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## **A Voice of Reason: The Products Liability Scholarship of Gary T. Schwartz**

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### A Voice of Reason: The Products Liability Scholarship of Gary T. Schwartz

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**A VOICE OF REASON:  
THE PRODUCTS LIABILITY SCHOLARSHIP  
OF  
GARY T. SCHWARTZ**

JOSEPH A. PAGE\*

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Of my many fond personal memories of Gary Schwartz, the one that stands out most vividly summons from the mists of time an evening in June 1983 at Boston's Fenway Park. It was my last visit to a childhood haunt where I had seen my first professional baseball game in 1941, an occasion that marked the beginning of a life-long passion for the national pastime. Settled into an excellent seat that faced the storied left-field wall (and brought to mind visions of the large advertisements that covered its surface before it became known as the "Green Monster"<sup>1</sup>), I began to lose myself in the contest that was leisurely unfolding. But I hadn't counted on my two companions, Gary Schwartz and David Owen, who in about the second inning launched into a perfervid, nonstop discussion of some problematic issue raised by the California Supreme Court's holding in *Barker v. Lull Engineering Co.*<sup>2</sup> I found myself engrossed by their earnest give-and-take and soon rendered totally oblivious to how the Red Sox were faring. It was then I truly realized how much of an academic I had become.

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1. I can recall large pictures promoting Gem razor blades and Lifebuoy soap. In 1947 the advertisements came down and the wall became a green monolith, except for the scoreboard. See PHILIP J. LOWRY, GREEN CATHEDRALS 23 (1992). When and how the expression "Green Monster" originated remains a mystery. See DAN SHAUGHNESSY & STAN GROSSFELD, FENWAY: A BIOGRAPHY IN WORDS AND PICTURES 101 (1999).

This footnote is dedicated to the baseball fan in Gary, who was a life-long Cleveland Indians' enthusiast and a Los Angeles Dodgers season-ticket-holder.

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

## I. INTRODUCTION

The untimely loss of Gary Schwartz at a moment in time when he was serving as Reporter for the new *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* and standing poised to deliver what undoubtedly would have been his crowning achievement as a torts scholar is an immeasurably grievous one, both for the field in which he toiled and for the learned community he graced with singular distinction. We can only speculate about how he might have shaped the direction of tort law in the twenty-first century, had he been able to complete the project.<sup>3</sup>

Although Gary first drew the attention of torts mavens with an article re-assessing the doctrines of contributory and comparative fault,<sup>4</sup> it was his lucent analysis of *Barker* in the *California Law Review*<sup>5</sup> that signaled his particular fascination with the products liability precinct of personal injury law. That interest maintained a grip on him and sparked a series of scholarly works that constitute a unique contribution to our understanding of the complexities and conundrums conjured up by the theories, doctrines, and rules imposing liability on manufacturers and sellers for the harm caused by their products.<sup>6</sup> In addition, some of his articles on nonproducts topics occasionally touched on manufacturers' liability.<sup>7</sup>

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3. What we do know is that he engaged a segment of the torts academy in the beginnings of a spirited conversation provoked by his draft of basic principles dealing with negligence law—to the extent that an entire (and fat) issue of a law review devoted itself to reactions to the draft. See Symposium, *The John W. Wade Conference on the Third Restatement of Torts*, 54 VAND. L. REV. 639 (2001).

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

5. Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979) [hereinafter *Understanding*].

6. See, e.g., Gary T. Schwartz, *Directions in Contemporary Products Liability Scholarship*, 14 J. LEGAL STUD. 763 (1985) [hereinafter *Directions*]; Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991) [hereinafter *Myth*]; Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796 (1983) [hereinafter *New Products*].

Gary also served as an Adviser to the Reporters of the new *Products Liability Restatement*. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter PRODUCTS LIABILITY RESTATEMENT].

7. See, e.g., Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 653-56 (1992) [hereinafter *Beginning*] (discussing judicial rejections of certain forms of strict liability in products cases); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 150-52 (1982) [hereinafter *Deterrence*] (analyzing the appropriateness of awarding of exemplary damages against manufacturers who made product-design decisions on the basis of cost-benefit calculations); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 405-13 (1994) (discussing how well product liability law deters the marketing of defective products).

Even his first article, which dealt with an aspect of municipal-government law, analyzed a provocative products liability issue. See Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 728 (1973) (discussing whether a California city ordinance could abrogate the rule of strict tort liability the state supreme court had adopted in suits against manufacturers for harm caused by defective products).

A rereading of Gary's products-liability scholarship inspires a renewed appreciation of the special qualities he brought to it. Analytical rigor stood as the hallmark of his approach to the scholarly enterprise and reflected an abiding faith in the value, force, and efficacy of reason. At the same time, he leavened his work with a generous dose of fair-mindedness as well as large dollops of commonsense and a refreshing awareness of the real-world implications of the ideas with which he dealt—the latter a characteristic not often demonstrated by many of his peers in the academy.

In a scholarly era marked for some time by the predominance of theory, Gary brought a bracingly nondoctrinaire outlook to his intellectual pursuits. He belonged to neither the efficiency nor the corrective-justice "churches" that have dominated theoretical writing in the torts field,<sup>8</sup> but instead he opted, *inter alia*, to perform the eminently useful function of explaining to nonbelievers the dogmas, doctrines, and teachings central to both, and, even more importantly, to subject them to the critical perspective of an intellectually curious outsider.<sup>9</sup>

This Article will examine three of Gary's major articles dealing with products liability and point out how they exemplify the unique features of his scholarship. First, it will consider the noteworthy aspects of his early piece on *Barker*. Second, it will consider his treatment of the controversial matter of products liability reform at the federal level. And third, it will examine Gary's interpretation of the famous Ford Pinto case. In tribute to Gary's high standards of scholarship, I shall offer an occasional criticism, which I am certain he would have welcomed (and which he would either have agreed with or responded to vigorously, in his customarily thoughtful way).

## II. GARY SCHWARTZ ON *BARKER*

The California Supreme Court has always been on the cutting edge of the development of products liability doctrine. Landmark decisions of the court ranged from Justice Traynor's famous concurring opinion advocating what he termed the "absolute liability" of manufacturers of defective products<sup>10</sup> to the first judicial decision adopting a general rule of strict tort liability for harm resulting from

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8. In assessing the entire range of products liability scholarship, Gary identified doctrine, history, and empiricism as alternatives to efficiency and corrective justice as foci of academic concern. See *Directions*, *supra* note 6, at 763. Several of his own articles traced the historical development of certain tort doctrines. See Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981). However, one cannot accurately characterize him as a law-and-history person because his concerns ranged far beyond the bounds of legal history.

9. Indeed, one of his most useful and interesting pieces begins work on a bridge over the yawning chasm that separates the two schools (whose adherents rarely address one another), and attempts to develop what he called a "mixed theory" of tort law, under which "tort law imposes or assigns liability for proper deterrence reasons—unless this result is not compatible with the criterion of corrective justice." Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1824 (1997).

10. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

products flaws,<sup>11</sup> and from the approval of the use of comparative negligence as a defense to strict products liability<sup>12</sup> to the creation of a rule of market share liability for manufacturers of generic pharmaceuticals.<sup>13</sup> Although not all of its innovative holdings have commanded universal or even widespread approval,<sup>14</sup> the opinions of the California court have consistently generated ideas with which not only other jurisdictions but also scholarly commentators have found it necessary to reckon.<sup>15</sup>

*Barker* was one of these seminal moments in the history of California's contribution to products liability law, with its path-breaking adoption of the consumer-expectations and risk-utility approaches as alternative methods of establishing defective design, and with a reversal of the traditional burden of proof when plaintiff opts to use the risk-utility test.<sup>16</sup> The opinion also suggested, in dictum, that the risks to be considered in applying risk-utility should be determined on the basis of hindsight rather than foresight,<sup>17</sup> and that under certain circumstances manufacturers might be liable for harm caused by defect-free, highly dangerous products.<sup>18</sup>

Gary's analysis of *Barker* quickly became "must reading" as the best available introduction to some of the most troublesome issues in products liability jurisprudence. Because his goal was to demonstrate the full sweep of the opinion, he did not purport to exhaust all its implications. However, he did succeed in identifying both the original and the problematic aspects of the decision, and providing an analytical frame of reference and point of departure for others.

His tour de force began with a history of the development of California products liability law and the snag produced by *Cronin v. J.B.E. Olson Corp.*,<sup>19</sup> which rejected the concept of unreasonable danger as a test for determining when a product is defective and thereby seemed to leave lower courts without any workable standard for jurors to apply in strict-liability design and warnings cases.<sup>20</sup> It was this problem that the court sought to solve in *Barker*.<sup>21</sup>

He then put forward the concept of what he called "genuine strict liability," which would hold manufacturers strictly liable for all harms associated with their products, whether or not they were defective.<sup>22</sup> The *Barker* court did not consider

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11. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963).

12. *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978).

13. *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

14. *See, e.g., Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 344-45 (Ill. 1990) (rejecting the theory of market share liability); *Lester v. Magic Chef, Inc.*, 641 P.2d 353, 361 (Kan. 1982) (rejecting the two-pronged *Barker* test); *Bowling v. Heil Co.*, 511 N.E.2d 373, 380 (Ohio 1987) (rejecting *Daly*).

15. *See, e.g., James A. Henderson, Jr., Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979) (criticizing *Barker*).

16. *Barker*, 573 P.2d at 452.

17. *Id.* at 454.

18. *Id.* at 455 n.10.

19. 501 P.2d 1153 (Cal. 1972).

20. *Id.* at 1163.

21. *Barker*, 573 P.2d at 446.

22. *See Understanding, supra* note 5, at 441-48.

this as an option, but Gary deemed it worth examining as a road not taken and a prelude to a discussion of what the court actually did. Others have called this concept enterprise liability,<sup>23</sup> which ideally would provide incentives for manufacturers to take all cost-justified risk-reduction measures and to spread, through insurance and price adjustments, the costs of harm not reasonably worth preventing.<sup>24</sup> In rejecting the wisdom and feasibility of this approach, Gary pointed out its shortcomings, such as the unfairness in holding a manufacturer of a non-defective product liable to someone whose negligence or recklessness contributed to the resulting injuries, and the possibility of multiple causative factors that would severely complicate the achievement of sensible loss spreading,<sup>25</sup> which help explain why no court has yet to adopt the theory.<sup>26</sup>

Gary then examined the roots of strict products liability, and located them in both tort and contract doctrine.<sup>27</sup> His basic point was that the shift to strict tort in the 1960s and 1970s was not really a radical departure from prior law, since most manufacturing flaws probably resulted from some negligence on the part of the manufacturer, but the injured plaintiff might not be able to prove this in every instance; hence, strict tort created a *de facto* irrebuttable presumption of culpability on the manufacturer's part. Moreover, the way most courts determined liability for design and marketing defects was virtually indistinguishable from how they would go about deciding whether a manufacturer was negligent.<sup>28</sup> One detects a slight

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23. See, e.g., Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 158 (1976). For an application of the theory of enterprise liability to the products liability field, see Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993).

24. See *Understandings*, *supra* note 5, at 443.

25. *Id.* at 444-48. He might also have mentioned the difficulty of creating a workable system of enterprise liability decisionally through the adjudicative process.

Gary reiterated his disapproval of the concept of genuine strict liability on several later occasions. See, e.g., *New Products*, *supra* note 6, at 809.

26. For a comprehensive treatment of the subject, see VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY* (1995).

Although no jurisdiction has explicitly endorsed the theory, it is plausible to view strict liability in tort for manufacturing defects as a limited form of enterprise liability, applicable only to one kind of product flaw, since it seeks to accomplish deterrence and cost-spreading goals in the same way these aims would be pursued under enterprise liability.

27. See *Understanding*, *supra* note 5, at 448-64.

28. In holding to these views, Gary would later take strong issue with the claim made by one torts scholar to the effect that modern products liability law had already actually become a system of enterprise liability, subjecting manufacturers to a form of absolute liability. See *Beginning*, *supra* note 7, at 624-28 (discussing 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 had asserted that "[T]he contours of modern tort law reflect a single coherent conception of the best method to control the sources of product-related injuries. This conception . . . provides in its simplest form that business enterprises ought to be responsible for losses resulting from products they introduce into commerce." Priest, *supra*, at 463. Gary's criticisms lent force to the conclusion that this notion conflated the theory animating early proponents of strict products liability with the actual development of the case law.

ambivalence in Gary's thinking here, because although he acknowledged the contributions of contract law, with its focus on the relationship between seller and purchaser, he remained a tort person at heart and never wavered from his conviction that products liability belonged exclusively within the embrace of tort law.<sup>29</sup>

Next, he discussed the two prongs of the *Barker* test for design defects.<sup>30</sup> His clear preference was for its risk-benefit approach, although he expressed some misgivings about the California court's innovative shifting of the burden of proof to manufacturers to show that the benefits of the design they chose outweighed the costs of any alternative design.<sup>31</sup> Here, he stressed the practical point, fortified by a report of conversations with victims' trial attorneys,<sup>32</sup> that from a tactical perspective lawyers representing injured claimants will prefer to present evidence of a feasible alternative that defendant could have adopted at a reasonable cost, in order to seize the initiative in putting before the jury a powerful story that would advantage their clients.<sup>33</sup> He did not, however, take an unequivocal position on whether courts should require plaintiffs to present, as a *sine qua non* element in every design-defect case, evidence of a reasonable alternative design,<sup>34</sup> an issue that has generated substantial controversy in recent years.<sup>35</sup>

Gary ended up by endorsing a very practical compromise that would permit burden-of-proof shifting once plaintiff had put forward some evidence of an alternative design; in his view the burden of proof should then shift to defendant to

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29. See *New Products*, *supra* note 6, at 811 ("It is time that product liability be integrated into the mainstream of tort, rather than treated as some exotic or super-modern specialty.").

30. See *Understanding*, *supra* note 5, at 464.

31. See *id.* at 468.

32. For further discussion of Gary's use of information and insights gleaned from the world of practical experience, see *infra* notes 84-108 and accompanying text.

33. See *Understanding*, *supra* note 5, at 469.

34. His statement that "one simply cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative (including any design omission) that can serve as the benefit for risk-benefit analysis" suggests that in some situations plaintiff might make out a prima facie case of defective design merely by alleging that defendant should not have utilized some particular design feature—for example sharp protrusions on automobile hubcaps. *Id.* at 468. See *Passwaters v. Gen. Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972) (holding vehicle manufacturer might be liable to motorcycle passenger whose leg became caught in protrusions extending from hubcap of a passing automobile). Of course, the product without the unreasonably dangerous design feature could qualify conceptually as an alternative design.

Gary did not consider whether there might be some products whose designs are so obviously dangerous in the extreme that it would serve no useful purpose to compel plaintiffs to present evidence of an alternative design. See, e.g., *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956) (concerning a lawn chair that folded in such a way as to act as a guillotine and cut off the finger of a consumer who grasped it in the wrong way).

35. The new *Products Liability Restatement* requires proof of a reasonable alternative design in a black-letter provision. See *PRODUCTS LIABILITY RESTATEMENT*, *supra* note 6, § 2(b). For criticisms, see for example, Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407 (1994); John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996). For the Reporters' response, see James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORN. L. REV. 867 (1998).



explain why plaintiff's alternative was or should have been rejected.<sup>36</sup> The fact that manufacturers have access to the type of information that might make clear the undesirability of a specific design option would eliminate unfairness concerns, and the willingness of trial courts to direct verdicts when the evidence offered by manufacturers overpowers plaintiff's claim would make this approach sensible and workable.

Gary also expressed serious reservations about the consumer expectation test, because of what in his judgment were insurmountable practical difficulties in applying the standard in design cases.<sup>37</sup> He did recognize that some product-related injuries might be traceable to a product's failure to perform as expected—the result of some shortcoming in design.<sup>38</sup> Here Gary was ahead of his time in suggesting a different way of looking at the universe of product defects.<sup>39</sup> However, he viewed such performance defects as evidenced by the fact that the product did not function as similar products (a sort of departure from industry custom) rather than as indicated by the fact that the product frustrated the reasonable expectations of consumers.<sup>40</sup>

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36. See *Understanding*, *supra* note 5, at 470-71. Gary had discovered, from conversations with practitioners, that California trial judges had been using this approach before *Barker*. *Id.* The latter holding did not require plaintiffs to offer proof of a reasonable alternative design, but merely obliged plaintiffs to prove that the product's design caused the injury. The California Supreme Court later refused to overrule that portion of *Barker* placing on manufacturers the burden of proof on the risk-utility prong decision. *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 304 (Cal. 1994).

37. See *Understanding*, *supra* note 5, at 472-81. In one provocative footnote, he presented the argument that if a manufacturer's portrayal of a product was such as to generate and frustrate specific consumer expectations of safety, this would for all intents and purposes amount to a breach of express warranty or an innocent misrepresentation, for which consumers could recover under theories other than strict liability for defective design. *Id.* at 476 n.241.

However, to make out a *prima facie* case for breach of express warranty or innocent misrepresentation in tort, plaintiff would have to establish her detrimental reliance. See 1 DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, MADDEN & OWEN ON PRODUCTS LIABILITY § 4:2, at 128 (3rd ed. 2000) [hereinafter MADDEN & OWEN ON PRODUCTS LIABILITY] (stating that under express warranty plaintiff presumed to have relied on representation that became basis of bargain, whereas under innocent misrepresentation she must show actual reliance). Courts applying the consumer expectations test in design-defect cases have imposed on plaintiffs no equivalent requirement.

38. See *Understanding*, *supra* note 5, at 465.

39. The generally accepted tripartite categorization of products liability cases divides them into claims involving manufacturing flaws, design flaws, and inadequate warnings or instructions for use. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW ON TORTS § 99, at 695-702 (5th ed. 1984). One could consider performance defects as overlapping manufacturing and design flaws, or as falling into a separate category, where the actual cause of the malfunction is irrelevant and it is the malfunction itself that qualifies as the defect.

40. This provides further evidence of Gary's conviction that products liability doctrine should be located squarely within the four corners of tort law.

The *Products Liability Restatement* would permit courts to draw an inference that a product was defective in manufacture or design when the incident that caused the harm "was of a kind that ordinarily occurs as a result of product defect." PRODUCTS LIABILITY RESTATEMENT, *supra* note 6, § 3(a). Comment *b* points out that the rule here is "limited to situations in which a product fails to perform its manifestly intended function." *Id.* at § 3 cmt. b. *Quaere* whether plaintiffs might prove a manifestly intended function by establishing justifiable consumer expectations, which would thereby

The *Barker* dictum, to the effect that courts applying the risk-benefit prong should do so with the benefit of hindsight rather than from the perspective of foresight, attracted some thoughtful attention from Gary. He pointed out that a court might use hindsight to determine what risks the manufacturer should have taken into account in designing the product or in deciding what warnings and instructions for use should accompany the product, and also to determine the technology the manufacturer should have incorporated into the product to make it reasonably safe.<sup>41</sup> In the latter cases, which raise the state-of-the-art issue, he argued convincingly that a hindsight approach would be inappropriate, from the perspectives of both efficiency and corrective justice.<sup>42</sup> However, he did express approval of the use of hindsight in assessing the risk side of the risk-benefit balance, which means that manufacturers could be charged with an awareness of risks known at the time of trial, even though the latter might have been unknown or unknowable when the product was designed or the warnings and instructions for use conveyed.<sup>43</sup> Because in most cases manufacturers probably had some inkling of the existence of a risk and it might be very difficult for product victims to prove this, he concluded that a hindsight knowledge-of-risk test might be appropriate.<sup>44</sup> Thus, once again he linked strict liability to what he felt were its negligence origins, here manifested by the recognition of a kind of irrebuttable presumption that manufacturers are aware of all risks associated with their products, and therefore might be liable, under the risk-utility test, for failing to design out the dangers or to warn against them. Although the negative reaction generated by the New Jersey Supreme Court when it adopted the hindsight test<sup>45</sup> and the subsequent rejection of the test in California<sup>46</sup> and in the *Products Liability Restatement*<sup>47</sup> (as well as in

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be reinvigorated as an independent measure of defectiveness. For discussions of the meaning of § 3, see Sheila L. Birnbaum, *Traditional Restatement or Harbinger of Policy Changes?*, 8 KAN. J. L. & PUB. POL'Y 47, 48-49 (1998); Harvey S. Perlman, *Section 3's Circumstantial Evidence Rule: Can It Cure the Defects in Section 2?*, 8 KAN. J. L. & PUB. POL'Y 99 (1998); Bill Wagner, *Help for "The Other Side,"* 8 KAN. J. L. & PUB. POL'Y 95, 96 (1998).

41. See *Understanding*, *supra* note 5, at 482.

42. A hindsight test would not promote deterrence, since manufacturers could not possibly incorporate undiscovered, unavailable technology into their products, and imposing liability for failing to do the "undo-able" would probably run counter to the community's sense of fairness. See *id.* at 483-84.

43. His precise language is that in cases involving unknowable risks "on balance a hindsight approach is probably sensible." *Id.* at 488. It would seem to follow that hindsight should also be used when the existence of a risk was known at the time of manufacture, but the true extent of the risk did not become knowable until some time later.

44. See *id.* at 486-88.

45. See *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982). For critical responses to the decisions, see for example, John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 754-56 (1983) and William R. Murray, Jr., Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983).

46. See *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991).

47. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 6, § 2 (b)-(c).

New Jersey itself<sup>48</sup>) have dealt severe blows to the looking-backward approach, a recent decision from the Wisconsin Supreme Court suggests that reports of its demise may have been premature.<sup>49</sup>

The final aspect of *Barker* to draw Gary's attention was the "norm-of-danger" dictum indicating that a manufacturer might be liable for harm caused by a product's known risks, even though no alternative design was feasible, if the dangers were substantial.<sup>50</sup> Here, Gary drew a comparison with the doctrine of strict tort liability for ultrahazardous activities, and he argued that a cause of action against the user of an ultrahazardous product would be more appropriate than a suit based on strict tort liability against the manufacturer of the product.<sup>51</sup> This might take care of third parties injured by an abnormally dangerous product. With respect to injured users, he posited that it would not be unfair to deny recovery to plaintiffs who chose to expose themselves to an inherently risky product with full appreciation of its substantial danger.<sup>52</sup>

Gary's discussion here touched only faintly on the possibility that a non-defective but very dangerous product might also have very low (or no) social utility.<sup>53</sup> Therefore, he did not give careful consideration to the extent to which process concerns might cut against the judicial imposition of liability for marketing a highly risky product that contributed little or nothing to the good of society.<sup>54</sup> A spirited controversy over whether courts should have been able to impose liability on the manufacturers of such products for harm caused by their inherent dangers broke out during the drafting of the *Products Liability Restatement*,<sup>55</sup> which in its final form left the door slightly ajar for the possibility of recovery for harm caused by

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48. See *Feldman v. Lederle Labs.*, 479 A.2d 374, 388 (N.J. 1984). Although the New Jersey Supreme Court pretended that *Feldman* did not overrule *Beshada*, a fair reading of the case suggests that it marked the quickest "turn around" in the history of products liability law.

49. See *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 750-51 (Wis. 2001) (holding that latex gloves might be found defective and unreasonably dangerous even though at time they were marketed the manufacturer could not have known of the risks of harm they generated).

50. *Barker*, 573 P.2d at 455 n.10.

51. See *Understanding*, *supra* note 5, at 490-91.

52. See *id.* at 491.

53. See *id.* at 491 n.308.

54. In a subsequent article, Gary adverted to this very briefly, when he noted that it might "extend the risk-benefit idea well beyond its institutional breaking-point to allow individual juries to consider whether entire genres of products—cigarettes, handguns, auto convertibles—should be regarded as deficient under risk-benefit reasoning." *Beginning*, *supra* note 7, at 684. However, he continued to focus on dangerous products that have more than minimal social utility at best, and he did not consider whether there might be any principled way for courts to impose liability on the manufacturers of products of highly dubious social value.

55. See Philip H. Corboy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 TENN. L. REV. 1043, 1096-98 (1994); Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1434-54 (1994); see also Symposium, *Generic Products Liability*, 72 CHI.-KENT L. REV. 3 (1996).

generic product risks.<sup>56</sup>

Gary's analysis of *Barker* reflected the thoroughness with which he approached doctrinal questions and his skill at teasing out their implications. His approach to scholarship embodied reasoned elaboration, made even more effective by the elegance and directness of his writing style. Next, I shall consider how he combined these skills with an abiding fair-mindedness when he confronted controversial issues.

### III. GARY SCHWARTZ AND PRODUCTS LIABILITY REFORM

One of Gary's most attractive traits was his ability to maintain a remarkable evenhandedness when he grappled with disputed subjects. This gave his work the mark of a scholar in the traditional and best sense of the term. Of course, he did not hesitate to reach carefully thought out conclusions. However, before doing so, he thoroughly examined all sides of the matter with dispassion, clarity, and logic, qualities that elevated the level of debate and merited the respect of those with whom he disagreed.

To demonstrate this point, I should like to take as paradigmatic an article Gary wrote on the role federal statutory and decisional law might properly play in the realm of torts.<sup>57</sup> More specifically, I shall focus on what he had to say about the "hot topic" of federal intervention in the area of products liability,<sup>58</sup> initiatives called "reform" by advocates<sup>59</sup> and "deform" by opponents.<sup>60</sup> Putting aside consideration of the substantive strengths or weaknesses of various proposals that would have federalized aspects of products liability law, Gary chose instead to examine a threshold and perhaps more difficult question, the wisdom of nationalizing a field of law that had traditionally been the province of the states.<sup>61</sup>

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56. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 6, §2 cmt. e (considering the hypothetical case of toy gun that shoots hard rubber pellets; court might "declare the product design to be defective and not reasonably safe because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible social utility that no rational, reasonable person, fully aware of the relevant facts, would choose to use, or allow children to use, the product").

57. Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917 (1996) [hereinafter *Federal Role*]. The article examined proposals to federalize both malpractice and products liability law, but the latter occupied the bulk of the author's attention.

For a nonproduct-related example of Gary's willingness to deal forthrightly with controversial issues, see Gary T. Schwartz, *Feminist Approaches to Tort Law*, in 2 THEORETICAL INQUIRIES IN LAW 175 (2001) (criticizing theories of feminist tort scholars).

58. For a sampling of articles demonstrating the controversial nature of the subject, see *Tort Reform Symposium Issue*, 64 DEN. L. REV. 613 (1988).

59. See, e.g., Victor E. Schwartz & Mark A. Behrens, *The Road to Federal Product Liability Reform*, 55 MD. L. REV. 1363 (1996).

60. See RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 259 (1996) (attacking the "tort deform movement" undertaken by "corporations and politicians beholden to corporate interests").

61. One of the telling points he made in launching his analysis was that the idea of enacting a federal products liability statute gained serious momentum at a time when its backers (mostly Republicans and members of the business community) were otherwise intent on rolling back existing

Gary identified two major problems with the current system: non-uniformity and structural bias. Most manufacturers mass-produce their goods and market them nationally, yet may be subject to tort law that varies from state to state.<sup>62</sup> This can make it difficult, if not impossible, to comply with divergent rules, a situation that casts serious doubt on the amount of deterrence these conflicting rules can achieve.<sup>63</sup> Gary also articulated doubts about one of the supposed advantages of federalism, the virtue of experimentation by various states as they test out various rules and doctrines.<sup>64</sup>

The structures of federalism might also create distortions in the development and application of products liability law. What has been termed structural bias might encourage state lawmakers to take positions that favor state rather than national interests, a notion that has led some to conclude that judges and lawmakers support the rights of in-state victims of product-related accidents rather than out-of-state manufacturers doing business on a national level.<sup>65</sup>

Gary's response was to suggest that this application of the notion of structural bias might reflect the triumph of theory over reality. First of all, he discounted as evidence of this phenomenon an opinion of the West Virginia Supreme Court stating in dictum that in certain kinds of products cases, where a split of authority exists with respect to a rule the court might apply, it should always choose the rule

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federal programs and letting states perform functions that had previously been handled at the federal level. On the other hand, opponents of federal products liability bills vigorously defended leaving the development of tort law to the states. *Federal Role*, *supra* note 57, at 918.

Gary went on to charge both sides with raising or lowering the flag of federalism strategically, depending on how they felt about the merits of specific proposals to federalize. *Id.* at 919. Although Gary provided contemporary examples of behavior indicating inconsistency on the part of pro-defendant tort reformers, he had to strain to paint pro-plaintiff advocates with the same brush. *Id.* at 918. Thus, he speculated that they would have supported the 1908 Federal Employers Liability Act, which federalized the tort duties owed by railroads to their employees, and that they might have backed attempts to insert into the Traffic Safety Act a provision (which was in fact never put forward) expanding tort liability. *Id.* at 920. In fact, the only section of the Traffic Safety Act directly affecting civil liability sought to preserve state common law as it governed suits against vehicle manufacturers. *See* National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 108(c), 80 Stat. 718, 723 (codified as amended at 15 U.S.C. § 1397(k) (1988 & Supp. III 1991), recodified as 15 U.S.C. § 108(k) (1994)). *See* 15 U.S.C. § 1397(k) (1988). Had he cited recent and actual instances to buttress his argument, it would have carried more bite. (Of course, it is arguable that the decisions of pro-plaintiff people not to push for selective federalization of tort law that might benefit accident victims derived from an appreciation of political reality rather than from principled preference.)

62. As an example, Gary mentioned design-liability claims brought against manufacturers of cigarette lighters on behalf of children injured because the product did not have child-resistant features. In some of the states where these claims were brought the courts used the risk-utility test for design defects, while in others the consumer expectations test governed. *See Federal Role*, *supra* note 57, at 928-29.

63. There is another aspect to the nonuniformity problem, the possibility that juries in different states might render different results, even though they apply the same rules or standards.

64. *See Federal Role*, *supra* note 57, at 930. Gary's main point here was that in the area of products liability the states have had several decades to experiment and had already produced whatever results the experimentation process might have been capable of producing.

65. *See id.* at 933.

more favorable to plaintiffs.<sup>66</sup> On the other hand, he conceded that an argument could be made that state judges might, subconsciously or otherwise, tilt in favor of expanding the rights of product victims, because even though they might consider the public interest to a greater extent than state legislators, they still might “devalue manufacturer’s arguments that the proposed expansion would treat manufacturers unfairly or would impose excessive costs on manufacturers.”<sup>67</sup>

His final point was that state legislators might respond more readily to pressures from defense-oriented groups located both within and outside the state. Consumers and others put at risk by defective products are unlikely to compete effectively in the legislative arena with pro-defense groups, which are able to raise substantial sums and launch highly coordinated lobbying efforts.<sup>68</sup> Here Gary made the powerful observation that if it is true, as many have argued,<sup>69</sup> that consumers habitually underestimate the risks associated with products, they are equally likely to undervalue the benefits they might gain from pro-victim legislative activity, and will therefore give inadequate credit and rewards to legislators who defend their right to recover for product-related harm. The fact that most legislative tort reform at the state level favors defendants<sup>70</sup> provides eloquent testimony about the way structural bias works in practice.

Gary then examined a number of suggested choice-of-law proposals that might solve the problem of nonuniformity. They included letting manufacturers designate the state law that will govern products liability claims against them, applying the state law where the product was first sold, and letting Congress specify a choice-of-law rule that would require courts to apply the state law where a manufacturer has the greatest number of employees.<sup>71</sup> He found them all wanting, mainly because they would create incentives for states to downplay safety and health concerns and

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66. *Blankenship v. Gen. Motors Corp.*, 406 S.E.2d 781, 786 (W.Va. 1991). Gary’s criticism of the dictum’s author, Justice Richard Neely, was characteristically both gentle and cutting. He noted that the opinion offered no basis for its negative view of state decisional law in the area of products liability, and suggested that Justice Neely was actually issuing an invitation to the United States Supreme Court to reverse the decision for violating the Constitution’s Commerce Clause. *See Federal Role*, *supra* note 57, at 934.

67. *Federal Role*, *supra* note 57, at 935. Gary did not mention here the trend in state decisional law, beginning in the 1980s and undercutting this supposition, against the expansion of the rights of product victims. *See* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990). The omission is curious, since Gary had previously written about the subject. *See Beginning*, *supra* note 7, at 603-04.

68. Gary might have considered the roles and evaluated the influence of the plaintiffs’ bar and pro-victim public-interest groups, which offer organized opposition to defense-oriented tort reform.

69. *See, e.g.*, Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1572 (1999) (“[A]ll the evidence of consumer product market suggests that this manipulation [by manufacturers] has been successful and will continue to be so until policymakers take and behaviorism as seriously as marketers do.”).

70. *See Beginning*, *supra* note 7, at 681-82; *see also* 1 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 37, §1:7, at 25 (noting that defense-oriented groups are the “principal proponents of . . . tort reform”).

71. *See Federal Role*, *supra* note 53, at 937-41.

adopt products liability laws that would favor manufacturers.

Having established the existence of a nonuniformity problem and willing to concede the possible presence of structural bias, Gary considered whether and how a federal statute might address them.<sup>72</sup> He put forward three alternatives and concluded that none of them successfully responded to the concerns he had identified. First, Congress might see fit to enact a comprehensive statute completely nationalizing all aspects of products liability law.<sup>73</sup> This would create nettlesome inconsistencies in cases where plaintiffs sue manufacturers and third parties not covered by the act, and judges have to apply different rules to each set of defendants. Gary also questioned whether federal legislators would be better than state judges when it came to taking into account tort policy.<sup>74</sup> Finally, he pointed out complications that might arise when courts had to construe ambiguous provisions in a federal products bill.<sup>75</sup>

Second, Congress might pass a statute adopting federal substantive rules only for certain aspects of products liability law and allowing state law to govern issues not addressed by the act.<sup>76</sup> This would raise harmonization problems similar to those that the first alternative would create, and additional concerns as well, since judges might have to apply both federal and state law to the claims asserted by plaintiffs against manufacturers or sellers.<sup>77</sup>

The third alternative would be a statute federalizing products liability law in principle, but leaving to the state and federal courts the task of developing its substance. They would do this by creating a new federal common law to govern products cases. This would create the type of harmonization difficulties associated with his first alternative, and in addition would place a considerable burden on the United States Supreme Court, which has a heavy enough agenda without being assigned responsibility for having the final word on disputed products liability issues.

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72. *See id.* at 941-46.

73. None of the bills introduced in Congress during the 1980s and 1990s purported to federalize the entire field of products liability law. (The bill that came closest, H.R. 7000, 96th Cong., 2d Sess. (1980) incorporated most but not all of the Department of Commerce's Model Uniform Product Liability Act. *See* 44 Fed. Reg. 62714 (Oct. 31, 1979)). Such an initiative would have invariably left gaps that the courts would have to fill, by giving effect to the broad purposes underlying the federal statute. This would require the judiciary to engage in the type of interstitial lawmaking called for, to a much greater extent, by the third of Gary's alternatives.

74. Here he cited his own personal experience to support his sense that state judges do a better job. *See Federal Role, supra* note 53, at 942-43 & n.160.

75. Gary noted that the political compromises that would inevitably occur in the drafting of a federal bill would produce numerous "awkward and ambiguous provisions," and court decisions interpreting these provisions might produce conflicting constructions. *See id.* at 943-44.

76. This is the approach Congress actually took during the two decades it seriously considered products liability reform. *See, e.g.,* S. 2631, 97th Cong. (1982).

77. Gary did not consider the possibility that, if a federal products statute is sufficiently minimalist, it will not raise these difficulties. *See, e.g.,* General Aviation Revitalization Act, 49 U.S.C. § 40101 (1994) (providing an eighteen-year statute of repose for general aviation aircraft and component parts).

All in all, Gary brilliantly succeeded in clarifying the intractability of federal products liability reform, which on the one hand seemed necessary in order to create uniformity in the legal rules and principles governing national product manufacturers and sellers, but on the other hand seemed impossible to achieve because of basic structural shortcomings in the processes of lawmaking and law application at the federal level. He expresses guarded hope that the new *Products Liability Restatement* might achieve some degree of standardization, but also recognized that the controversy it has generated might limit its success in this regard.<sup>78</sup>

#### IV. GARY SCHWARTZ AND THE FORD PINTO

Controversy about the design of the fuel-tank integrity system of the subcompact Ford Pinto began with a multi-million-dollar punitive damages award against the manufacturer,<sup>79</sup> intensified as a result of an unsuccessful criminal prosecution of the company for recklessness in its design of the vehicle<sup>80</sup> and regulatory initiatives by the National Highway Traffic Safety Administration (NHTSA),<sup>81</sup> and reached a high pitch by provoking an uproar in the mass media.<sup>82</sup> The dangers attributed to the Pinto's gas tank, which had a tendency to rupture and burst into flames when hit from behind, became symbolic of what critics saw as the evils of corporate cost-benefit decisionmaking, which traded lives for profit.<sup>83</sup>

Gary made his way into this thicket and produced one of his finest pieces.<sup>84</sup> In his usual evenhanded way, which occasionally juxtaposed his criticisms of positions asserted on both sides of the tort-policy spectrum,<sup>85</sup> he pointed out exaggerations

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78. See *Federal Role*, *supra* note 57, at 949-51. For a reiteration of these views about the *Products Liability Restatement*, see Gary T. Schwartz, *The Nature of the New Restatement*, 8 KAN. J.L. & PUB. POL'Y 43 (1998).

79. See *Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 348, 390-91 (1981) (jury verdict of \$125 million in punitive damages against an automobile manufacturer reduced on appeal to \$3.5 million).

80. The trial is described at length in LEE PATRICK STROBEL, *RECKLESS HOMICIDE?: FORD'S PINTO TRIAL* (1980).

81. For a summary, see *Myth*, *supra* note 6, at 1018 and John D. Graham, *Product Liability and Motor Vehicle Safety*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 120 (Peter W. Huber & Robert E. Litan eds. 1991).

82. The story came to public attention as a result of a Pulitzer-prize winning article. See Mark Dowie, *Pinto Madness*, *MOTHER JONES*, Sept.-Oct. 1977, at 18. The episode eventually inspired the motion picture *Class Action*.

83. The verdict in *Grimshaw* assessed \$125 million in punitive damages for what the jurors believed Ford had saved when it put off installing a safety feature that would have greatly increased the safety of the vehicle in rear-end collisions. See Connie Bruck, *How Ford Stalled the Pinto Litigation*, *AM. LAW.*, June 1979, at 23, 26.

84. *Myth*, *supra* note 6. Gary had previously examined some of the issues raised by the awarding of punitive damages against Ford Motor Company for recklessness in designing the Pinto. See *Deterrence*, *supra* note 7, at 140-41, 149-52.

85. See, e.g., Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 421 (1994) (taking issue with argument that courts should not impose punitive damages on defendants who have been, or might be, found liable for compensatory damages to large numbers of victims); *id.* at 422 n.40 (pointing out the contradiction between claims in the same article to the effect



and distortions made by Ford's critics, yet he also found enough evidence to support a finding that the design of the Pinto's fuel system was unreasonably dangerous.<sup>86</sup> Additionally, he addressed the troubling disconnect between, on the one hand, tort law's concept of reasonable care as exemplified by Judge Learned Hand's famous formula,<sup>87</sup> and, on the other hand, the public's refusal to accept the notion that it might be reasonable to refuse to take safety precautions because of their cost, and, what is more, the willingness of juries to punish corporations that engage in this type of decisionmaking when they design products.<sup>88</sup>

The first of the factual distortions pointed out by Gary concerned a Ford document that compared the costs of including a particular safety feature with the value of the deaths and injuries its installation might prevent.<sup>89</sup> The calculated safety benefit amounted to \$49.5 million, while the cost of the design change was set at \$137 million.<sup>90</sup> Ford's critics treated the report as evidence of how the company made actual decisions when it designed the Pinto, and took particular umbrage at the use of a paltry \$200,000 as the value of each life the alternative design would have saved.<sup>91</sup> Gary demonstrated that Ford prepared the report for submission to NHTSA in opposition to a proposed safety standard aimed at preventing fuel leakage in the event of a vehicle rollover.<sup>92</sup> Thus, it had nothing to do with the integrity of the fuel tank, which was the actual focus of the Pinto brouhaha.<sup>93</sup> Moreover, he found that setting the value of a life at \$200,000 at the time of the report's preparation was "within the range of expected and acceptable advocacy,"

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that punitive damages are justifiable because the resources of federal and state law-enforcement agencies to initiate prosecutions are limited, and constitutional protections are not needed in punitive damages actions because of the absence of the reason why they are required in criminal cases, namely the substantial investigatory resources available to federal and state law-enforcement agencies); *see also supra* note 61.

86. *See Myth, supra* note 6, at 1026-28.

87. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (postulating a test for negligence under which it is not deemed unreasonable for an actor to forgo accident-prevention expenditures whose costs exceed the expected benefits they might bring, in the form of reduced deaths, injuries, and property damage). The risk-utility test for defective design reaches a similar conclusion. *See PRODUCTS LIABILITY RESTATEMENT, supra* note 6, at § 2(b).

88. *See Myth, supra* note 6, at 1041. Gary also pointed out how ironic it was that Pinto owners probably engaged in the same type of cost-benefit decisionmaking (albeit for the most part subconsciously) when they received recall letters from Ford, since only fifty-three percent of them took advantage of the company's offer. Thus, as many as forty-seven percent may have reckoned that the costs of retaining the vehicle (which would include the risk of harm from a fuel-tank explosion and the temporary loss of use of the vehicle when they brought it to a dealer) outweighed the benefits they felt were to be gained from complying with the terms of the recall. *See id.* at 1042.

89. *See id.* at 1020.

90. *Id.*

91. *Id.* at 1022.

92. *Id.* at 1021.

93. Indeed, the numbers Ford used reflected the total number of vehicles that the proposed regulation would affect, not just Pintos.

because it was the figure NHTSA itself had used in calculating safety benefits.<sup>94</sup>

In addition, Gary took strong issue with the claims that Ford Pintos were “firetraps,”<sup>95</sup> and maintained that the basic design of the vehicle was not “inordinately dangerous” when compared to competitor subcompacts.<sup>96</sup> Moreover, he demonstrated that the number of fatalities critics attributed to the Pinto’s fuel system was exaggerated.<sup>97</sup>

Having brought to light the misconceptions that had distorted the Pinto saga, Gary nonetheless concluded from the evidence taken as a whole that a reasonable person might have faulted Ford for not incorporating several features which would have cost \$9 per vehicle, and would have improved the safety of the fuel tanks and would thereby have increased the chances of occupant survival in rear-end collisions; the company decided not to do so because of cost concerns.<sup>98</sup>

The next part of Gary’s article devoted itself to the apparent contradiction between risk-utility balancing, which one of the legal tests for defective design encourages manufacturers to do, and the public reaction against Ford’s apparent prioritizing of profits over human lives.<sup>99</sup> Here he made the key point that any savings generated by the failure to spend more on securing the fuel system enabled the company to keep the price of the Pintos down, so that more consumers could afford them; thus, any profits Ford might have realized came only as a result of increased sales.<sup>100</sup>

Gary also made an important contribution to our understanding of how popular distaste for the notion of corporate cost-benefit decisionmaking on matters of safety impacts on the trial of design-liability cases. Utilizing an investigative technique that enriched his scholarship from time to time and made it unique in a very important sense,<sup>101</sup> he elicited from defense attorneys a description of how they

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94. *Myth*, *supra* note 6, at 1025. It has always struck me that the value placed on each preventable injury—\$67,000—was extraordinarily low, since severe burns can cause the sort of pain and suffering that can produce very substantial jury verdicts.

95. *See id.* at 1026 (citing STUART M. SPEISER, *LAW SUIT 357* (1980)).

96. *Id.* at 1028. *See also* DAVID G. OWEN ET AL., *PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS* 942 n.4 (3rd ed. 1996) (“In fairness to Ford, it should be noted that the Pinto gas tanks appear to have been no more hazardous than those of most other subcompacts at the time.”).

97. *See Myth*, *supra* note 6, at 1029-30.

98. *See id.* at 1034-35.

99. *See id.* at 1035-47.

100. *See id.* at 1059 n.178.

101. For other notable examples, see *Understanding*, *supra* note 5, at 450 (noting practitioners reported to Gary that “many juries seem puzzled, if not disturbed, by the very notion of strict liability”); *id.* at 469 (stating plaintiffs’ attorneys expressed preference for ignoring burden-of-proof shift authorized by *Barker* when they have facts sufficient to make out a prima facie case of design defect under traditional risk-utility test); *Beginning*, *supra* note 7, at 630 n.138 (reporting that defense counsel find that roughly twenty-five percent of victims of general-aviation crashes file tort claims, as evidence of fallacy of claim by scholar that products liability law subjects general-aviation manufacturers to virtual absolute liability); *id.* at 688 (noting plaintiffs’ lawyers description of litigation based on theory of market share liability as “nightmarish” because of high costs, uncertainties, and delays).

defend manufacturers in cases where plaintiffs claimed that conscious design choices rendered a product unreasonably dangerous. Their tactics included stressing the loss of utility that would have resulted if the manufacturer had adopted the design alternative advocated by plaintiff, asserting that the product's design conformed to the state of the art, and alleging product misuse by plaintiff or a third person, causative negligence on the part of plaintiff or a third person, or plaintiff's assumption of a known or obvious risk; and they avoid at all cost any hint that financial considerations played any part in the design decision.<sup>102</sup>

The Pinto case, however, did not turn on a weighing of risk-utility factors by the jury, since the trial judge rejected defendant's proposed risk-benefit instruction and let the case go to the jury under the consumer expectation test.<sup>103</sup> This led Gary to speculate whether the decision could usefully be interpreted as imposing *de facto* liability for failure to warn,<sup>104</sup> which one might infer from the jury's finding that the vehicle failed to meet the reasonable expectations of the ordinary consumer. The absence of a warning about the risks generated by the design of the fuel-integrity system might have prevented plaintiff from making a fully informed choice about whether to purchase the vehicle. Having suggested an inadequate-warnings approach for cases where manufacturers made conscious design choices about features affecting a product's safety, Gary proceeded to reject it, on the basis of a careful assessment of the difficulties a court would encounter in attempting to determine what information a consumer would need in order to make an informed choice about the purchase of an automobile, and whether supplying such information was a cause-in-fact of the harm.<sup>105</sup>

Gary then returned to the design-defect dilemma he had identified. As a possible solution, he brought back to the table the notion of genuine strict liability as an option, since it would eliminate the problem arising from the public's negative attitude about cost-benefit decision-making, but he reiterated his conviction that such an approach would impose liability too broadly.<sup>106</sup> He then presented for consideration a compromise solution that would require plaintiffs to present evidence bearing on the risks of a product's existing design and the costs of reducing or eliminating them. The trial judge would have the responsibility to direct a verdict for defendant if the design utilized by the manufacturer was clearly reasonable, but if reasonable minds might differ about whether the manufacturer should have used the alternative design, the judge should submit the case to the jury.<sup>107</sup> Gary did not explain, however, what kind of jury instruction would be

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Gary also did not hesitate to draw on his own real-life experiences to illustrate points he was making. *See, e.g., id.* at 644 n.204 (driving on the highway where an accident occurred giving rise to the opinion he was discussing); *see also supra* note 74.

102. *See Myth, supra* note 6, at 1038.

103. *See id.* at 1039-40.

104. *See id.* at 1061-62.

105. *Id.* at 1055. As an alternative, Gary suggested a NHTSA regulation that would require manufacturers to include safety information on stickers attached to new cars. *See id.*

106. *See id.* at 1063-64; *see supra* notes 22-26 and accompanying text.

107. *See Myth, supra* note 6, at 1065-66.

appropriate.<sup>108</sup>

The Pinto article, in addition to underscoring Gary's abilities as a scholar, demonstrated another of his noteworthy qualities. The conflict between the Hand formula and the risk-utility test on the one hand and the public's attitudes toward corporate decisionmaking on the other might have suggested as a possible solution the removal of these kinds of cases from juries. However, Gary's comments reflect his appreciation of the value of maintaining a process that permits the community to have a voice in matters that affect the safety and health of the public. In this sense, he kept his feet on the ground and his eyes on the broader picture, and he directed his efforts toward reconciling the discrepancy.

## V. CONCLUSION

A retrospective examination of the entire body of Gary's products liability work ignites in the reader the sparkle of intellectual engagement in tandem with an appreciation that the shaping of ideas ought to include consideration of how they might play out in practice. In addition, it provokes a profound sense of sorrow at what we shall miss. Gary might not always have been right,<sup>109</sup> but he was never uninteresting and consistently challenging, and he made better scholars of us all.

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108. Gary might have considered how his approach compared with that adopted by the Pennsylvania Supreme Court in *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), which approved an instruction to the effect that manufacturers were guarantors of the safety of their products. *Id.* at 1027. For an interpretation of *Azzarello* that offers interesting parallels to Gary's suggestion, see Ellen Wertheimer, *Azzarello Agonistes: Bucking the Strict Products Liability Tide*, 66 TEMP. L. REV. 419 (1993).

109. See, e.g., Gary T. Schwartz, *Tobacco Liability in the Courts*, in SMOKING POLICY: LAW, POLITICS, AND CULTURE 131, 132 (Robert L. Rabin & Stephen D. Sugarman eds. 1993) (writing that "tort law does not have a major role to play in the development of public policy for smoking in the 1990s," proving the hazard of making predictions). On the contribution of information about tobacco unearthed during product liability litigation to the development of regulatory policy by the Food and Drug Administration, see Margaret Gilhooley, *Tobacco Unregulated: Why the FDA Failed and What To Do Now*, 111 YALE L.J. 1179, 1187 (2002).