

IN MEMORY OF HARVEY J. GOLDSCHMID[†]

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Today we bid farewell to Harvey Goldschmid, a sweet and gentle man, a friend whom so many of us trusted, a powerful and influential voice in corporate and securities law, a person whose career was as effective both as a scholar and teacher and as a government official as I have ever known. Harvey also was my closest friend in academia. Our friendship began literally in the first hours of my professional career.

It is particularly appropriate we do so at an ILEP conference. Ed Labaton took the lead in organizing the first and all subsequent ILEP conferences. Harvey and I, along with Jim Cox, worked with Ed on the first conference, and Harvey and Jim stayed deeply involved during the next 21 years of ILEP events. From the initial focus on Class Actions at the Crossroads to the conference today, ILEP has made a difference in articulating thoughtful programs, including outstanding speakers on pivotal issues of investor protection. Harvey's role has been consequential in every program.

Harvey characterized the noted Columbia historian Richard Hofstadter as the most important influence in his education, "although ironically he almost dissuaded [Harvey] from becoming a lawyer. [Harvey] did a major writing project for [Hofstadter],"¹ which I believe was a study of the influential Columbia University President Nicholas Murray Butler to which Harvey sometimes alluded in conversations with me. "At some point . . . [Hofstadter] said that I really ought to do something more important with my life [than become a lawyer]."² Harvey thought about this, but realized, "I love history in terms of reading, but there was more of an activist in me than in Richard Hofstadter. . . . [T]he excitement of being in the world more was . . . what finally drew me [to law]."³

Harvey served as a volunteer attorney in Mississippi for the Lawyers' Committee for Civil Rights during the summer of 1967. His close friend Peter Swords recalled that Harvey had just finished clerking for Judge

[†] This tribute is an expansion of an encomium I published earlier, *In Honor of Harvey J. Goldschmid*, 106 COLUM. L. REV. 1479 (2006).

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1. Interview by Robert Colby, SEC Historical Soc'y, with Harvey Goldschmid, at 2 (June 17, 2013), available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/20130617_Goldschmid_Harvey_T.pdf [hereinafter SEC Historical Soc'y].

2. *Id.*

3. *Id.*

Paul Hays and begun working as an associate at Debevoise & Plimpton. Harvey represented local movement lawyers who were attempting to enforce the Civil Rights Acts of 1964 and 1965, often attempting to secure the release of local leaders who had been jailed on bogus charges so they could continue their work. Harvey also liked to recall bailing Peter Swords out of jail when Peter was incarcerated after receiving a parking ticket at a laundromat.

This sense of wanting to help change the law also touched the way Harvey thought about his career at Columbia Law School. Harvey began teaching at Columbia Law School in 1970, emphasizing much later, “As I think about teaching, you’re trying to do two basic things: first, give students the knowledge, skills, background to handle complex issues . . . but the second more important part of university teaching for me is to think about not only what the law is, which students need to know, but what it ought to be.”⁴

Harvey’s work in government and private law made him more effective than many in academia, an effectiveness greatly amplified by his ability to win the trust and sometimes partnership of individuals who initially had staked out distinctively different policy positions, such as Weil, Gotshal & Manges senior partner Ira Millstein, who led efforts for the Business Roundtable in opposition to Harvey’s work at the American Law Institute Corporate Governance project, but who later co-taught seminars with Harvey.

Harvey’s wide range and intellectual sophistication further amplified his effectiveness. At the beginning of the Bill Clinton presidency, for example, Harvey performed the unique role of simultaneously advising Robert Pitofsky, then Chair of the Federal Trade Commission, and Arthur Levitt, Chair of the SEC.⁵

I first met Harvey during the summer of 1974. I had just graduated from Harvard Law School and begun work for Ralph Nader on a proposal for federal chartering of major corporations. Harvey was a protégé of former SEC Chair and then-Columbia Law professor Bill Cary. On my first day on the job, I attended a conference that Harvey helped organize in the Rainbow Room of the Rockefeller Plaza in New York City. Harvey amplified remarks he had given in 1973 on “The Greening of the Board Room: Reflections on Corporate Responsibility.”⁶ He delivered a powerful

4. *Id.* at 2, 13.

5. *Id.* at 20–21.

6. Harvey J. Goldschmid, *The Greening of the Board Room: Reflections on Corporate Responsibility*, 10 COLUM. J.L. & SOC. PROBS. 15 (1973).

critique of the typical corporate board, building on the work of Professor Myles Mace, among others, who had described the “considerable gap between . . . myth and reality”⁷ in the role played by the board and the weaknesses of state corporate law. He urged that boards should have more clearly defined functions, that boards should be composed only of outside directors, that shareholders should have an opportunity to nominate directors, and that the board itself should have a small independent staff.⁸

I was struck by Harvey’s maturity. He was thirty-four years old when he delivered his remarks, but he conveyed a sense of mastery of the subject and articulated themes that others, soon including Bill Cary, would also address.

Our friendship began. Harvey encouraged me to pursue an academic career a few years later. I was startled and grateful for his confidence in me. I consulted him every time I had a major life decision, and with the possible exception of Al Sommer,⁹ Harvey read more manuscripts I prepared than any other individual I knew. He was the Dutch uncle that everyone should have, a person of endless patience and extraordinary and sensitive intelligence.

Over time, we became a kind of mutual admiration society. I often wrote or called on his behalf to support his nomination and was thrilled when he was appointed SEC Commissioner. Harvey often supported me in my academic career and elsewhere. We both had the great pleasure of working together on a few occasions, including as Governors of the Financial Industry Regulatory Authority during six recent years.

There were occasional disappointments. Many years ago, after the Columbia football team lost twenty-nine consecutive games, one of Harvey’s sons wrote me when I was at Michigan Law School, asking me to send him a Michigan sweatshirt. “It is just too embarrassing otherwise.” I gladly did so and, after checking with my Dean, urged him to encourage his father to accept a Visiting Professorship at Michigan with the sweetener, “and I will do my best to arrange season tickets during next season on the 20 or 30 yard line.” Weeks passed. Finally, I received another letter from the son: “I talked to my Dad about this and he convinced me that we did not need to move to Ann Arbor. When we go to Columbia football games, we can sit anywhere we want!”

7. Myles L. Mace, *Directors: Myth and Reality—Ten Years Later*, 32 RUTGERS L. REV. 293, 293 (1979).

8. Goldschmid, *supra* note 6, at 18–28.

9. Former SEC Commissioner, 1973–76.

A more poignant disappointment for me was the rejection by the White House of the fervent efforts of me and many others to support Harvey's appointment as Chair of the SEC in 2009. I remain convinced that he would have been the wisest possible choice for the Commission at that time.

The first five years of my academic career were devoted to writing *The Transformation of Wall Street*, a history of the SEC.¹⁰ In 1982, I dedicated *Transformation* to Harvey in gratitude for his friendship and his encouragement of my academic career. I did not realize then how remarkable his contributions to securities law would ultimately prove to be. As a sometime historian of the Commission, I am confident that he was the most influential SEC Commissioner who did not become a Chair in the agency's history. Since this is an agency that has been blessed with extraordinary Commissioners, I mean this encomium as the highest possible praise.

Harvey's relationship with SEC Chair Arthur Levitt, initially as an advisor and then as general counsel, was "one of the great pleasures of [Harvey's] professional life."¹¹ In Harvey words, "Arthur was an extraordinarily effective chairman. He has remarkable leadership skills, immense concern about investor protection and the integrity of our financial markets, admirable courage, and unmatched practical insight and wisdom."¹² As Arthur Levitt's SEC memoir attests, these feelings were mutual.¹³ Arthur was not a lawyer, and Harvey, a lawyer's lawyer, supervised key projects for Levitt, such as the revision of the pivotal SEC Rule of Practice 102(e),¹⁴ which provides a standard of care for accountants and lawyers, and helping draft Regulation FD,¹⁵ which requires that corporate communications not be selectively disclosed to securities analysts. This was a key mechanism to reduce insider trading, which is the trading of material information before it is effectively disclosed to the public. Harvey had the ability to translate Arthur's policy preferences into proposals which were wise, sound, and feasible. On issue after issue, ranging from accounting independence to bank regulation to audit committees or pay for play for attorneys, Harvey's efforts were crucial to the success of Arthur Levitt's chairmanship.

10. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* (3d ed., Aspen 2003) (1982).

11. SEC Historical Soc'y, *supra* note 1, at 26.

12. *Id.*

13. ARTHUR LEVITT, *TAKE ON THE STREET* 91–92 (2002).

14. 17 C.F.R. § 201.102(e) (2016).

15. 17 C.F.R. § 243 (2016).

During the chairmanships of Harvey Pitt and Bill Donaldson, Harvey continued his service as a Commissioner. His inevitable preference was to work quietly and behind the scenes to help craft the most appropriate possible consensus policy at the SEC. His term as Commissioner should be remembered for quiet victories on a myriad of issues such as implementing Sarbanes-Oxley rules, among many other topics.

But Harvey's period as Commissioner will also be remembered for a small number of very public occasions on which he took a stand on principle. His statement opposing the confirmation of Bill Webster as the first chair of the Public Company Accounting Oversight Board was a profile in courage. Harvey knew and admired Bill Webster. Harvey has a rare gift for friendship which made opposition to a man as extraordinary as Bill Webster particularly painful. The transcendent issue, however, involved a dysfunctional appointment process that had earlier offered the chairmanship to then TIAA-CREF CEO John Biggs and that subsequently led to an SEC Chair failing to share material information with fellow Commissioners. These were inexcusable failings. Harvey respectfully but firmly said as much when Bill Webster was confirmed by a three-to-two vote over Harvey's dissent. The bungling of the confirmation of Webster became a proximate cause of the subsequent resignations of both Bill Webster and Chairman Pitt. Never in the history of the SEC were relations among Commissioners as strained as they had been during the last months of Harvey Pitt's chairmanship.

Sometimes institutional courage is rewarded. During the subsequent chairmanship of Bill Donaldson, the Commission had a new Chair, an expanded budget, and dramatically improved morale. Harvey's role in some respects was even more remarkable working with Chairman Donaldson than it had been working with Chairman Levitt. The two, although from different parties, worked well together. Donaldson in many instances appeared to trust Harvey's judgment as much as Levitt had. To be sure, there were occasional differences, most notably over shareholder proxy access. But these were dwarfed by the number of issues on which Bill Donaldson and Harvey Goldschmid worked effectively together.

Harvey was the type of leader at the SEC who would have been deeply admired in Britain as an indispensable senior civil servant. We do not have a tradition in this country of respect for those who work to effectively implement the key policies of our government, but, as with Harvey, they verge on the indispensable for our government to function as well as it does.

On a personal level, Harvey Goldschmid's contributions to the SEC in particular and corporate and securities law in general were always marked

by a sense of gravitas, a mastery of complexity, and an ability to distinguish issues on which compromise was appropriate from those in which matters of principle had to dominate. Harvey Goldschmid loved to work quietly and thoughtfully on a systematic review policy, and only when his ideas were fully formulated would he publically address such topics as the value of full disclosure, ethical behavior, accountability, and effective institutional structure. When he spoke, his was an influential and powerful voice.

Throughout his career, Harvey published a good deal, but he should receive particular credit for being the drafter or editor of significant institutional documents. For many years, Harvey was one of the Reporters on the American Law Institute's ("ALI") Principles of Corporate Governance project.¹⁶ Perhaps the most effective part of this document is Part IV, which addressed the business judgment rule and duty of care and which Harvey took years drafting and revising.¹⁷ He is a good illustration of an adage I have often repeated: "To lead, listen." Harvey not only listened; he heard and found a way of articulating these essential corporate law concepts in ways that strengthened both shareholder protection and corporate effectiveness at the same time. To take another example, his work on SEC Rule of Practice 102(e)(iv)¹⁸ is but four short paragraphs long. These paragraphs, nonetheless, masterfully articulate "improper professional conduct" in a way that ended years of litigation and over time have proven to be effective for the auditing profession.

In the broadest sense, Harvey Goldschmid's career reflects a determination to improve the integrity and accountability of business corporations in ways consistent with their most efficient operation. There is a pivotal element of balance in his work. Harvey was capable of transforming shouting matches on issues concerning the corporate board into thoughtful discussions of how a new standard actually should operate and what the costs and benefits of proceeding with a proposed standard would be. He had an unerring genius for appreciating the operational implications of new rules.

For over forty years, Harvey was associated with Columbia Law School. I have always been in awe of his classroom abilities. He was capable of memorizing the names of each of more than 150 students and orchestrating a dialogue that involves all of them in reasoning through a

16. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994).

17. *Id.* §§ 4.01-.03.

18. 17 C.F.R. § 201.102(e)(iv).

case or concept. The students of Columbia Law School were the immediate beneficiaries of his pedagogy. But all of us who had the opportunity to hear, talk to, or work with Harvey Goldschmid were the ultimate beneficiaries of his multifaceted career.

Very rarely in life do you meet a scholar and government official who both makes great contributions to public policy and is a good man. In my lifetime, I have never met one who was the equal of Harvey Goldschmid.