like them." I am both enough of a "lumper" to want to emphasize the general tendency towards victim protectiveness in nineteenth-century tort law and enough of a "splitter" to secure satisfaction from identifying employment and government-related injures as important limitations on this tendency.[23]

Whatever his self-confessed "splitter" attributes, Schwartz returned to the workplace injury anomaly, seeking an explanation a decade later in his UCLA paper.[24] But that was only after his initial foray into late twentieth-century tort law, next to be considered.[25]

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21. *See* Schwartz, *supra* note 10, at 672–79. The "negligence plus" terminology is mine.

22. *See id.* at 715–18 (summarizing this conclusion, with an accommodation for a limited zone of no-liability—a phenomenon that I discuss in greater detail, *infra* Part III).

23. Schwartz, *supra* note 6, at 1771 (alterations in original) (citing J.H. HEXTER, ON HISTORIANS: REAPPRAISALS OF SOME OF THE MAKERS OF MODERN HISTORY 241–42 (1979)).

24. *See* Schwartz, *supra* note 10, at 692–715.

25. Note the chronology of the four principal articles: The nineteenth-century studies were published in 1981, *see supra* note 6, and 1989, *see supra* note 10; the twentieth-century studies were published in 1981, *see infra* note 26, and 1992, *see infra* note 26. In short, Schwartz went back and forth between eras.

II. Twentieth-Century Tort Law in Historical Perspective

The second phase of Schwartz's work moves forward a century in time to the contemporary scene, always a high-risk enterprise for historians. His historical narrative begins in 1960, with the documenting of what may be regarded as a powerful pro-plaintiff surge in liability law, followed by a perceived leveling off of expansive tendencies in the mid-1980s.

Once again, Schwartz's historical treatment of the era emerges most clearly in two related articles[26]—this time appearing in the *Georgia Law Review*, and written about a decade apart. Tort law remained more or less quiescent through the first six decades of the twentieth century, with the notable exception of *MacPherson v. Buick Motor Co.*,[27] which cast the mold for approaching tort duties from the perspective of general obligations of due care rather than status-based interparty relationships. Then, around 1960, the growth potential of *MacPherson*-like thinking began to take root. Schwartz identifies this trend towards more expansive tort liability in *The Vitality of Negligence and the Ethics of Strict Liability*, appearing in 1981, and then discusses the subsequent period of moderating tendencies in *The Beginning and the Possible End of the Rise of Modern American Tort Law*, a 1992 publication.

These two papers offer some interesting parallels to his historical exposition of the world of nineteenth-century tort law. Once again, he develops his reading of the state of tort doctrine by playing off against a scholarly thesis that strikes him as wrong-headed. In this instance, the thesis is enunciated by George Priest in a number of articles, perhaps most prominently in *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*.[28] Priest asserted that enterprise liability thinking, as articulated in particular by contracts scholar Fritz Kessler and torts scholar Fleming James, had driven the tort system to embrace "absolute liability" in the period after 1960.[29] As Schwartz's counter-thesis, he proposes that the post-1960 "vitality" period demonstrates a flowering of the *negligence* principle, as preexisting judicial limitations on the expansion of fault

26. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601 (1992) [hereinafter *The Beginning and the Possible End*]; Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 Ga. L. Rev. 963 (1981) [hereinafter *The Vitality of Negligence*].

27. 111 N.E. 1050 (N.Y. 1916).

28. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985). Priest's related work "stressing strict liability and downplaying negligence" is cited and discussed critically in *The Beginning and the Possible End*, *supra* note 26, at 620–34 & nn.84–85.

29. *See* Priest, *supra* note 28, at 505–21.

liability fell by the wayside.[30] Concomitantly, the stronger version of liability enhancement that Priest purports to identify during this period, and refers to as "absolute liability,"[31] seems inaccurate to Schwartz.

In particular, Schwartz draws on landmark cases of the era, California Supreme Court cases such as *Rowland v. Christian*,[32] *Tarasoff v. Regents of University of California*,[33] and *Molien v. Kaiser Foundation Hospitals*,[34] to illustrate negligence liability expanding the field of liability for unintended harm. Thus, in *Rowland*, the California Supreme Court abolished the long-standing categories of land occupier liability to land entrants that had dictated sliding scale responsibility depending on the entrant's status vis-à-vis the land occupier.[35] Land occupiers classically owed a full duty of due care to business invitees but a lesser obligation—warnings of known hidden dangers—to social guests, and still lesser responsibilities to trespassers (essentially restraint from carelessness amounting to willful misconduct).[36] *Rowland* established a general obligation of due care irrespective of the category into which a land entrant might fall.[37]

Seven years later, in *Tarasoff*, the California court extended a duty to warn—a due care obligation—to situations in which a therapist had been alerted to the murderous intentions of a patient.[38] And three years thereafter, in *Molien*, the same court appeared to recognize a broad obligation to avoid negligently inflicting foreseeable emotional distress on another.[39]

Most importantly, and most centrally challenging to Priest's "absolute liability" position, Schwartz revisited the thesis of his earlier foreword to a 1979 *California Law Review* symposium on products liability, in which he had argued that the developing case law was not consistent with the strict liability characterization that had been applied to it.[40] Rather, he suggested, design and warning defect cases were decided under a negligence-like ap-

30. *See The Beginning and the Possible End*, *supra* note 26, at 620–34; *The Vitality of Negligence*, *supra* note 26, at 964–77.

31. "Absolute liability," as distinguished from "strict liability," is not really a term of art used widely in the tort literature or the cases. It is, in my view, an unfortunate term because strict liability is anything but "absolute"—it still requires establishing every element in an accidental harm case other than breach of due care.

32. 443 P.2d 561 (Cal. 1968).

33. 551 P.2d 334 (Cal. 1976).

34. 616 P.2d 813 (Cal. 1980).

35. *Rowland*, 443 P.2d at 568.

36. *See* DAN B. DOBBS, THE LAW OF TORTS 591–608 (2001).

37. *Rowland*, 443 P.2d at 568.

38. *Tarasoff*, 551 P.2d at 345–46.

39. *Molien*, 616 P.2d at 819–21.

40. *See* Gary T. Schwartz, *Understanding Products Liability*, 67 CAL. L. REV. 435, 441–42 (1979).

proach, with only lip service being paid to strict liability, and strict liability for manufacturing defects was little more than res ipsa loquitur in disguise.[41]

Thus, just as Schwartz's mode of addressing a critical juncture in tort history was replicated in his treatment of late twentieth-century developments—that is, through setting the record straight on what he perceived to be a distorted scholarly conception of the era—so too does his substantive reading of doctrinal developments replicate his nineteenth-century findings that the negligence principle was far more robust and pervasive than was generally recognized.

While these paired Georgia articles on late twentieth-century tort law match up in interesting ways with his paired studies of tort law in the previous century—as indicated, in playing off against the received historical wisdom, and in demonstrating the underappreciated robustness of negligence doctrine—the later surveys depart in important ways from Schwartz's coverage of the earlier era as well. The best way of characterizing the departure may be to say that his scholarship on the twentieth century indicates a resolve to paint with broader brushstrokes.

How is this resolve manifested? To begin with methodology, Schwartz abandons the comprehensive survey of state court decisions in particular jurisdictions. Instead, he relies on the more standard legal scholarship tradition of lead case analysis. In the first Georgia paper (the "vitality" paper), as mentioned, he discusses a number of the notable California Supreme Court opinions issued in the heyday of activism on that court between the mid-1960s and early 1980s, and also notes state legislative actions that eliminated immunities or adopted comparative negligence.[42] Similarly, in the second Georgia article, he again relies on lead case analysis to show greater judicial constraint, beginning in the mid-1980s both in recognizing new categories of obligation in tort, and in expanding on existing liability principles. And correspondingly, he sketches out the legislative tort reform activity of the period.[43] Taken as a whole, he offers what might be regarded as a benchmark approach to modern tort history—providing a synthesis of developments that indicate a "mature phase" (my own characterization) of the fault principle.

But it is not just Schwartz's methodology that metaphorically could be likened to a broad brushstroke approach. Especially in the later Georgia article (the "leveling off" paper), his explanatory perspective is far more open-textured and speculative about the linkage between tort law and broad-based political undercurrents in society at large than one finds in his

41. *Id.* at 455–81.

42. *The Vitality of Negligence*, *supra* note 26, at 964–77.

43. *The Beginning and the Possible End*, *supra* note 26, at 647–83.

earlier work. Looking back at the expansive era, 1960–1985, he posits three sociopolitical phenomena that seem to have had spillover effects in extending the reach of tort law. First, there was the influence of the Warren Court, a singular moment in U.S. Supreme Court activism, which provided a model of proactive judicial recognition of individual rights—and especially victims' rights.[44] Ironically, perhaps, the leading instance of tort-related Warren Court activism, which Schwartz discusses, is *New York Times v. Sullivan*,[45] a case that had nothing to do with negligence law and that in fact sharply restricted the rights of tort plaintiffs, rather than expanding those rights. This justly celebrated case involved a defamation action against civil rights proponents and the *New York Times*, which had published their ad protesting the plaintiff's policing activities. On its face, the Court's interposition of a First Amendment privilege defeating plaintiff's claim[46] is far removed from the contemporaneously expanding universe of tort obligations to physical injury claimants. Nonetheless, whatever the outcome in the *Times* case, one can argue, as Schwartz does, that the broad spirit of Warren Court activism was best captured by increased attentiveness to the claims of personal injury victims.

Second, Schwartz points to the more general public policy activism that was a hallmark of the period extending from the presidencies of John F. Kennedy to a somewhat begrudging Richard Nixon, and featuring the Great Society/New Progressive initiatives in the interim.[47] Third, and as a more specific outgrowth of this era, he posits the direct influence on tort law of congressional enactments, including the National Traffic and Motor Vehicle Safety Act of 1966[48] and the Consumer Product Safety Act,[49] as well as the prominent role of Ralph Nader that directly influenced the expansive approach to products liability law.[50]

In a similarly speculative mode, Schwartz ponders the question of why these expansive tendencies may have run their course in the post-1985 pe-

44. *Id.* at 609–10.

45. 376 U.S. 254 (1964).

46. *Id.* at 283–84.

47. *The Beginning and the Possible End*, *supra* note 26, at 610–12. "New Progressive" is my term, not his, for the consumer-environmental legislation adopted in the late 1960s and early 1970s.

48. Pub. L. No. 89-563, 80 Stat. 718 (codified as amended at 15 U.S.C. §§ 1391–1426, 1431 (2000)).

49. Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051–2084 (2000)).

50. *The Beginning and the Possible End*, *supra* note 26, at 612–16; *see also* Robert L. Rabin, *The Monsanto Lectures: Tort Law in Transition: Tracing Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 13–14 (1988) (similarly linking the changing course of products liability law to public policy activism and federal regulatory enactments in the areas of health and safety during this period).

riod. To begin with, he posits agenda completion as a key factor—something of a teleological explanation, emphasizing that every doctrinal advance eventually reaches its outer limits and then becomes settled law.[51] At the same time, as the country turned more politically conservative—perhaps best exemplified by the Reagan presidential years—so too did judicial appointments, especially in the federal system, become more conservative.[52] In addition, as Schwartz observes, there was a strong perception of adverse consequences of doctrinal expansion in the form of rising costs of the tort system and related increases in the costs of goods and services.[53] And finally, in the realm of academic commentary, there was the growing influence of a conservative critique of the tort system from the newly prestigious law and economics movement.[54] Taken together, these various strands were reflected in a state legislative tort reform movement that, among other measures, constrained noneconomic loss recovery, joint and several liability, and the collateral source rule in many states, and dampened the enthusiasm of state judiciaries for continuing to enunciate new common law tort duties and adopt more expansive readings of causal linkages and due care obligations.[55]

Taken as a whole, Schwartz's historical writings could be described as defining a broad arc. The narrative begins in an early pre-industrial period in which he finds confused but identifiable tendencies to require fault as a premise for liability.[56] The next chapter continues in the industrial era, in which fault emerges as a robust and core principle of liability for accidental harm.[57] The story then goes by fast-forward to a late twentieth-century period in which robust negligence takes an expansive leap forward to a more far-reaching negligence principle through recognition of more broad-based duties of due care.[58] And the tale ends, on the contemporary scene, where one finds an eventual leveling off of further expansive tendencies—at least for the present.[59]

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51. *The Beginning and the Possible End*, *supra* note 26, at 683–84.

52. *Id.* at 685–87.

53. *Id.* at 687–93.

54. *Id.* at 693–99.

55. *See generally* Barbara Franklin, *Learning Curve: Lawyers Must Confront Impact of Changes on Litigation Strategies*, 81 A.B.A.J. 62 (1995); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

56. *See* Schwartz, *supra* note 6, at 1722–34.

57. *The Beginning and the Possible End*, *supra* note 26, at 646–70; Schwartz, *supra* note 6, at 1734–75.

58. *The Vitality of Negligence*, *supra* note 26, at 964–77.

59. *The Beginning and the Possible End*, *supra* note 26, at 647–83.

III. A CRITIQUE

As an impresario of tort doctrine, Gary Schwartz's work constitutes a singular achievement. In an earlier generation, the foremost doctrinalist, William Prosser, chronicled the content of tort doctrine—what it looked like at a slice in time—edition by edition, in his authoritative hornbook, *Prosser on Torts*.[60] By contrast, although Schwartz was as adept as any in noting and parsing tort doctrine, he was centrally concerned with illuminating the sweep of doctrine across historical periods through the clarification of evolving concepts and a grounding in a socioeconomic context.

If there is a critical perspective to be offered on such an enterprise, in my view, it is intrinsic to the undertaking itself: Doctrine has to be taken with qualifications as a benchmark in surveying the legal landscape. This critical stance is by now familiar, having been forcefully made by the law and society school.[61] By way of illustration, H. Laurence Ross demonstrated a number of years ago in his study of settlement practices by insurance adjusters, that the law in action was quite different from the law on the books.[62] Organizational goals and norms led adjusters to settle cases in routinized fashion with reference to strict liability-like traffic laws and rule-of-thumb damage precepts, rather than considerations of fault and individualized compensation.[63]

My own critique, although in no way at odds with the law and society perspective, proceeds from a different angle. I would emphasize what might be referred to as the "silences" or gaps in a system of law that is measured strictly with reference to a universe of the maker's own creation. Throughout the nineteenth century, and to a lesser extent in the twentieth century as well, the negligence principle appears far less robust when assessed in the context of a wide array of no-duty and limited-duty rules that consigned entire categories of potential injury claims to the darkness of simply being nonactionable.[64]

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60. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984). Beginning in 1941, William Prosser's *The Law of Torts* went through five editions—the last produced by coauthors in 1984, after his death. For an interesting discussion of Prosser's contribution to the law of torts, see G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 139–79 (1980).

61. *See, e.g.*, Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351, 352–54. The same view was expressed even earlier, by the legal realist movement. *See* WHITE, *supra* note 60, at 63–113.

62. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 233–43 (1970).

63. *Id.*

64. For a more elaborate discussion of the critique that follows, see Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

Consider, by way of illustration, the celebrated line of cases involving product-related injuries extending from *Winterbottom v. Wright*[65] to *MacPherson v. Buick Motor Co.*[66] For the most part, this category of cases does not show up on Schwartz's radar screen of nineteenth-century supreme court decisions. Undoubtedly, their absence is explained in part by the fact that the late nineteenth century remained a period in which extended chains of product distribution had yet to develop—and certainly the nationwide mass distribution of consumer goods was at most a gleam in the eye of the most far-sighted product manufacturer. At the same time, it is certainly the case that even in relatively small communities where purchases of durable goods involved a trip to the general store, let alone in the growing urban centers, retail distribution of products marketed by a third-party manufacturer had become an accepted byway of commercial life. And it defies common sense to think that a range of household implements and tools—saws, ladders, whatever—were any less likely to be defectively manufactured a century ago than they are today.

Rather, one can surmise that as long as injury victims and hometown lawyers perceived legal obligations to turn on privity of contract, in the absence of a product that might be regarded as "imminently dangerous"—the long shadow cast by *Winterbottom* thinking[67]—the prospect of a tort claim simply did not register.[68] In short, the negligence principle may have been robust where it applied, but its domain was limited, at least as far as product-related claims were concerned.

How broadly does this proposition apply? How prevalent were the silences imposed by perceptions of a no-duty/limited-duty threshold to liability for carelessness? Schwartz acknowledges the immunities that barred actions against governmental entities.[69] One could add intrafamily and charitable immunities.[70] More centrally, social guests and trespassers on premises allowed to fall into a state of disrepair would have been ill-advised to seek recourse in tort against the land occupier unless willfully injured.[71] These status-based relationships aside, only the foolhardy litigant would have ventured claims for emotional distress or economic loss without attendant physical harm. Well into the twentieth century, most states adhered to

65. 152 Eng. Rep. 402 (Ex. 1842).

66. 111 N.E. 1050 (N.Y. 1916). Judge Cardozo tracks the progression through the New York cases in his opinion. *Id.* at 1051.

67. *Winterbottom*, 152 Eng. Rep. at 404.

68. For a more general account of the prospect of tort-claiming registering—the rise of rights-based thinking in the late twentieth century—see LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 60–63 (1985).

69. *See* Schwartz, *supra* note 6, at 1768, 1770.

70. *See* Rabin, *supra* note 64, at 953; *see also* DOBBS, *supra* note 36, at 751–57, 760–65.

71. *See* DOBBS, *supra* note 36, at 591–99.

the "impact" rule that established a threshold of physical contact for any claim of negligently inflicted emotional distress—no matter how clear the failure to exercise due care in and of itself.[72] And even today, the circumstances under which recovery for pure emotional distress are recoverable are sharply limited.[73] All of these limitations on liability came into play despite the failure of a defendant to exercise due care—that is, they operated irrespective of negligence on the part of the defendant.

But the products and landowner liability limitations suggest a more foundational constraint on negligence in the nineteenth century—what might be termed a paradigm constraint in the minds of the judiciary.[74] Well into the nineteenth century in Anglo-American jurisprudence, the domain of tort remained ill-defined. Indeed, many legal authorities of the day were reluctant to regard it as an independent area of law, in contrast to the more well-established territories of contract and property, which rested on clearly articulated rules of governance over relational conduct and ownership interests.[75] Indeed, Oliver Wendell Holmes himself, as late as the 1870s, was of two minds about whether torts should be regarded as a basic common law category.[76]

Thus, while the privity requirement in products cases no doubt expressed a floodgates concern, as it still does today in a far more limited range of cases,[77] it also stood as a judicial declaration that the domain of contract was more salient than that of tort when nineteenth-century courts came to characterize product injuries for purposes of fashioning liability rules. And similarly, when limited premises liability rules sharply constrained the compensation prospects of injured trespassers—or, the opposite side of the coin, in some situations established strict liability in favor of landowners for the invasive acts of outsiders[78]—more was at work than an exaggerated concern for the landed gentry.[79] At bottom, that concern expressed a hierarchy of

72. *See id.* at 835–36.

73. *Id.* at 836–39.

74. *See* Rabin, *supra* note 64, at 945–48.

75. *See* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1239–56 (2001). The authorities were not all of one mind, however. *See id.* at 1233–38 (discussing Roman law, civil law, and nineteenth-century English authorities who regarded torts as an independent field of law).

76. *Id.* at 1232.

77. *See, e.g.*, Strauss v. Belle Realty Co., 482 N.E.2d 34 (N.Y. 1985) (holding that no duty of due care was owed in claims against an electricity utility by non-bill-payers for negligence in causing city-wide blackout).

78. The classic case is *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330 (1868) (appeal taken from Eng.).

79. On the dominant influence of the landed gentry on the judges involved in deciding *Rylands v. Fletcher*, see Francis H. Bohlen, *The Rule in* Rylands v. Fletcher, 59 U. PA. L. REV. 298, 318–19 (1911). A later study by Robert Thomas Molloy reported social and biographical data on the judges contradicting Francis Bohlen's thesis. *See* Robert Thomas Molloy, Fletcher v. Rylands—*A Reexamination of Juristic Origins*, 9 U. CHI. L. REV. 266 (1941).

interests in which a well-established network of rules regarding property rights was more congenial to the nineteenth-century judicial mind than the fledgling negligence principles still reflecting their confused recent origins in the writs of trespass and trespass on the case.

These considerations come to a head in the worker injury cases that troubled Schwartz so greatly. In his first exposition on these cases, his Yale paper, Schwartz was content to chalk himself up as a "splitter" as well as a "lumper," and to regard the courts' strikingly uncharitable reception to employment-based injury claims—expressed in consistent reliance on the assumed risk defense and fellow servant rule to bar recovery—as something of an aberration in a developing world of robust adherence to the negligence principle.[80]

Later, however, when he revisited the nineteenth-century tort cases in his UCLA paper, he offered a more fulsome explanation for the courts' seemingly low regard for the claims of injured workers. Contrasting railroad workers' claims with those of seamen, on the one hand, and those of railroad passengers, on the other—both of whose claims he found were decided under robust negligence standards—Schwartz speculated that nineteenth-century judges may have felt sympathy for seamen (as lower-class types) and empathy for railroad passengers (their own types), whereas railroad workers (relatively high-prestige workers, yet at some social distance from the judges) left them cold.[81] This seems a somewhat strained and indeed question-begging rationale: Would railroad workers have been treated any differently from others when suing as injured pedestrians or property owners? Surely not. Why should they have been treated differently in the workplace, apart from their contract-based status as workers?

Moreover, the two defenses in question applied across-the-board as bars to worker claims, rather than applying only to railroad workers. If anything, the seamen cases were the aberration and might be explained by the special corpus of admiralty law that located them outside the competing domains of common law I have been discussing. Nor does the negligence-favorable treatment of passengers, despite their contract of carriage with the railroad, undercut the contract-dominance thesis when applied to workers' claims. For passengers' claims come out of another venerable line of cases: the common law's traditionally protective stance toward an especially dependent class in a long lineage of innkeeper/common carrier cases, where despite the contractual nexus of the relationships, public policy reasons led courts to adopt near–strict liability responsibility.[82]

80. *See* Schwartz, *supra* note 6, at 1771.

81. Schwartz, *supra* note 10, at 712–15.

82. DOBBS, *supra* note 36, at 383–84.

My argument, then, is that just as workers' compensation laws replacing the tort system were later seen to strike a bargain—a workplace-related contractual nexus between employer and employee—so, too, in mirror-image did earlier judges in the nineteenth century view work-related injuries through the prism of contract.[83] In this earlier era, of course, "normal" risks were included in the bargain to the distinct disadvantage of the worker, who in the judicial mindset of the time took the hazards posed by the workplace and fellow workers as a total package.

More generally, my point is that status was a highly salient limiting characteristic of nineteenth-century tort law. Throughout the century, the negligence principle appears considerably less robust in scope when assessed in the context of a wide array of no-duty and limited-duty rules grounded in a variety of status relationships.[84]

What of the late twentieth century? I think Schwartz gets the picture right, in broad brushstroke: The period stretching from 1960 to the mid-1980s was indeed an era of major ferment and growth in the tort domain, highlighted by resort to the negligence principle in new settings. In a sense, the period can be viewed as picking up on the unfinished business of *MacPherson*. The reach of negligence law expanded through the replacement of rule-based limitations on the scope of negligence with a standard-based system characterized by broad discretion in juries to determine due care on a case-by-case basis—"the vitality of negligence," as Schwartz calls it.[85]

If there is a cautionary note to be entered, it is on still another inherent limitation of lead case methodology—that it tends to overstate the degree of change through what might be called a foreground bias. By way of example, consider briefly the three lead cases discussed earlier from Schwartz's exposition in his "vitality" paper: *Rowland*, *Molien*, and *Tarasoff*.[86]

Rowland, to recapitulate, abolished the restrictive categories in cases involving injury claims arising out of alleged substandard maintenance of

83. Rabin, *supra* note 64, at 939–42. Schwartz at one point seems to accept this proposition. *See* Schwartz, *supra* note 10, at 679 ("To be sure, the fellow-servant rule cases relied on contract reasoning to justify the weak liability position of the injured employee."). But he then draws back because of what he regards as an inconsistency in the similarly contract-grounded claims of railroad passengers and common-carrier shippers, where a "strong liability position" is found. *Id.* at 679–80. But, as I have just suggested in the text, there is no necessary inconsistency here, because common carriers were historically regarded as having special protective responsibilities in their service-provider role. *See* DOBBS, *supra* note 36, at 383–84. On the contract-based bargain underlying workers' compensation laws, see ORRIN KRAMER & RICHARD BRIFFAULT, WORKERS' COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 13 (1991).

84. *See* Rabin, *supra* note 64, at 933–45. But, as I have suggested, *see supra* text accompanying note 82, in some circumstances (such as the obligations of common carriers), as a consequence of historical considerations, status could work in the other direction as a liability-enhancing factor.

85. *The Vitality of Negligence*, *supra* note 26, at 964–77.

86. *See supra* text accompanying notes 32–39.

premises; no longer were social guests and trespassers to be pigeonholed into limited-duty categories. Viewed in isolation, *Rowland*, which forthrightly overruled a long-standing set of doctrinal limitations, certainly appears to herald a purification of the negligence principle, by adopting an across-the-board due care standard as a replacement for a set of narrower limited-duty rules. But the most obvious objection is that *Rowland* cannot be viewed in isolation. Whatever its boldness, the importance of *Rowland* turned on its acceptance elsewhere, and *Rowland* received a highly mixed reception from the outset. At the time when Schwartz wrote, a number of states had rejected it outright, and others had refused to extend it to trespassers.[87] In fact, the limited-duty categories remain in place today in about half the states.[88]

A starker instance of the same rather straightforward proposition—that lead case analysis may highlight interesting developments without necessarily revealing influential developments—is *Molien*, which appeared to commit the California Supreme Court to relatively unconstrained foreseeability analysis in determining liability for negligently inflicted emotional distress. *Molien* was never picked up elsewhere; the vast majority of states remained committed to a limited-duty approach in pure emotional distress cases, turning on whether the claimant was in a zone of danger (i.e., feared physical injury) as a consequence of the defendant's lack of due care.[89] And in fact, the California Supreme Court itself soon beat a retreat from the *Molien* frontier, consistent with the theme in Schwartz's later Georgia paper indicating a leveling off of proactive expansion of the negligence principle.[90] California aside, reliance on lead case analysis arguably constructed an edifice of

87. *See* KEETON ET AL., *supra* note 60, at 433. Thus, Keeton and his coauthors noted:

> Although the abolition movement gathered impressive momentum through the mid-1970s [as it was adopted in some form in thirteen jurisdictions by their count], it thereafter quite abruptly lost its steam, and in 1979 it came to a screeching halt. All six courts passing on the issue from then until 1982 [one year after the "vitality" article was published] have reaffirmed their commitment to the traditional trespasser-licensee-invitee classification scheme.

Id.

88. *See* DOBBS, *supra* note 36, at 620.

89. See the canvass of state courts which adhered to the zone-of-danger rule in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424, 431–32 (1997), in which the Court looked to the common law of the states for guidance on whether negligently inflicted emotional distress, without present physical injury, impact, or zone-of-danger exposure, should be recognized, and dismissed the claim under the Federal Employers' Liability Act, Act of June 11, 1906, ch. 3073, 34 Stat. 232 (codified as amended at 45 U.S.C. §§ 51–60 (1994)).

90. *Burgess v. Superior Court*, 831 P.2d 1197, 1201–02 (Cal. 1992), limited *Molien* to its facts, in a case in which a mother's claim for emotional distress due to injury to her child in delivery was recognized only because of the special physician-patient relationship.

vitality in the 1960–1985 period that rested on a somewhat fragile foundation.[91]

Tarasoff requires a more systemic critique. It poses the silences at the outer edges of negligence doctrine, which I discussed earlier in the nineteenth-century context, but this time as a rather different twentieth-century phenomenon. In surveying the earlier period, I emphasized the wholesale immunities and no-duty rules that were a familiar feature of the nineteenth-century landscape.[92] A century later, as Schwartz suggests, those expansive preserves had been replaced in many instances by newly recognized obligations of due care. But those duties—now explicitly grounded in tort—were hedged in by boundaries and confined to relatively narrow straits. *Tarasoff* is illustrative. Take lack of due care in the case as a given—that is, assume the relatively costless ability of defendant therapist effectively to warn a third party of his patient's concededly violent intentions. Nonetheless, once one substitutes a dentist, bartender, or sales clerk for the therapist as defendant, it seems safe to say that no duty to warn would be recognized by virtually any court. Relational considerations may have been stood on their head here—that is, they now lead to domain-expansive duties rather than domain-limiting tort liability—but they also describe sharp outer limits to the advances.[93]

What is at work here is the concept of duty, in frequent interplay with the standard of due care as a restraining mechanism. Schwartz never felt entirely comfortable with the duty element in negligence cases, and in fact, when he shed his historian's cloak to serve as Reporter on the *Restatement*

91. Even in California, Schwartz's survey of the period fails to mention *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), which addressed the issue of bystander claims for emotional distress. Although *Dillon* is generally regarded as progressive in allowing these claims so long as the plaintiff was a close relation of the injured party, sensorially and contemporaneously perceived the accident, and was in close proximity, *id.* at 920–21, the holding falls far short of foreseeability-based liability for negligent acts—it is, in other words, very clearly a limited-duty holding. Nor does Schwartz mention *Borer v. American Airlines, Inc.*, 563 P.2d 858, 866 (Cal. 1977), another leading case of the period, in which the court outright refused to recognize loss of consortium claims in favor of children or parents, despite the defendant's failure to exercise due care. To some extent, assessing the quantum of vitality through lead case analysis is a question of whether one chooses to regard the glass as half-empty or half-full.

92. *See* Rabin, *supra* note 64, at 933–54.

93. The requirement of a close familial relationship in bystander emotional distress cases offers another example. *See supra* note 91. To extend recovery to close family members, assuming other privity requirements were met, is certainly an advance. But denying recovery in the same circumstances to close friends and live-in companions surely stops far short of foreseeability-based recovery for negligently inflicted emotional distress. *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988) (denying plaintiff's claim for negligent infliction of emotional distress where plaintiff had witnessed the injury and death of his unmarried cohabitant, on grounds that plaintiff and cohabitant were not legally married at the time of the incident), *overruled by* CAL. CIV. CODE § 1714.01 (West 2001) (extending recovery to some domestic partners in negligent infliction of emotional distress cases under the same circumstances as spouses).

(Third) of Torts: Liability for Physical Harm (Basic Principles),[94] he triggered a controversy among torts scholars when he relegated duty to a relatively minor role.[95]

CONCLUSION

The historical legacy of Gary Schwartz is a rich portrayal of the evolving role of the fault principle in American tort law over the course of two centuries. Tracing the American law of negligence back to its confused roots in medieval England, he offers a compelling analysis of the development of a robust fault principle in industrializing nineteenth-century America, as articulated by the common law judges of the time. He then picks up the historical thread in the late twentieth century, sketches with characteristic precision the expansive tendencies through a quarter-century beginning in 1960, and chronicles the leveling off of dynamic growth in the ensuing years. Never content simply to rehearse doctrinal developments, Schwartz grounds the analysis of state supreme court case law in a finely wrought description of contemporaneous social context, with attentiveness to the influence of emerging schools of scholarly analysis. The resulting portrayal is tort law writ large across a sweeping historical panorama.

As I have suggested, my reservations go largely to what is left out of this picture. In the nineteenth century, the fault principle appears robust within its domain, as state supreme court doctrinal developments indicate, but the restricted expanse of that domain continued to reflect the recent origins of tort as a unified body of case law. Particularly in relational settings, courts frequently addressed liability issues in light of conceptual schemes of property rights and contractual obligations that had more identifiable and long-

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

95. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001); Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787 (2001). In particular, the authors of these articles take issue with the arguably narrow conception of the duty element in negligence cases in section 6 of the *Restatement (Third)*:

> Even if the defendant's negligent conduct is the legal cause of the plaintiff's physical harm, the [defendant] is not liable for that harm if the court determines that the defendant owes no duty to the plaintiff. Findings of no duty are unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 6, at 82 (Discussion Draft, 1999). In addition to declaring findings of no duty "unusual," there is no effort to elaborate on particular categories of no-duty or limited-duty rules. Section 6, and the accompanying section 7, were modified to relax the restricted-duty limitation by the new coreporters in RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 2, 2002).

standing roots than the fledgling tort precepts announced in "highway" cases.[96]

Often, one can surmise, these conflicting paradigms operated at a sub-doctrinal level: Searching supreme court cases for product injury claims against product distributors remote in the sales chain is a fruitless exercise, because it must have been clear to injury victims at the time that no obligation in tort would be recognized. These suits simply would not have been brought—indeed, they generally would not have been conceived as prospective tort claims in the first instance. Correlatively, at the doctrinal level, when claims did emerge, as in the worker injury cases, courts frequently had recourse to defenses such as assumed risk, which in that earlier period did not reflect a tort perspective.

In the late twentieth century, the domain of fault is clearly more pervasive. Consider, as a salient illustration, the readiness of courts to expand fault-like logic in product defect cases beyond manufacturing flaws in a single unit to design flaws in a product line. Or, the willingness of courts to assign responsibility to third-party defendants in what I have elsewhere referred to as "enabling tort" scenarios: situations in which a defendant creates a risk that sets the stage, through the conduct of another, for injury to an unwitting plaintiff.[97] These various categories of cases, and others in which no-duty limitations precluded liability at an earlier time, are readily identifiable. What is missed in this instance, by focusing on selected proactive doctrinal developments, is the other side of the coin: the systematic way in which no-duty rules continue to exercise important restraints on the ubiquity of negligence liability even today.

This is not the right note on which to close, however. If I am correct in my assessment that Schwartz tended to understate the significance of no-duty/limited-duty constraints, it does not begin to diminish his achievement. It demonstrates no more than that in the work of all scholars of the first rank, there are nuances ignored that complement their work, rather than lessening its importance.

96. I do not mean "highway" cases in a literal sense, although many of the early leading precedents on the contours of negligence and contributory negligence arose in road accident cases. *See, e.g.*, Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809) (holding that contributory negligence is an absolute bar to negligence liability); Davies v. Mann, 152 Eng. Rep. 588 (Ex. 1842) (upholding the doctrine of last clear chance as a qualification on contributory negligence). Rather, I mean to draw a generally applicable distinction between relational cases and nonrelational cases (ordinarily, these are cases where the litigants are strangers).

97. *See* Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 437–50 (1999).