

# Tulsa Law Review

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Volume 34

Number 4 *The Life and Legacy of Bernard Schwartz*

Volume 34 | Number 4

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Summer 1999

## Introduction: The Life and Legacy of Bernard Schwartz

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### Recommended Citation

Robert H. Henry, *Introduction: The Life and Legacy of Bernard Schwartz*, 34 Tulsa L. J. 651 (1999).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol34/iss4/1>

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## SYMPOSIUM

### INTRODUCTION: THE LIFE AND LEGACY OF BERNARD SCHWARTZ\*

The Honorable Robert H. Henry<sup>†</sup>

I first met Bernard Schwartz in the most fortunate of accidents. Dean John Makdisi, always the gentleman scholar, had invited me to drive over from Oklahoma City University to hear a visiting heavy-weight, the dean of one of our finest national law schools, who was to speak here at Tulsa.

I attended, and frankly, was a bit bored with the speech. Perhaps the visiting dean, a noted scholar, was not at his best that day. More likely, he had dusted off an old presentation that he had not bothered to update, feeling secure no doubt—having misconstrued his constitutional topic as jurisprudential—that his presentation was therefore timeless. I was regretting the time investment until after the address Dean Makdisi introduced the law school's new Chapman Professor of Law, and asked if he had anything to add.

A year or so later, I would hear Bernard Schwartz, as he spoke at my invitation in Oklahoma City, describe Justice Rehnquist when he first came on the court as a Hushpuppy-loafer-wearing, sweater clad, thick spectacled chap who looked like a small town college math professor.<sup>1</sup> Well, as Professor Schwartz rose that day in Tulsa, I also saw *and* felt the persona of a college math professor, but it was a certain

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\* The introduction of this tribute is based on remarks delivered at the Memorial Service Celebrating the Life and Legacy of Bernard Schwartz, Monday, February 23, 1998, The University of Tulsa Sharp Chapel, in 33 TULSA L.J. 1048 (1998).

† Judge, United States Court of Appeals for the Tenth Circuit; formerly Dean and Professor of Law, Oklahoma City University College of Law, 1991-94; Attorney General of Oklahoma, 1987-91.

1. Bernard Schwartz, 1994 Quinlan Lecture, *Not How the Grinch Stole Christmas, but How Chief Justice Rehnquist Almost Stole Roe v. Wade*, Oklahoma City University School of Law.

well-known German mathematician/physicist who retired to Princeton. Rising slowly, as he thought how best to diplomatically say what needed to be said, our jurisprudential unified field theorist began: "Well,—I, uh,—I think the dean is knocking on a door that has been closed for a very long time. . . ." And then, in a deluge of rapid-fire, impromptu sentences that had in fact been constructed by a lifetime of thinking about the topic, Professor Schwartz demonstrated the fallacies of pure originalism, and punctuated his argument with the easiest-to-understand example he could find of its shortcomings: the "coinage" clause of Article 1, Section 8, cl. 5, of our Constitution which clearly grants Congress the power "To coin Money, [and] regulate the Value thereof."

Professor Schwartz proceeded to explain that, unlike so many other clauses, the intent of the framers as to the exact meaning of that clause was crystal clear (not so clear to Professor Schwartz was probably whether they intended their intent to control and for how long). "Coin" did not mean "print," and *specie*, good, hard, metallic money was what everyone had in mind, especially after the disasters of paper money during the Revolutionary War. He went on to quickly explain the rise of paper currency in the Civil War era, and the disaster that resulted when the Court put in its two bits worth by trying to enforce the constitutional norm.<sup>2</sup> In a fraction of the time taken by the visiting dean, the new professor had more convincingly made the case. He sat down to a moment of awed silence at the effectiveness of his unprepared remarks, and then a round of generous and genuine applause followed.

Later I would read this same lesson in the Master's printed word:

A basic document, drawn up in an age of knee-breeches and three-cornered hats, can serve the needs of an entirely different day only because our judges have recognized the truth of Marshall's celebrated reminder that it is a *constitution* they are expounding—an instrument that could hardly have been intended to endure through the ages if its provisions were fixed as irrevocably as the laws and the Medes and Persians.<sup>3</sup> The constantly evolving nature of constitutional doctrine has alone enabled our system to make the transition from the eighteenth to the twentieth century.<sup>4</sup>

This was the basic constitutional teaching of Bernard Schwartz. He was an instrumentalist in the Hamiltonian sense, and in the Holmesian sense. His jurisprudential sympathies were with the Yankee from Olympus. He wrote:

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2. *Hepburn v. Griswold*, 75 U.S. 603 (1869), *overruled by* *The Legal Tender Cases*, 79 U.S. 457 (1870).

3. The reference is to the use in Judeo-Christian holy writ to the inflexible, unchangeable laws of the Medes and the Persians. See *Daniel* 6:8, 12, 15 (The New Oxford Annotated Bible 1977) ("Now, O king, establish the interdict and sign the document, so that it cannot be changes, according to the law of the Medes and the Persians, which cannot be revoked." *Daniel* 6:8). This inflexible order resulted, to the dismay of the King who drafted it, in the casting of the prophet Daniel into the fiery furnace. See *Daniel* 6. Professor Schwartz had an ancient clay tablet containing law from this region and era, which he showed me at my first visit to his home.

4. BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 264-65 (1990).

When Holmes asserted in his *Common Law*, "The life of the law has not been logic; it has been experience," and that the law finds its philosophy in "considerations of what is expedient for the community concerned," he was sounding the clarion of twentieth-century jurisprudence. If the law reflected the "felt necessities of the time," then those needs rather than any theory should determine what the law should be.<sup>5</sup>

But his call was for a law that was "flexible in the joints,"<sup>6</sup> not amorphous. Law was a principled activity based upon legal principles. Holmes was instrumental, but he was also restrained. Rights, "felt necessities," and human dignity were all encompassed by the "living traditions"<sup>7</sup> that even the paradigmatic conservative Justice John Harlan described as our American legacy. But along with these were legal principles, including restraint, and above all values. The major problem for modern jurisprudence, he would often remind, is the resolution of Roscoe Pound's antimony: "Law must be stable and yet it cannot stand still."<sup>8</sup>

Professor Schwartz would sharply criticize jurisprudential schools that were not grounded in stable principles of law. He would describe Critical Legal Studies as "academic nihilism" and observe that "Karl Marx still lives in only one place: the American Academy."<sup>9</sup> And, offering advice to feminist and critical race theorists, he would caution the abandonment of notion of objectivity upon which our law has been based.

It may be questioned [he said] whether women and minorities do not have the most to lose if objectivity is no longer an essential legal desideratum. Those who urge that objectivity should give way to "a more subjective, emotional legal rhetoric" may think they are advancing a just and noble end. Ultimately, however, they do no service to their cause or the women and minorities they profess to represent. One may modify what Justice Black once said of efforts to supplant legal process by coercive tactics in favor of minorities, "[Objective] law . . . is too precious, too sacred, to be jeopardized by subjecting [the law to subjective standards] that have been fatal to individual liberty and minority rights wherever and whenever such practices have been allowed to poison the streams of justice."<sup>10</sup>

And, as to values, he would close his *magnum opus* with the words of John Paul II, who warned that if there are no ultimate values

to guide and direct . . . activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without

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5. BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 394 (1993).

6. The phrase is really Judge Richard A. Posner's. See RICHARD A. POSNER, OVERCOMING LAW 244-45 (1995); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 238 (1990).

7. The quote was, "That tradition is a living thing." *Poe v. Ullman*, 367 U.S. 497, 543 (1961).

8. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1967).

9. See MAIN CURRENTS, *supra* note 5, at 604.

10. *Id.* at 623.

values easily turns into open or thinly disguised totalitarianism.<sup>11</sup>

Professor Schwartz concluded: Ultimately, a law without values is an oxymoron that cannot stand.<sup>12</sup>

But even though Professor Schwartz was an advocate of his Holmesian Hamiltonianism, he was more than that, a philosopher in search of a dialogue. He thought all respectable schools of thought should be invited to the table to participate. He battled frequently with Judge Posner over the judge's advocacy of the economist's cost-benefit analysis to legal questions that he thought it ill-suited for—like procedural rights. But he confided with admiration that Posner was the most influential and contributing jurist of this day.

As Tony Mauro wrote in *The Legal Times*, "When someone dies at the age of 74, the sadness felt by friends and admirers is sometimes tempered by the knowledge that the person lived a full life . . . but when . . . Bernard Schwartz . . . died the . . . shock was akin to the type of jolt following the death of someone much younger, someone in the prime of his or her most productive years."<sup>13</sup> The reason that shock was felt was because it was true. Professor Schwartz was truly in his prime, and in a place he loved, and in a place that adored him.

We will miss his sauntering through the hallway in stocking feet; the amazing connections he would find between the law and Dr. Seuss, Dick the Butcher, or David Letterman; his lively articles that could make administrative law minutiae seem part of our "living traditions"; his classroom performances, his lunching with colleagues, his dropping his important writing to chat with a student. He had so much more to say to us, so much more "fragmented jurisprudence" to repair. We are grateful indeed to Dean Belsky for his diligent work to gather, compile, and complete all that he can.

Professor Schwartz and I talked at some length a few days before the tragedy. He called to tell me how much he had enjoyed my review of his *Main Currents in American Legal Thought*.<sup>14</sup> We talked about several things, and when I raised one concern he told me that he had written a book on the subject in 1991 and if he could find a copy, he would send it forthwith. My clerk met me in the parking garage the day before Christmas to tell me the tragic news. I rushed into my office to call the University and saw the book, which had arrived that morning, at the very top of my mail stack.

All the books that Professor Schwartz gave me have special meaning. I am pleased to say that the most expensive book of his is one that I *bought*. I read *Main Currents* to brush up before my confirmation hearings. It was the best legal time I have ever spent.

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11. *Id.* at 643.

12. *See id.*

13. Tony Mauro, *Remembering a Supreme Scholar*, *LEGAL TIMES*, January 15, 1998 at 8.

14. *See* Robert H. Henry, *Catching the Jurisprudential Wave: Bernard Schwartz's Main Currents in American Legal Thought*, 33 *TULSA L.J.* 385 (1998).

I must add that early on I asked Professor Schwartz to call me not “judge,” but “Robert.” He refused, saying he always calls judges “judge.” I suspect he made an exception for his wife, but he would not except me. Which was just as well. I could never bring myself to call him “Bernie,” and, come to think of it, he never invited me to.

In a chapter on his beloved friend, Justice William Brennan, Professor Schwartz related how unceremonious and unassuming this “most influential associate justice in Supreme Court history”<sup>15</sup> was. He mused that Justice Brennan had once related with awe how at a charity auction, someone bid several thousand dollars to have lunch with him and Mrs. Brennan.

I am awed by the fact that I, like so many of you, often had the opportunity to have lunch with Bernard Schwartz, the legal giant, the “Superprof,” and it cost us nothing. Although that door, like the topic of the speech where I fortuitously met Professor Schwartz, is now closed to us, it will reopen every time we consult his books or articles, and remember his devotion to his craft, to his friends and to his students. Professor Bernard Schwartz is a permanent part of the “living traditions” that make up American Law.

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15. Bernard Schwartz, *How Justice Brennan Changed America*, in *REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE* 31 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

