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## Tributes to Professor Oscar S. Gray

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## Tributes to Professor Oscar S. Gray

### Authors

Donald G. Gifford, Guido Calabresi, Jana B. Singer, Robin L. West, Alan M. Rifkin, John L. Huff, and Michael Green

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**THE TORTS SAGE AS MENTOR AND FRIEND:  
IN MEMORY OF OSCAR GRAY**

DONALD G. GIFFORD\*

More than twenty-five years ago, the late Professor Jeffrey O'Connell of the University of Virginia spoke a few words that seem most fitting as a tribute to Oscar Gray. Speaking on a panel that Oscar had organized for the AALS Torts Section,<sup>1</sup> Jeff said, "In the world today, no one better epitomizes that 'ancient and hallowed term "scholar"' than Oscar Gray."<sup>2</sup>

Oscar, the Jacob A. France Professor Emeritus of Torts at the University of Maryland Carey School of Law, was one of the nation's preeminent tort scholars from the 1970s until the time of his death in October 2019. He published the second and third editions of the treatise originally co-authored by his former teachers at Yale Law School, Fowler Harper and Fleming James, Jr.<sup>3</sup> He also was a co-editor of the influential torts casebook, *Cases and Materials on Torts*, along with Harry Shulman, Fleming James, Jr., and, much later, me.<sup>4</sup> During the mid-1990s, he served as chair of the AALS Section on Tort and Compensation Systems, and in 2010, he received the William L. Prosser Award for lifetime service from the section. Oscar was also extremely active in the activities of the American Law Institute and its drafting of the various parts of the *Restatement (Third) of Torts*.

Oscar, a native of Maryland, attended Yale College from which he graduated Phi Beta Kappa. He decided to attend Yale Law School because, as he said in a 2011 interview, "law [is] a mechanism for bringing about social change, and . . . a way—perhaps the most striking way—of fighting

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\* Jacob A. France Professor of Torts and Former Dean. A version of these remarks was presented at a memorial service in honor of Professor Gray at the University of Maryland Frances King Carey School of Law on December 10, 2019.

1. I.e., the "Association of American Law Schools Section on Torts and Compensation Systems."

2. An expanded version of Professor O'Connell's remarks later appeared in the *Maryland Law Review*. See Jeffrey O'Connell et al., *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. 1016 (1993). Regrettably, the written version omits Professor O'Connell's remark about Professor Gray that is quoted herein.

3. FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS (2d ed. 1986) [hereinafter second edition of HARPER, JAMES & GRAY]; FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS (3d ed. 2006-2007).

4. HARRY SHULMAN, FLEMING JAMES, JR., OSCAR S. GRAY & DONALD G. GIFFORD, CASES AND MATERIALS ON THE LAW OF TORTS (6th. ed. 2015).

for the righting of wrongs.”<sup>5</sup> There he received, from Harry Shulman and Fleming James, Jr., what he described as “the best introduction to Torts I could have hoped for.”<sup>6</sup> He also worked as a research assistant with Fowler Harper.

In the early 1950s during the anti-Communist hysteria of the McCarthy era, Professor Gray served as an attorney-adviser in the Legal Adviser’s Office of the U.S. Department of State. Both in this role and when he applied for admission to the Maryland Bar, he was asked, but refused as a matter of principle, to answer questions about his political beliefs or the people whom he knew. From 1957 until 1971, he became a vice president and director of a start-up company in the nuclear materials field. He later served the government as special counsel to the President’s Task Force on Communications Policy and as acting director of the Office of Environmental Impact for the U.S. Department of Transportation where, as he later described it, he “had a dandy time trying to prevent roads from doing unnecessary environmental harm.”<sup>7</sup>

As a result of this work, in the late 1960s, Oscar received offers to teach the newly developing subject, Environmental Law, at Georgetown and Catholic. While doing so, he assembled a casebook on environmental law because there were no commercial offerings in the field.<sup>8</sup> In 1970, Georgetown Law offered him a full-time faculty position teaching Torts. Oscar’s first step was to visit his own Torts teacher, Fleming James, at Yale to seek his suggestions regarding teaching Torts. At the end of their encounter, Professor James asked Oscar if he was willing to co-edit a new edition of the Shulman and James tort casebook and Oscar enthusiastically accepted the offer.<sup>9</sup> A year or so later, Oscar joined James as a co-editor of the torts treatise.<sup>10</sup> When asked in the 2011 interview what he regarded as his most important professional accomplishment, Oscar answered that it was “keeping alive the voices of Shulman and James, and Harper, so that they can continue to speak to new generations of students and scholars.”<sup>11</sup>

In 1971, Oscar joined the faculty at the University of Maryland School of Law where he actively taught until 1996. During the 1990s, when I visited with literally hundreds of alumni in my role as Dean, often the best and most successful practitioners took the initiative to inquire about Professor Gray.

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5. Interview with Oscar S. Gray, in Baltimore, Md. (March 10, 2011).

6. *Id.*

7. *Id.*

8. OSCAR S. GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW (1973).

9. *See* SHULMAN, JAMES, GRAY & GIFFORD *supra* note 4.

10. *See* sources cited *supra* note 3.

11. *See* Interview with Oscar S. Gray, *supra* note 5.

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From the first month I had entered legal education at another law school some fifteen years before becoming Dean at Maryland, I had heard the legend of Oscar Gray—the scholar who was keeping alive the torts treatise, the scholar who arguably knew more American and English tort law than anyone else on the face of the earth. When I came to Maryland, I became a “student” of Oscar’s, even though I was already established as a scholar in the field of torts. Early on, I asked Oscar to attend a lecture I offered on the causes of the perceived medical malpractice crisis, a focus of my previous scholarship. Following the lecture, Oscar took exception to one of my conclusions. He had detected a problem with my reasoning, but he was neither contentious nor argumentative. In a gentle and supportive manner, he challenged me to reconsider my analysis. I had previously perceived Oscar principally as a guru of torts doctrine, but that day he demonstrated a mastery of statistical analysis in exposing the shortcomings of my logic.

Thus, I was very flattered when Oscar asked me in the late 1990s to work with him on a new edition of his torts casebook.<sup>12</sup> During an intense time while I was working on both the casebook and an article or two, I told Oscar that I felt like I was living two lives. There was the everyday life of interacting with other people in the tangible world. There was also, I told him, a second life, I had entered—a life within my mind where I was putting together how the pieces of the torts puzzle fit together and thinking about the interrelationships among them. He broadly smiled and responded, “Congratulations, you’ve become a scholar.”

Oscar held in his mind a totally organized, structured, and tidy conception of tort law. This must come as a bit of a shock to my colleagues who observed the places where Oscar worked. For decades, through adverse possession, Oscar had taken ownership of two additional offices in the library and two large tables, constantly and totally covered with volumes from the West Reporter system. Both the librarians and Oscar’s colleagues sometimes referred to his workspaces as “the Gray zone.”

I had never collaborated with Oscar before the casebook, and I soon discovered that Oscar was a perfectionist with strong ideas, sometimes idiosyncratic, about how things should be done. Even today, I systematically train my research assistants who work with me on the torts treatise supplements about the fifteen or twenty ways that the Oscar-Gray system of citation differs from *The Bluebook*,<sup>13</sup> the system of citation typically followed.

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12. HARRY SHULMAN, FLEMING JAMES, JR. & OSCAR S. GRAY, *CASES AND MATERIALS ON THE LAW OF TORTS* (3d. ed. 1976).

13. *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

As Oscar and I began working with each other on the case book, we often brought very different ideas to the project. Oscar seemed extremely reluctant to replace any case decided before 1900 with a more contemporary one. Most often, he and I would debate our respective preferences and, at a subsequent meeting, make trade-offs. There was one case, however, about which we really locked horns. This late-nineteenth-century case involved a woman from Spain who stepped into a coal hole while she walked alongside a street in Boston.<sup>14</sup> “Oscar, I am drawing the line at this one, my students have no idea what a coal hole is.” We did not resolve our disagreement for months. Finally, Judge Guido Calabresi, who used (and continues to use) the casebook Oscar and I were now editing while teaching Torts at Yale for decades, wrote an opinion for the Second Circuit in a products liability case that extensively discussed the coal hole case, its historical importance in American tort law, and its contemporaneous relevance.<sup>15</sup> Obviously, both the coal hole case and Judge Calabresi’s opinion now feature prominently in the case book. And the students love the coal-hole case!

Oscar and I vigorously debated what would be included within the new edition of the casebook. Six months into the project, my wife Nancy told me that she wasn’t sure that the project would be completed before one of us killed the other. Once we finished the new edition, I sat down with Oscar in an attempt to smooth over any disagreements we had had. To be clear, both he and I were pleased with the edition that we had created together, and it has stood the test of time. I shared with him Nancy’s concern in the early going that the experience might be fatal to one of us. His response: “I had the same concern.” I then said, in what I thought was an overly generous comment that “I had to admit in retrospect that he had been correct ninety percent of the time.” He stroked his silvery beard and responded, and I’ve never been sure whether he was being serious or teasing me, “I don’t seem to recall the other ten percent.”

Oscar became much more than a late-in-life scholarly mentor to me. He was for years my closest friend. Many of us here today attended Orioles’ games with Oscar. For decades, with paper and pencil, he would “score” the games. During more recent years, when the Orioles consistently lost, I asked him what the moral virtue was in continuing to root for a terrible team. He answered that continuing to be a fan of a losing team made the joy even

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14. *Lorenzo v. Wirth*, 49 N.E. 1010, 1011 (1898) (Holmes, J.) (holding that defendant was not negligent as a matter of law in failing to warn those walking alongside street adjacent to her house of the dangers posed by an open and visible coal hole).

15. *Liriano v. Hobart*, 170 F.3d 264, 268 (2d Cir. 1999) (Calabresi, J.) (noting that “[t]he so-called Holmes view—that standards of conduct ought increasingly to be fixed by the court for the sake of certainty—has been largely rejected . . . . The tendency has been away from fixed standards and towards enlarging the sphere of the jury.” (quoting second edition of *HARPER, JAMES & GRAY*, *supra* note 3, § 15.3, at 358–59 n.16)).

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greater when that team won. At least once in recent years, during a time when Oscar was even then not physically well, the Orioles rallied late in the game to take an 8-3 lead. It was the only time I ever witnessed him belly-laugh.

If you were Oscar's friend, you knew of his adoration of Dr. Sheila Hafter Gray,<sup>16</sup> his wife. In 2018, Oscar and Sheila celebrated fifty years of marriage. Dr. Gray has been a leader in the psychoanalytic education and accreditation communities for decades. We all know that Oscar praised the life of the mind, so it was very significant when he constantly said of her, "She's way more intelligent than I am," praise that he did not offer others. Oscar and Sheila together enjoyed chamber music, particularly the Tokyo String Quartet, and opera. Oscar was also a serious wine collector.

More than anyone, Oscar is responsible for my becoming a serious scholar late in my career. More important, however—and I want to pause here because Oscar was the one who taught me that the correct phrase is "more important" not "more importantly," a battle that I have since waged with countless law review editors. More important, Oscar brought joy to me, as someone who had grown up in a far less intellectual and sophisticated world than the one where he thrived. To others, Oscar's legacy was to bring integrity, precision in the use of language, and the understanding of this wonderful field called tort law. He did all that for me as well, but he also brought his mentorship, his friendship, his warmth, and joy.

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16. M.D.; Adjunct Professor of Psychiatry, Uniformed Services University of the Health Sciences; Chair, Board of Trustees, Accreditation Council for Psychoanalytic Education.

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## OSCAR GRAY AND THE YALE APPROACH TO TORTS

GUIDO CALABRESI\*

Dear Friends:

I am here wearing two hats, first and more formally, I am here as a former Dean, to represent the current Dean—Heather Gerken and the whole Yale Law School to honor one of its most distinguished graduates. But I am also here as a Tortnik and a friend and, as much as the first reason to be here is important, the second means more to me!

“When our constitutions were enacted it was the law of the land that no man who was without fault or negligence could be held liable . . . .”<sup>1</sup> These words were the key to *Ives v. South Buffalo Railway*,<sup>2</sup> a case in which 110 years ago the New York Court of Appeals held New York’s workers compensation statute unconstitutional. It is the case with which Harry Shulman, Fleming James, and Fowler Harper began their Torts I course. Oscar and I did too—and, like our teachers, Shulman James and Harper, we then asked our students: Was it in fact so (which of course it wasn’t, as shown by many early cases), and even if it had been so, so what?

This may seem an odd way to begin a first term Torts class. But it, and the structure of the course, and of the case book used for the course, which Oscar took over and kept updated, were and continue to be a fine way of teaching the Yale approach to Torts, which is what Oscar was dedicated to. As he put it, he wanted to keep “alive the voices of Shulman and James and Harper so that they can continue to speak to new generations of students and scholars.” Others will speak to many others of Oscar’s achievements. And in some ways I would like to also, but as his younger brother in the enterprise of keeping the Yale approach alive, I will focus on this, and on how Oscar both brilliantly and lovingly did it.

What then is this approach to Torts?

First that, whatever private elements there might be in the relation between injurer and victim, Torts is primarily a public law subject. And, as was crucial to Jimmy James, so especially also to Oscar, it is concerned with

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\* Former Dean, Sterling Professor Emeritus, and Professorial Lecturer, Yale University Law School; Senior Judge, United States Court of Appeals for the Second Circuit. A version of these remarks was presented at a memorial service in honor of Professor Gray at the University of Maryland Francis King Carey School of Law on December 10, 2019.

1. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 439 (N.Y. 1911).
2. 94 N.E. 431 (N.Y. 1911).



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making sure that injured victims are not left destroyed physically, emotionally, and financially as a result of accidents. Because a decent society, as a matter of sound public opinion policy, can do no less, the approach, then, like Oscar himself, is a *caring* approach. Deterrence of individuals—perhaps always, but certainly since the coming of insurance, is unimportant. Spreading the losses so that they are bearable and so humans are not crushed. That is the key.

Second, while—since this particular Yale child came on the scene—deterrence of categories of risky activities does matter, it too *matters only* insofar as it can be analyzed/achieved, consistently with safeguarding and protecting the shattered individual. The aim, is not some non-existent economic utopia, but the structuring of society so that (i) employing private means, (ii) it leads activities to develop safer ways of producing, selling, and behaving while, (iii) making sure no one is left naked and suffering.

I could go on and give many more details, but my aim today is rather to point out how this caring and empathetic approach *was also* in the most fundamental way Oscar Gray himself. Oscar lived his whole life the Yale approach to Torts. His scholarship great enough to win the Prosser Prize in Torts—reflected his person. And that, as well as his scholarship, is why I loved him. There is, however, another reason for my affection. As I suggested earlier, he was my older brother; we both were children of James and Harper. And, as Oscar's extraordinary wife, Sheila Hafter Gray, knows all too well as a psychoanalyst, siblings can be rivals. But there was never a touch of that in Oscar. He cared for me, guided me, and helped me. He rejoiced in my own successes and so made it easy for me to rejoice in his. In this too Oscar was a mensch and in this too he was a true pupil of Jimmy James, who was made happy by those students—who, like Oscar—pushed the quest further!

Thank you, Oscar, for all you did and all you were—I loved you and I will miss you immensely.

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## TRIBUTE TO PROFESSOR OSCAR S. GRAY

JANA B. SINGER\*

Oscar Gray was not only a brilliant scholar and a dedicated teacher. He was also an amazing colleague, mentor, and friend. From the moment I arrived at Maryland as a young and very green faculty member, Oscar made himself available as a source of wisdom, support, and intellectual inspiration. Although he was clearly the most renowned member of the Maryland faculty at the time I joined, he was never too busy—or too self-absorbed—to interact with and nurture his junior colleagues. Whenever I had a question about a torts issue that overlapped with the work I was doing, I would knock on Oscar’s door (or waylay him in the library) and ask if he had a few minutes to talk—and he always did. I remember many illuminating conversations with Oscar about issues ranging from inter-spousal tort immunity (we both opposed it) to the convergence of tort and contract remedies. I always came away from those conversations inspired and impressed—not only by Oscar’s breadth and depth of knowledge, but also by his intellectual openness and his genuine interest in my perspective.

I am by no means the only Maryland faculty member who benefitted from Oscar’s intellectual mentorship. Our colleague, Richard Boldt, remembers that soon after Richard joined the Maryland faculty, Oscar reached out to offer support and encouragement. Richard writes that Oscar’s

breath of knowledge and close attention to detail was intimidating at first, but Oscar was kind to me, and I soon came to appreciate his wisdom and judgment. I found I had to lean in to fully absorb all that Oscar was offering. And lean in I did. His approach to torts, indeed to the study of law more generally, was not only detailed, it was also subtle and full of nuance. As a young faculty member, I gained enormously just by observing his process, his approach to framing and examining legal problems.

Multiple other colleagues have expressed similar sentiments. Professor Mark Graber writes, “Oscar was exceptionally welcoming when I first came to Maryland. He embodied the gentleman scholar whose erudite was matched only by his kindness and generosity of spirit.” Similarly, Professor Taunya Banks remembers that Oscar “was an invaluable resource for me for

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\* Jacob A. France Professor Emeritus of Law, University of Maryland Francis King Carey School of Law. A version of these remarks was presented at a memorial service in honor of Professor Gray at the University of Maryland Francis King Carey School of Law on December 10, 2019.

decades. He knew the background of and accurately predicted future developments in torts. He was never too busy to answer my questions.”

Professor Bob Percival recalls:

Although I do not remember meeting him during the recruitment process, Oscar Gray was the most wonderful surprise I had when I joined the Maryland faculty. We quickly discovered shared passions for wine and baseball, and Oscar’s extraordinary kindness instantly made me feel that Maryland was where I truly belonged. His fierce dedication to scholarship was an inspiration to me and to all other young faculty members at a time when the school was making great strides.

Our emeritus colleague, Peter Quint, describes Oscar as “one of the aristocrats of Law School teaching.” Peter notes:

Oscar was highly respected throughout the law school world, and it was impressive to see. For example, the particular respect accorded him at the meetings of the August American Law Institute. To talk to Oscar about a legal topic, was, as often as not, a kind of lesson from a master.

Our former colleague, Alan Hornstein, also highlights Oscar’s deep intellectual influence on his colleagues:

Oscar was a mentor to many of us—demanding and exacting, but also kind and understanding. At a time when many legal scholars seek to know more and more about less and less, Oscar belonged to an age of systemitizers of the like of Prosser, Wright, Farnsworth and their ilk. He strove to learn and teach about an entire field of law—and did so brilliantly and with great diligence.

Oscar’s mentorship and intellectual example were not limited to the ivory tower. Rather, he encouraged his colleagues to spread their wings and to participate actively in legal reform efforts. Soon after I received tenure, Oscar encouraged me to apply for membership in the American Law Institute—a prestigious organization of lawyers, judges, and legal academics responsible (among other things) for issuing influential Restatements of various areas of the law. It was a step that I would not have taken on my own at that point in my career and one that frankly, I was not sure I merited. But Oscar gently insisted that I had something valuable to contribute, and he graciously—and successfully—recommended me for membership. I have since learned that he did the same for numbers of other Maryland colleagues—once again using his own high reputation and commitment to excellence to mentor and inspire others.

Oscar also had a passion for justice—a passion that he shared with his colleagues and instilled in his students. In 1985, a group of law students approached Professor Michael Millemann and proposed a project to repeal Maryland’s contributory negligence rule and replace it with comparative

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negligence. When Michael asked why they were suggesting this, the students replied that they were doing it “for Professor Gray.” They had been inspired by his Torts course and deeply moved by his criticisms of the archaic contributory negligence doctrine. Under the joint supervision of Oscar and Michael, the students helped to draft the bill, recruited allies, lobbied in Annapolis, and came within an eyelash of succeeding in the Maryland legislature. The student mantra was, “Do it for Oscar,” and Oscar was a key consultant throughout the process. As Professor Millemann explains, “The students’ many hours of hard work evidenced their deep respect and admiration for Professor Gray, and their profound gratitude for what he had taught them.”

Our colleague, Doug Colbert, similarly expressed his admiration for the enormous support that Oscar provided for the efforts of our Access to Justice Clinic to reform Maryland’s pretrial justice system and ensure legal representation for indigent defendants at bail hearings. Doug described Oscar as “a steadfast believer in the cause of ensuring equal justice to the poor person seeking to regain liberty while awaiting trial.” As Doug put it, “Oscar may have been the foremost authority on tort law, but he shared an instinctive sense of knowing what equal justice demanded for poor people accused of crime . . . .”

Oscar’s friend and long-time colleague, Bill Reynolds, also spoke eloquently of Oscar’s commitment to justice: “Oscar was passionate about rights,” Bill recalls, “not only his, but everyone’s. His outrage at the cross on the Maryland flagpole, his action against American Express, his refusal to pull over for an unmarked car, all show this passion dramatically.”

Oscar and I shared a special bond as alumni of that “other” Law School in New Haven. Throughout our years at Maryland, we kept each other apprised of events and developments at our joint alma mater. We especially enjoyed sharing stories about the Yale faculty members whom Oscar knew well and who had been my teachers and mentors when I was a student. I reveled in this connection to Oscar and to Yale.

Several Maryland colleagues recently emailed me to say that they too shared a special bond with Oscar—whether it be through a love of opera, an appreciation of good food and wine, or a passion for baseball. These emails vividly remind me that Oscar was not only a man of many interests and talents, but that he made a special effort to connect individually with his colleagues. For Oscar, being a law professor was not just about teaching and scholarship, it was also about being an active and engaged member of a vibrant intellectual community.

Eighteen months ago, as I was transitioning to Emeritus status after thirty-three years as a full-time faculty member, my son Josh was receiving his law degree from Maryland Carey Law. While at Maryland, Josh was

fortunate to work as a research assistant for Oscar's co-author and dear friend, Professor Donald Gifford. One of Josh's main research assignments for Professor Gifford was to help update the torts treatise that bears Oscar's name and that serves as a centerpiece of Oscar's scholarly legacy. How wonderful, I thought, that Oscar should serve as an intellectual wellspring for not one, but two generations of my family. And how fortunate we have been as Maryland faculty members to have had Oscar as a colleague, mentor, and friend. We will miss him dearly, but we are honored to carry on his legacy.

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## TRIBUTE TO PROFESSOR OSCAR S. GRAY

ROBIN L. WEST\*

I was a student of Oscar Gray's in the mid-1970s and later a colleague in the late 1980s. I remember from my student days a professor who was rigorous and probing and who demanded that his students be likewise. But I also remember a humble man who was kind and gentle and thoughtful in the classroom and asked as much of his students as well. And I remember a man who deeply loved the law that he so thoroughly enjoyed teaching.

Oscar Gray presented tort law as a field of knowledge and of norms, asking of citizens who mix and meet and interact in public spaces that we be at least reasonably careful to protect the wellbeing of each other, as we go about doing so. The classroom is one place where such teachers and student-citizens so mix, and meet, and interact. And in that semi-public space of the classroom, Oscar Gray was not just reasonably, but extraordinarily careful, and caring, of every student's wellbeing. In addition to the rules of tort law, Oscar Gray taught by example the mutual care and regard that is tort law's heart.

But he taught us so much more. Also by example, and sometimes by exhortation, he asked us, the future lawyers in his classroom, to develop our capacity for sympathy. As students and as lawyers, Professor Gray made clear we should learn to sympathize for these tortfeasors and tort victims whose stories showed up in our casebook, all of them, every day, every case. Oscar Gray taught us how to do that. And one remarkable way he taught us how to do that,—how to learn to develop sympathy for absolutely everyone—was through constant self-reference. Tort law of course is about the most utterly ordinary of legal events: accidents, bar fights, insults. So, as is typical we started the course with accidents.

When introducing the concept of negligence, our Torts professor began his lecture by confessing—and I mean truly confessing, not ironically and not for humor—that on his daily commute from his beloved home in the District to his law school in Baltimore, he would speed down Interstate 95 at a rate significantly above the posted limit. And not a little bit above but really a lot, he made clear. He could not help himself, he told us. He would try to drive under the limit, but Oscar Gray had a lead foot, when putting the pedal

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to the medal. So, Professor Gray sped down the interstate, on many working days of his life, behaving most unreasonably. When introducing the subject of defamation, he confessed—again, a true confession, not an ironic one—of his love of gossip, and really the more defamatory the better.

Why did he do this? I don't mean why did he gossip and speed, but why did he make these extraordinary admissions against interest? I don't really know, but I do know that they drove home a complicated and profound point, and in one breathtaking moment: Tort law is for and about our human weaknesses and foibles, and not just other people's. Those weaknesses and foibles are universal; we all have them. So, the law of tort is not about punishing or shaming those who act on those weaknesses and hurt people in the process. It is not about denying the existence of them or moralizing about them or holding vice up to the light of virtue. Tort law is all about these flawed people—us—finding ways to live together anyway, to make allowances, to compensate for the harms we cause, to be made whole for the injuries we sustain, and then for moving along, remaining a community. Tort law is all about what makes civil law civil, and Oscar Gray taught us and showed us the heart of civility.

Oscar Gray knew and forgave his own unreasonableness as well as that of others, and he knew the purpose of the law he loved to teach was basically to find a way that would allow all of us to do likewise. He knew the sensitivities and the vulnerabilities and the weaknesses, as well as the strengths and the ample compassion of the students in his charge. He knew all this, and he knew how to teach what he knew. That is why his students loved him, and that is why we will miss him, and that is why those of us who are privileged to teach law will always stretch ourselves to emulate him.

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## TRIBUTE TO PROFESSOR OSCAR S. GRAY

ALAN M. RIFKIN\*

I was first introduced to Professor Gray on my very first day of law school. For many of us, Professor Gray was our torts professor—and our gateway to understanding the law. And, quite literally, he appeared to be right out of central casting. Not only did he look the part with his well-manicured beard and mustache and his scholarly demeanor, but, as we soon came to know, Professor Gray was also a well-respected academic and author with a passion for social justice.

Now, as it happened, after my first semester—and for reasons that now escape me—Professor Gray offered me one of his prized research internships in connection with his legendary treatise on torts. And, having a modicum of common sense, I jumped at the opportunity. As I recall, I was given an assignment to research some arcane point of tort law back to its natural origin. Now, that may seem like a simple task, but these were the days before the internet and online research. And, of course, the research threads were typically obscure. The other student interns and I fondly referred to our assignments as the “search for Gray’s anatomy.”

As I researched my particular thread back in time—to the turn of the century and back further still to the earliest days of U.S. case law—I recall being very proud of myself. Naively thinking I had completed the task, I presented my first research paper to Professor Gray. After looking it over, I recall that he said with a certain degree of conviction: “I doubt your family tree began on this continent, so why do you think your research must end here?” So, back into the stacks I went and found my way in case law across the pond, to common law and kings. Finally, when the thread could be traced no further, and I honestly think I had gone as far back as the advent of the printing press, I again presented my research to Professor Gray. This time, he said something that has resonated with me ever since. He said: “Mr. Rifkin, as significant as it is to connect your research back to its humble origins in time, what’s more important is what you do with the law for good and justice—that’s what makes all the difference.”

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\* Managing Partner, Rifkin Wiener Livingston LLC. A version of these remarks was presented at a memorial service in honor of Professor Gray at the University of Maryland Francis King Carey School of Law on December 10, 2019.



Well Professor Gray, you were right, and you made all the difference for many of us—and for good and justice. On behalf of Professor Gray's many student interns—some of whom have gone on to teach the law as well—we are all connected in time by the strong threads of your teachings, writings, passion for social justice, and mentorship. And, we say thank you. You will be missed but never forgotten.

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## MEMORIES OF PROFESSOR OSCAR S. GRAY

JOHN L. HUFF\*

Professor Oscar Gray was a magnificent man in every respect: extraordinarily intelligent, refined, thoughtful and kind; completely devoted to his students and his law publications; leavened with a happy demeanor and good sense of humor. Following are a few of my special memories:

I arrived at the old Georgetown University Law Center at 4th & E Streets for my first day of class on a Monday in late August 1970. I had received my discharge from active duty at Ft. Dix, New Jersey, the previous Friday. My head was spinning as I lugged two huge shopping bags full of casebooks and horn books I had just purchased across the street from the Lerner Law Book Co. Among my first classes that day was Torts with a dignified visiting professor named Oscar S. Gray. As he entered the classroom, a fellow to my right leaned over and remarked, "I hear Professor Gray is a big intellectual from Yale." He was correct. For the next two or three weeks Professor Gray led a classroom of 125 eager, aspiring lawyers through the nooks, crannies, and nuances of *Ives v. South Buffalo Railway Co.* At one point, he called upon me to stand and discuss some of those nuances with him. My answers to his questions proved to be not exactly what he expected and wanted. While I successfully recited the facts of the case and correctly answered his fundamental question about the court's decision, my legal reasoning was in its infancy and poorly developed. The kind professor gently let me down easy as I stood before my fellow students; it seemed as though there was a spotlight on me. I recall and cherish his words as if they were uttered a minute ago: "Well, Mr. Huff, you are in the right cabbage patch; and your instincts are correct; but False" Whereupon he gently expounded upon the point he was trying to draw out of me for the benefit of the class. I will always remember that first, marvelous experience with the Socratic Method administered by Professor Gray.

As the year progressed, Professor Gray marched us through the thickets of the Shulman & James casebook *The Law of Torts*, clarifying everything. It was an incredible, joyful experience. I still have the well-worn casebook in my chambers at the courthouse. Next to it is the Fourth Edition of Shulman, James, Gray & Gifford, *The Law of Torts*, which I bought when I learned it had been published. I called Professor Gray to say that I had bought

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his book and asked if I could send it to him for his autograph. He said he'd be delighted to do so. Upon its return, I opened the book to find the following handwritten note on the inside cover: "For John Huff—with the warmest regards, respect and affection of a grateful teacher—[signed] Oscar Gray." Both books are among my treasures.

As my first year at Georgetown drew to a close in the spring of 1971, I happened to mention to Professor Gray that I was looking for a summer clerkship. He brightened up and suggested that I contact an attorney by the name of Jack Vardaman, a former law clerk to Supreme Court Justice Hugo Black. Mr. Vardaman was then an associate with the prestigious law firm of Williams, Connolly & Califano, and is now a partner with Williams & Connolly. He was looking for assistance with a lawsuit entitled *Citizens to Preserve Overton Park v. Volpe* in which he had recently obtained a reversal before the Supreme Court in favor of the preservationist plaintiffs. Professor Gray suggested that I call Mr. Vardaman after a few days' time so he could call ahead to endorse my application. I got my first job in the law, thanks to Professor Gray.

The summer of 1971 was a very special time for me. I was having the time of my life working at Williams, Connolly & Califano. Plus, my personal life blossomed as well. The love of my life, Alice Angelo, and I were married in Manhattan. As I accompanied my new bride down the aisle following our wedding ceremony in St. Jean Baptiste church, I came upon the smiling faces of Oscar and his wife, Sheila, to our left. As we approached, Professor Gray smiled broadly and nodded constantly as if to say, "Well done, John!" I can still see him and Sheila in my mind's eye. It was a joyful time!

During the years that followed, Alice and I stayed in touch with Sheila and Professor Gray. Whenever they were in Chicago for an American Law Institute conference, we met for dinner and caught each other up on what was happening in our lives. And, when we were in D.C. for a Georgetown reunion, Sheila and Professor Gray invited us to a delightful, delicious dinner at their home.

These are just some of the many, so happy memories I have of Professor Gray. I think of him often, and I thank God that I had the magnificent experience of being his student and friend.

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## OSCAR GRAY'S ALI CONTRIBUTIONS

MICHAEL GREEN\*

Oscar was one of the titans of twentieth-century tort law by any measure one might adopt. My assignment is to speak about Oscar's contributions to the American Law Institute ("ALI")—the organization that prepares the Restatements of the Law that courts consult when looking for clarification of the law or for coherent rules of law that can be adopted or even just for confirmation that their instincts in a particular case are on the right track. Or not. What many don't know is that it's not just the Reporters who prepare Restatements. The most notable feature of the ALI is its extensive process before any Restatement is finalized and becomes official ALI policy. Many members and advisors contribute by reading multiple preliminary drafts and attending meetings to discuss the draft and provide constructive criticism (and rarely, even praise) to the Reporters who have put those drafts together.

To return to Oscar, often when one sees the word "prodigious," as an adjective, it is an exaggeration. But describing Oscar as a prodigious contributor to the ALI is, if anything, an understatement. Oscar spent an extraordinary forty-four years as a member of the ALI. During that time, he participated in fourteen different Restatement projects, ranging from the Uniform Commercial Code to Agency to Charitable Nonprofits to Liability Insurance to Judgments to, of course, Torts. By my count, Oscar was an active participant in six distinct torts Restatement projects going back to the completion of the second *Restatement of Torts* in 1977. As one of the Reporters for two torts Restatement projects in which Oscar participated, I can attest—with firsthand knowledge—that Oscar was a remarkably careful reader of drafts, often finding typos and other glitches that the Reporters and the ALI's cadre of proofreaders has missed. But more important, Oscar would draw on his deep and broad knowledge of tort law and contribute wise counsel to the Reporters for the project. And those Reporters, well aware of the value of Oscar's input, paid particularly special attention when he wrote.

Oscar also was a regular attender and participant in the ALI's annual meetings where final drafts of Restatements are brought for discussion, polishing, and final approval. His remarks at those meetings were frequent, cogent, and welcomed by the Reporters responsible for the drafts. At one

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meeting in 1992 about suretyship, Professor Alan Farnsworth followed an Oscar Gray gem, stating: “I would agree with Oscar Gray in spades . . . .” In my role as a Reporter, I was always grateful for Oscar’s well-thought out, compelling, and gracious comments. His remarks at an annual meeting in 2001 about one of the most controversial positions in that Restatement helped to bring about a resolution that satisfied both the Reporters and those who were concerned about the original drafting, which suggested that in many cases, courts could ignore the matter of duty.<sup>1</sup> His suggestion at an annual meeting two years later resulted in rewriting garbled language for which I was responsible into the basic standard that one finds today for proximate cause in that Restatement.<sup>2</sup>

I could go on, but I want to sum up Oscar’s ALI work by quoting Geoff Hazard, who served as Director of the ALI from 1984-1999 and as the Reporter for the second *Restatement of Judgments* on the occasion of Oscar’s retirement from his beloved law school in 1996. Oscar possessed, Geoff wrote, “the clear and careful intelligence behind his unpretentious mien.”<sup>3</sup> He regularly graced the ALI “with the benefit of gracious presentations of thoughtful views.”<sup>4</sup>

I end on a personal note. Both Oscar and I were Advisers when the ALI inaugurated the third *Restatement of Torts* by tackling Products Liability in the mid-1990s. I will never forget a cab we shared at the conclusion of an advisers’ meeting in Philadelphia returning to Center City from the ALI headquarters in West Philadelphia. I could not understand a position Oscar had urged on the Reporters that a product could be defective without being defective for one of the three reasons courts had identified after section 402 A captured the strict products liability day in 1965. In the cab I told him so. Oscar patiently and graciously explained his view and provided an example that turned on a bright light for me. His response was ultimately adopted in what became section 3 of that Restatement and led me to write one of the best papers I have authored about Products Liability.

Oscar, the ALI owes you a debt that it can never repay. Thank you for all that you did.

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1. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (AM. LAW INST. 2010) (providing that all those who create a risk to others are subject to a duty of exercising reasonable care).

2. See *id.* § 29 (adopting a “harm within the risk” standard for proximate cause).

3. Geoffrey C. Hazard, Jr., *Tribute to Professor Oscar Gray*, 55 MD. L. REV. 1062, 1064 (1996).

4. *Id.*