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Tributes

TRIBUTES TO PROFESSOR OSCAR GRAY

GUIDO CALABRESI*

Can it be that Oscar Gray is retiring? It is possible that the time is ripe for a *estschrift* honoring him and his extraordinary achievements as a teacher and scholar? In one way it surely is time, because what he has accomplished undoubtedly justifies this and many honors. But his wisdom, and his feistiness, suggest that it is far too early and that there is yet much more to come.

His teacher, and mine—that is why we are truly brothers in the law—Fleming James, Jr., would be both very proud and very, very pleased. *Jimmy* wanted Oscar to take over “his” casebook—Shulman, James, and Gray—and, even more, he wanted Oscar to inherit and maintain “The Treatise”—Harper, James, and Gray. James knew that among his many pupils, Oscar better than anyone else understood his vision and yet was independent and creative enough to chart new courses as the law of torts demanded them. In other words, Oscar was, and is, as Jimmy once put it: that rare pupil who is capable of “pushing the quest further” and, as such, worthy of his teacher’s “special affection.”

But that special affection is due to Oscar from many more than just his great teacher. It is due him from all of us who work in this wonderful field. And it is due to him especially from me. As a teacher I have, for many, many years rejoiced in his insights, and in the elegance and clarity with which they are presented. As a judge, I have

* Judge, United States Court of Appeals for the Second Circuit. Former Dean and Sterling Professor of Law, Yale University.

found the scope and depth of his learning invaluable . . . and also fun. Even though I have thought, taught, and written about torts for nearly forty years, I could not conceive of starting to write an opinion in the field without having a lively conversation with Oscar Gray's writings first. And, when I approach other areas of law, I find myself wishing again and again that there were, in those fields as well, works of the calibre of Harper, James, and Gray to argue with and learn from.

This is so, of course, because of the breadth of Oscar's knowledge, and because of the depth of his insights. But it also is so for another, perhaps even more important, reason. And that is Oscar Gray's profound decency. This human quality informs everything Oscar writes and makes his works, like the works of Fleming James himself, infinitely valuable to scholars, to teachers, and especially to judges.

Years ago, when James retired, I wrote a piece in which I called him "*il miglior fabbro*." How true this is today of Oscar Gray, and how appropriate it is to end this note of appreciation as I did the one to Fleming James—

Oscar, *Ad Multos Annos!*

GEOFFREY C. HAZARD, JR.*

Professor Oscar Gray became a member of the American Law Institute in 1975. Since that time, Oscar has served on several committees: the Advisory Committee for the *Restatement (Second) of Torts*, the final text of which was published in 1979; the Advisory Committee for the *Restatement (Second) of Judgments*, the final text of which was published in 1982; the Advisory Committee of the *Restatement (Third) of Torts: Apportionment of Liability*, the work on which was begun two years ago; and the Members Consultative Group for the *Restatement (Third) of Torts: Products Liability*, a project that is presently in midstream. In addition, Oscar has regularly attended the annual meetings of the Institute in May of each year, and he has given me as director of the Institute, and my predecessor, Herbert Wechsler, occasional advice on various matters of Institute concern.

I first came to know Oscar in his capacity on the Advisory Committee for the *Restatement (Second) of Judgments*. That project had been outlined in a prospectus by Professors Benjamin Kaplan and David Shapiro of Harvard Law School and then commenced with them as reporters in 1971. Originally I was on the Advisory Committee, along with Oscar. Not long afterward, Ben Kaplan was appointed to the

* Director, American Law Institute.

Supreme Judicial Court of Massachusetts, which required his withdrawal as reporter—he then joined the Advisory Committee. I was appointed co-reporter with David. Shortly thereafter, David suffered an illness that required his withdrawal. So it was that I became reporter for the project, eventually carrying it through to completion. The opportunity evidently was a pivotal event in my eventually becoming director of the Institute. My success as reporter was due in large measure to the intellectual and collegial support provided by the members of the Advisory Committee, Oscar among them.

The task of a member of an ALI Advisory Committee requires a combination of competences. Obviously, one is having a sufficient familiarity with the subject matter of the project to be able to make substantively useful suggestions. Another is being a careful reader, to discover what suggestions should be made, to prepare for participation in the informal discourse of an Advisory Committee meeting, and to give opinions to the director when necessary concerning the progress of the project. Another is being a good listener, to understand the exchanges between the reporter and other members of the Advisory Committee, to identify confusion and help rectify it, and to ration one's contributions in suitable deference to the other participants. Still another is being a good critic, because the essence of the Institute's deliberative procedure is the frank exchange of views about what the law is and the direction in which its development should be encouraged. Yet another is being a good colleague, because even the most self-confident reporter can be discouraged by criticism leveled at his most precious work.

The need for these qualities is greater still when a project's progress is interrupted. The progress on the *Restatement (Second) of Judgments* was interrupted twice, as indicated above. The patience and support of the members of the Advisory Committee, Oscar among them, was of inestimable value.

The same qualities are required of an effective participant at annual meetings of the Institute. If anything, even greater discipline is required. More diverse subject matter must be canvassed than in an Advisory Committee meeting, with less time available for each subject. The annual meetings of the Institute are large gatherings at which the floor is open. Any such convocation inevitably reveals members whose appreciation of their own contributions exceeds the evaluation placed by others in the company.

In my observation the member is most effective who is well prepared, has something to say, and says it concisely. As a former reporter, I can say that contributions of this kind are welcome because

they not only improve the product but also improve morale and hence receptivity to other suggestions. As present director of the Institute, I am also aware of the professional respect that is tacitly conferred by members of the Institute on those who make contributions of this quality.

Oscar Gray consistently has made such contributions to the Institute. I can immediately visualize him on the Institute floor, rising quietly to take his turn, holding the text in hand, addressing the reporter directly, and asking such questions as "Why?" or "What is the support for this proposition?" or "Is this section consistent with the Comment on page X?" Those presiding at the dais have long since learned that Oscar's questions, or comments in the form of questions, are very much worth heeding. Reporters, typically having less experience in the Institute, usually require time to learn this lesson. But when the lesson has been learned, a reporter comes to know that Oscar rises in order to clarify and to support creation of the best work a project is capable of producing.

Advisory Committee work affords Oscar greater prominence, given that a committee is a much smaller group and sits together for two or more days running. Here again I can visualize Oscar, now seated. His beard hangs upon his chest, his glasses make it difficult to read his eyes, and he is no taller than when standing. He is unfailingly polite in anticipation, waiting to be called upon rather than intruding on someone else's discourse. When he is recognized, he is unfailingly polite in presentation, doing his best to address what the text is trying to convey. He always has something valuable to say, and he always says it in few words. When he comes back to a point after others have spoken, it is because the force of his comment had not been fully comprehended. He is always understood to be seeking improvement in the text and not vindication of his presence.

Oscar is thus an excellent teacher of lawyers and law professors. I would infer that he is equally good with students, particularly those who can recognize the clear and careful intelligence behind his unpretentious mien. His retirement from the University of Maryland School of Law will leave a very large gap in that faculty. However, it will leave him continuing opportunity to provide the American Law Institute with the benefit of gracious presentations of thoughtful views.

DONALD G. GIFFORD*

Professor Oscar Gray's retirement from the University of Maryland School of Law marks, in a very real sense, the end of an era in American law and legal education. Professor Gray is among the last in a tradition of great American treatise writers. In recent years, he has been the sole remaining author of *The Law of Torts*, which bears his name along with those of the late Professors Harper and James. The publication of new editions of the work and the annual supplements is the result of thousands of hours spent meticulously reading new cases, each carefully noted on three-by-five inch cards. The entire process is a passion not only for Professor Gray, but also for his numerous research assistants. As such, Professor Gray follows in the footsteps of the great treatise writers before him: Williston, Seavey, Corbin, and Scott.

The good news is that Professor Gray's retirement from teaching will enable him to focus on his scholarship, to keep up *The Law of Torts*, and to develop other new scholarship for years to come. Unfortunately, the retirement of the nation's last great traditional treatise writer marks the transition to a new time when computer-assisted research has replaced the treatise. We can only hope that Professor Gray's retirement does not mean that we have seen the last of the giants in various fields of law who understand not only the big picture, but also how each individual decision from fifty-one jurisdictions fits into the mosaic.

Professor Gray has contributed much to the University of Maryland School of Law as one of a handful of "authorities" in what is clearly one of the most important areas (Gray and I would say, *the* most important area) of law. But he has given so much more. He has been the senior scholar and a voice of conscience at the School of Law since 1971. His brilliant mind spawns questions at faculty lectures and lectures by distinguished visiting guests that cut to the essence of the subject at hand. The books and articles of so many younger scholars have benefited from his critique and analysis.

Oscar is a teacher to all of us, faculty and student alike. As I talk with hundreds of alumni in my capacity as dean, invariably the best and most successful practitioners take the initiative to ask about Professor Gray and whether he is still teaching. Because my principal field of teaching and scholarship is also torts, I particularly cherish my role as one of Oscar's students. Not long ago, I asked him to attend a lecture I was offering on the causes of the perceived medical malprac-

* Dean and Professor of Law, University of Maryland School of Law.

tice crisis. It was a topic I had studied intensively for many years, and my own scholarship in the field had been well received. At the end of my lecture, Oscar took issue with an important point that I had made. He was not contentious or argumentative, but it soon became clear to me that the master had detected a logical flaw in my analysis. Without doing harm to my ego, he forced me to reevaluate some of my conclusions. What was all the more remarkable is that although Oscar is typically thought of as a fairly traditional legal scholar who emphasizes doctrine, he used the tools of statistical analysis to expose the shortcomings in my reasoning. Among my personal privileges as Oscar's colleague have been long lunches talking about topics such as the collateral source rule and joint and several liability. Both of us, I suspect, are occasionally frustrated that we find these topics more fascinating than our students sometimes do.

Professor Gray often sounds the lonely voice of principle in the modern world. Most recently, he has been heavily involved in debates with the American Law Institute on the Products Liability *Restatement*. By speaking out he has forced others to deal with the consequences of their actions, to recognize the ways in which the *Restatement* affects law that others may not have understood, and that may limit the role of juries in products liability cases.

I confess that emotionally I can only accept Professor Gray's retirement from the University of Maryland School of Law faculty when I recognize it for what it is in reality—a career transition. With so many scholarly projects to be completed, Professor Gray's retirement from teaching will allow him to focus on these efforts.

It is often lightheartedly said, "You are a gentlemen and a scholar." To no person could this be said more sincerely or more truthfully than to Professor Oscar Gray. We take this occasion, Oscar, to celebrate your achievements and to wish you long and continued success in your scholarly and personal endeavors.

DAVID BOGEN*

It is a pleasure to write this tribute to Oscar Gray in order to let him know publicly how much I value him as a colleague. He will, of course, point out the flaws and missing citations, and perhaps suggest some other perspectives on the piece, but I am counting on his usual generosity to his colleagues' work to forgive the blunders. Whether I will hear his comments may be a different matter. Oscar's voice is

* Professor of Law and T. Carroll Brown Scholar, University of Maryland School of Law.

often lost as it struggles to get through his beard—as though each thought must be filtered until it is pure.

Oscar Gray is an exemplar of the true scholar—equally at home in the past, the present, and the future. As the Maryland correspondent to the Selden Society, Oscar revels in the history of the common law. If he glimpses a spark of that interest in you, he will delightfully introduce you to its mysteries and joys.

It is the present, however, that Oscar has mastered. My English professor told his students that they were free to disagree with him about American literature after the Revolution, but, because he had read everything written during the colonial period, discussion was a waste of time. Although Oscar seems to have read everything written about torts, he is too modest to think that no one can add to his knowledge. He is always willing to learn as well as to teach. No one at Maryland will forget the lava-like flow of books that engulfed table after table in the library as Oscar read every tort case in the United States (and those of interest throughout the world) to achieve an unequalled mastery of current tort law.

His work at the American Law Institute (ALI) shows not just an understanding of the present, but a clear vision for the future as well. In Maryland, he has fought to reverse the antediluvian policies on contributory negligence that have blocked tort recovery, while his efforts at the ALI have sought to preserve plaintiffs' rights to sue for negligence in products liability cases.

Oscar Gray loves the law—he has devoted his life to learning it, explaining it, and contributing his voice to its improvement. While he is basically a calm and reasonable man, when his sense of justice is offended, he can be passionate in his denunciation. Professor Gray does not simply comment on the law, he participates in it. Whether defending a charge of resisting arrest, suing American Express, or getting the cross off the flagpole flown by the state—he is willing to pay the cost of fighting for his beliefs.

As with other legends, there are many stories about Professor Gray, and some of them are true. They suggest the many aspects of his character. The careful scholar is a Hagerstown, Maryland, boy who delights in the Orioles. The local boy is an international traveler with good friends from other lands. A man with global vision, Oscar has been active in his local Washington, D.C., community. He is a warm and generous supporter of younger colleagues (even as they too grow older). He is as liberal in his appreciation as he is astute in pointing to the weaknesses in a colleague's work.

Oscar's adventurous spirit is evident even in the trek from his home in the District of Columbia to work in Baltimore. Despite his mild manner, he is at least capable of keeping pace with the traffic that zips up the Baltimore–Washington corridor. One day, perhaps mulling over some arcane torts problem, he may have done a little more than “keep up.” Suddenly, the driver of a nondescript vehicle tried to force him to pull off the road. Alarmed by the perceived threat to his safety, Oscar pressed the accelerator to the floor. In the rear view mirror he could see his antagonist in pursuit, and that he had placed a revolving light atop his car. Oscar continued at full speed to escape the threat. As he neared Baltimore, the speeding professor's path was blocked by a phalanx of police vehicles. He came to a halt and was immediately surrounded by the police. The man from the nondescript vehicle also stopped, got out of his car, and joined his fellow officers in arresting the scholar.

For the next several weeks Oscar could be heard daily in the faculty lounge discoursing on the law of arrest—the requirements for identification as a police officer, etc. Perhaps his exposition of the law or that of his attorney was persuasive, or perhaps the former student who prosecuted him had some understanding and compassion. Whatever the cause, the charges eventually were dropped.

Every person on God's green earth is unique—but Oscar is unique.¹ Oscar is perhaps the most striking among a faculty filled with original figures. With a floppy hat of cotton in summer and tweed in winter, winter cape, ubiquitous cane, and enveloping beard, he has long served as a model of singular style and taste. Some years ago, laid low with an eye problem, Oscar was forced to wear a patch over his eye. He confided to a colleague that one advantage of his illness was the opportunity to wear such a rakish accessory. When his colleague said, “Why don't you just wear the eyepatch when your eyes recover,” Oscar replied, “But that would be affected!” And, clearly, Professor Oscar Gray is genuine. There is, however, one “affect” that always will accompany Professor Gray: the deep “affect-ion” that his colleagues hold for this epitome of scholarship and humanity.

WILLIAM L. REYNOLDS*

What can I say about Oscar? It certainly is true that for a quarter century, he has been a friend, role model, and source of delight. But

1. The dictionary vocabulary is not sufficient to describe Oscar Gray.

* Jacob A. France Professor of Judicial Process, University of Maryland School of Law.

that statement alone fails to capture the Oscar essence. Let me try a few stories.

Oscar has been a wonderful friend for these twenty-five years. In my neophyte teaching days he counseled and reassured me. (He once attended my contracts class as part of the promotions process; he came up afterward to a very nervous young professor, beckoned to me solemnly, and, in his hoarse whisper, said: "Write larger.") Oscar is always ready with great restaurant and wine recommendations—not your usual fare either, but extremely good values. If you're going to London or the West Coast, call Oscar first.

Oscar is the most dedicated scholar I have ever met. He seeks truth, and only truth will do. He is not content merely to read the cases that he cites (a rare enough trait among today's scholars), but he reads the sources cited in those cases, as well as the cases cited by the sources. Woe to the scholar caught by Oscar in an assertion not backed up by the record. Typical of Oscar, however, is his reaction: not scorn, but intense disappointment. Of course, this dedication leads Oscar down the trail of lost causes, most recently shown by his critique of the proposed *Restatement (Third) of Torts—Products Liability*.¹

As a result of his dedication (as well as his learning and his common sense), his magisterial treatise on tort law² is far and away the best comprehensive treatment on the subject. For both professor and practitioner, it is the first source for enlightenment.

Oscar's idiosyncracies (eccentricities?) have always been enjoyable. The D.C. Circuit took notice of his character traits a few years ago. Oscar and his delightful wife, Sheila, were having an anniversary dinner at a fancy restaurant where he tried to pay for dinner with an American Express card. After a while, the maitre d' returned and, stating that he was acting under orders from American Express, proceeded to cut up Oscar's credit card in front of the horrified couple. Now most of us would have taken our lumps and gone home. Not Oscar! He sued—and won.³ The court, speaking through Judge Mikva, after observing that Oscar had persevered despite an extremely burdensome course of litigation, commented that the plaintiff was "te-

1. See Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism*, 61 TENN. L. REV. 1105 (1994).

2. FOWLER V. HARPER ET AL., THE LAW OF TORTS (2d ed. 1986). It is typical of Oscar that although little remains of the 1957 edition of Professors Harper and James, Oscar's name still comes a very modest third.

3. The account of this grisly tale is told in *Gray v. American Express Co.*, 743 F.2d 10 (D.C. Cir. 1984).

nacious even beyond the professional custom . . . a stubborn professional."⁴

That statement certainly captured some of Oscar's spirit. I believe, however, that what really motivated him in the litigation was his fundamental sense of justice. He had been wronged by a powerful corporation, and that wrong had to be righted.

Curiosity is also an Oscar character trait. He is well read and knowledgeable on every topic. Illustrative are his comments on the floor of the American Law Institute, where he makes cogent and incisive comments on almost every topic up for discussion. Now this is not a forum for the faint of heart, yet Oscar not only speaks but he is listened to with great respect.

Throughout the twenty-five years Oscar has taught at Maryland, the school has grown by leaps and bounds in national reputation. More important, we have been an incredibly friendly, cohesive, and congenial faculty (think of us in this respect, at least, as the antithesis of Harvard). Few professors leave for greener pastures, and many have joined us after learning of our reputation. Much of that ambience can be traced to Oscar, to his warmth and his integrity.

I am very glad he is only retiring, not leaving. I look forward to another quarter-century of learning from Oscar, and laughing with him.

KENNETH S. ANECKSTEIN*

I have known Professor Oscar Gray for almost three years, first as a student and then as one of his research assistants. Looking back on the time I spent obtaining my legal education, some of my fondest memories and most rewarding experiences relate to my numerous encounters with Professor Gray. As a student, I had the good fortune of learning torts from one of the field's most eminent personas. As one of his research assistants, I had the additional pleasure of getting to know Oscar Gray, the person. In the few words that follow, I could not possibly do justice in discussing such a complex individual. Instead, this brief essay attempts to provide some snapshots of an individual who had a profound influence on my legal education. The very first class I attended in law school was Torts I. While I sat anxiously awaiting the commencement of my legal education, I walked Professor Gray. My first impression of him was not flattering: a frail man

4. *Id.* at 20-21.

* Clerk, the Honorable Glenn T. Harrell, Maryland Court of Special Appeals. J.D., University of Maryland School of Law, 1996.

wearing a well-worn sport jacket, his face shrouded by its most prominent feature, a bushy gray and white beard. Over the next few weeks my impression of him headed further south as we became mired in one case, *Ives v. South Buffalo Railway*.¹ In *Ives*, New York's highest court held the state's first workers' compensation law unconstitutional because it sought to impose liability without fault. Professor Gray spent the first three weeks of that semester criticizing the court's attempt to "reduce all tort liability to terms of fault."² Fine enough, but I was still waiting to learn what a tort was. It was not until later that I realized Professor Gray's true pedagogical purpose: to teach us that opinions, written by even the most esteemed jurists, should be scrutinized with a generous dose of skepticism.

At the end of the first semester I caught my first glimpse of the person Oscar Gray—a professor who cared about his students' welfare. At this point my classmates and I were all worked up over our upcoming exams. Professor Gray tried to allay our fears by telling our class that by having gained admission to law school, we were already members of the "club," and that we should not be too concerned about exams. While studying for the Torts I exam, I began to appreciate how well he had taught us. My class notes made sense because he had presented the material in a surprisingly simple manner and with a great deal of clarity. I also found his approach practical, grounded more in the real world than the ivory tower of academia. Not bad for someone touted as an eminent torts scholar.

Moreover, he said that we should use the exam as a vehicle for showing off our knowledge and reasoning ability. For me, his pep talk mollified some of the pre-exam jitters I was experiencing. His interest in students went beyond the classroom. As our relationship developed over the next two years, Professor Gray often sought my input before a faculty meeting when a student issue was on the agenda. To me it seemed that he truly had the students' best interests in mind.

Professor Gray also encouraged his students to cultivate their individual skills and talents. Early in the spring semester of my first year I asked Professor Gray for a job as a research assistant. At this point in my legal career, my resume barely filed half of a page—if I used extra spacing. At the suggestion of a friend, I included a line stating that I spoke conversational Spanish. Much to my surprise, this caught Professor Gray's interest. In my "interview" he strongly encouraged me to maintain my linguistic skills by reading the Spanish legal materials in

1. 201 N.Y. 271 (1911).

2. 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS 91 (2d ed. 1986).

the law library. This, he stated, would improve my prospects in the job market.

That summer I worked full time for him, during which the barriers that normally exist between students and their teachers dissolved. What struck me immediately was that he was a man of genuine modesty. He attributed any praise concerning his treatise to his co-authors, Fowler V. Harper and Fleming James, Jr., while assuming responsibility for any criticisms or errors. Moreover, throughout the treatise, Professor Gray referred to himself merely as "the junior author."

Oscar Gray's humility was also evident in the manner in which he treated his research assistants. Once he asked me to update the cases on malicious prosecution. Upon giving me this assignment, he encouraged me to consult other secondary authorities and said that if I believed he could present the material more clearly, I should say so. I was floored. Here was Oscar Gray, one of America's leading torts scholars, soliciting a critique from someone who had just completed one year of law school.

I have seen firsthand the energy Professor Gray puts into his work and the enjoyment he derives from it. Frequently we would meet to update and correct citations in his treatise. Often he would take a case that merely required a change in the reporter volume and begin poring over it. On these occasions it seemed as if he was revisiting and reminiscing with an old friend whom he had not seen in a while. In addition, if I brought to his attention a case that signaled a new trend in the law, he acted like a giddy child who had just received a new toy. He would then give me a discourse on the case from various angles, reminding me of how my English literature professor would dissect a Shakespearean play.

The acuteness and versatility of Professor Gray's mind is amazing. Once I had to summarize an article from a chemical engineering periodical for him. Within an hour he understood it on a level far deeper than I. While working for him we have discussed a variety of subjects ranging from social utility to shortstops; from products liability to the Privy Council.

After that summer I continued to work for him during law school, and our relationship has evolved to the point where I now consider him a good friend. He has a great sense of humor, and can also take a good deal of ribbing. One time during a used book sale, I saw Professor Gray rummaging through a box of books. I approached him and asked if he was looking for a Gilbert's or the Casenotes for his casebook, and offered to lend him mine if he could not find one. He

snickered and replied that he was checking out the going rate for his casebook. He then asked what his book cost new, thinking that the price was about twenty-five dollars. I told him to double that. Then I tugged at his trademark, well-worn, blue sport coat and said, "At fifty bucks a pop, I figure you could afford a new one of these." A wide smirk appeared from beneath his beard and he responded, "I paid less than that for this."

Finally, I have also seen Professor Gray's compassionate side. In the beginning of my second year, one of my classmates, who was dating another of Professor Gray's research assistants, died in a tragic suicide. A few days later, I was walking back to school from lunch when Professor Gray saw me and motioned me over. He asked how his other research assistant was doing and requested that I convey his sympathies. I suggested to Professor Gray that it would mean a lot if he expressed those sympathies directly. That night he telephoned my colleague and spent several minutes on the phone with him.

As of this writing, Professor Gray has taught his last torts class. Needless to say, his successor has big shoes to fill. Obviously Professor Gray's insight into tort law is irreplaceable. More important, however, the University of Maryland School of Law has lost one of the classiest members of its faculty. Oscar Gray is one of the last of the true gentlemen. With that I say good-bye to my teacher, boss, and friend, but hopefully not farewell.