

The Yale Law Journal

Volume 91, Number 1, November 1981

“You Can Call It Thucydides or You Can Call It Mustard Plaster, But It’s All Proximate Cause Just The Same!”

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Yes, Jimmy was a legal realist who had no patience with word games, new or old. He treated ancient formalisms and neologisms alike, with the same cheerful, slightly bemused scorn. If the emperor had no clothes, it didn't matter whether the royal tailor had long served the court or had just been hired. Jimmy would describe what he saw, and always in a tone that suggested that he couldn't quite believe that others had not seen or had been unwilling to affirm what, to him, seemed obvious. And obvious it frequently was, but only after he had described it.

Yet Jimmy was unusual among the legal realists for he knew how to build as well as how to tear down. Much of tort law as he found it, as it had traditionally been described, made no sense because it ignored the existence of insurance. It was ripe for debunking. But Jimmy was not satisfied with pointing out the sham that many of the traditional formulations were and how courts and juries got around them. He had to develop new rules that would make sense, given insurance, for *now*. (Not forever. Like his great squash opponent, Grant Gilmore, he knew better than to fall into *that* trap.) And he had to do it with unfailing objectivity.

It is this last quality that made his work especially useful to those of us who followed him. He was more than skeptical of the significance traditionally accorded deterrence in torts law. Given insurance, individual deterrence simply made no sense to him, and so he focused on compensation. But he was too self-critical and objective to be satisfied with torts law as a compensation device. If that is all there is to it, then torts is only a half-way house toward social insurance paid out of general taxes. He was far

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from against such social insurance, but again he was too objective to conclude simply that we would end up there. There were too many contra-indications that, unlike many of his contemporaries, he could not ignore. And this inevitably meant that he would ask, in his teaching and in his writing, questions he was not prepared to answer. Were there other, structural, forms of deterrence that would justify a torts, rather than a social insurance, system of compensation, even in the presence of insurance? Did these serve to explain those areas of strict liability that survived the high days of fault in the nineteenth century? He could not say; he did not know; yet the questions were consistently and courageously asked.

His great case book, written with Harry Shulman, remains today the most modern of torts case books for precisely this reason. The *questions* are all there—magnificently demonstrated in brilliantly chosen and counter-pointed cases—those still to be faced, no less than those to which his followers have given possible answers. I wrote my first article in his torts class while struggling with those questions; I use his casebook still because it continues to urge me to “carry the quest further” (his own words, with which he inscribed the copy of Harper and James that Fowler Harper left me) and to show me how much remains obscure. Just as he remade torts law, he showed us all how much remains, always, to be remade.

Of his work in procedure I cannot speak firsthand. In our time he was the theorist in contrast to J.W. Moore, the down-to-earth lawyer. But what a practical theorist! As in his polemic with his friend Charles Gregory on the difference between contribution among joint tortfeasors and comparative negligence, his theories were always based on the world as it was, as it really worked. This, together with his utter lack of cant and pomp, sometimes misled those who did not know his writings. I remember a great, but overly sober, European proceduralist, coming out of a first meeting with Jimmy and exclaiming to me that no one that bouncy, that childishly questioning, that *pragmatic* could be a scholar. I told him to read Jimmy, and soon after the European theorist became Jimmy’s follower and lifelong admirer.

I could go on about Jimmy as a scholar, but to do so would be to slight what he was as a teacher and colleague. And in the classroom (which he loved) as well as in the faculty meeting (which he hated)—showing instinctive taste as to each—he was superb. He fooled those students who wanted “practical law” into thinking they were, or soon would be, getting some, while making them discover for themselves the joys of thinking about legal theory. He was gentle with the weak—in those harsh times when many teachers could be extraordinarily cruel—and fierce with those who thought they knew it all. “Let him speak for himself,” he would

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bellow when a self-declared “class leader” would try to make elegant the halting attempts of the class dodo. And sure enough, often as not, the dodo would (with Jimmy’s help) come out with wisdom the “class leader” would never have dreamt of. He had the disconcerting habit of asking a question and, after half an hour of fruitless attempted answers each of which he would patiently demolish, of leaving the class utterly frustrated with a shrug that more than implied that he didn’t know the answer either. Only later were we to realize, that in teaching no less than in scholarship, questions as yet without answers are as fundamental to learning as are brilliant new solutions. His verve, his “brio” in the classroom, cannot be adequately described—but whether he was telling a hilarious anecdote (always with a point worth remembering), insisting that his students use English correctly (an alternative is the choice between only *two* possibilities), or parsing the facts of an immensely complicated case, one was alive and jumping with him. “Gee,” he would say, and too soon, always too soon, the hour would be over.

When I came on the faculty he was already a senior colleague, a keeper of the wisdom and traditions that this anarchical place wisely does not entrust to minutes or to acts. Though he hated meetings—whether of faculty or committees—for the time they took from important things like teaching and writing—he always was willing to serve. He could end a long and tedious wrangle over grading systems (in which many who should have known better had raised issues of trivia into issues of principle) with a straightfaced—ironical—account of all the useless past wrangles and equally useless changes that had occurred in grading in the history of the school. Yet he cared passionately about the place, and did so with his usual fierce objectivity.

He could oppose the appointment of a Dean for reasons lost to the memory of almost all, and yet be among the very first and fiercest in proclaiming him, correctly, a great Dean and in following his lead. Whether Jimmy ever became personally close to the man, I do not know. It did not matter. What mattered was that the Dean was doing his job and Jimmy knew it right away. He could dislike a junior member of the faculty and express the strongest doubt that the person could possibly be promoted, and then on reading what the person had written become in committee and in faculty a most powerful advocate for tenure. Again, personalities, styles and approaches did not matter. Was the person someone who dared to be original and who had the capacity to carry it off? If so, Jimmy could be counted on.

He was keenly aware of how hard it can be to begin to teach and write at a place like the Yale Law School. But, unlike many, he knew what to do about it. I had only been back a few weeks, a year or so after graduat-

ing, when Jimmy appeared at my door with a draft of an article he was writing. "Can you help me with the second part," he said, "since you know more about that than I do." In retrospect that statement was ridiculous; of course, he did not need my comments. At the time, however, it seemed plausible, and I was fooled, though only into realizing the truth—that we were now *colleagues*, that I could ask *him* to help *me*, to read my drafts without fear of being judged, that age and tenure existed but that the only thing that mattered was carrying the quest further.

There surely was a Jimmy before Ruth, but I did not know him. For me his dapper elegance and unflinching courtesy were always associated with her. So also was their eighteenth-century farm house, so welcoming and so comfortable that it too had to provide a model for how a scholar could live. I as often visualize them, together in winter, before the huge fireplace, as I do him, behind, to the side, around, and in front of the desk . . . teaching.

Next week classes begin; my torts class will, because his did, spend an excessive amount of time on *Ives v. South Buffalo Ry.* And I will invariably think of Jimmy as I always do—as, in fact, do so many of his former students—with that very special affection and gratitude one has for that person who first taught one to carry the quest further.

September 1, 1981

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