

Remembering Grant Gilmore

Dennis J. Hutchinson

IN 1967, GRANT GILMORE was voted the second triennial Coif Award by the Association of American Law Schools for his two-volume, 1500-page treatise, *Secured Interests in Personal Property*. The chairman of the Award Committee, professor and vice-provost Herbert Packer of Stanford Law School, cited the work as “a singular power of the single human mind” which had “impos[ed] a kind of order on unruly and recalcitrant facts” and presented “reality in a new way.”¹

The object of Packer’s compliments then rose to respond, and for those who did not know him, he presented a thoroughly unprepossessing figure: a business suit several years out of fashion, shirt-collar tips curled – their stays long-since gone – and a slightly cross-eyed gaze behind large horn-rimmed glasses. The entire effect, accented by a brushy mustache, might have been comical but for the disarming diffidence enveloping the entire package. Those who knew Gilmore were not

misled by his appearance but worried that they might not be able to hear his remarks; what his colleague Philip B. Kurland described as a voice with “cadence and vibrancy of a Welsh poet” was to others a low, rolling mumble often inaudible past the third row of a classroom or lecture hall. Gilmore’s remarks surprised many in attendance, because they focused as much or more on teaching than on scholarship.²

I have often thought that the distinguishing mark of our particular profession is its essential loneliness. There are many honorable ways of making a living – indeed of coping with life – in which you know to start with what it is that you are supposed to be doing and will in due course be told whether or not you have succeeded in doing it. We are like spies in an alien land, cut off from any contact with headquarters, with no way of ever finding out whether the intelligence which we diligently collect and relay is what is required of us or is even relevant to our vague and ambiguously stated mission.

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¹ “Coif Award to Gilmore,” 16 U. Chi. L. Sch. Rec. 8, 30 (Spring 1968).

² Id. at 30-31.

When Gilmore finally addressed the matter of scholarship, the occasion of his remarks, his emphasis remained on teaching, at least by implication.

The Coif Award was, by the conventions of the profession, the high-point of a distinguished career, a career spent entirely in elite institutions, depending on one's view of the United States Navy. Gilmore attended Boston Latin School, was elected to Phi Beta Kappa in his junior year at Yale College and received a doctorate in French from Yale in 1936 for *Stephen Mallarme: A Biography and an Interpretation*. After four years teaching French, Gilmore quit ("I couldn't take it any longer," he said many years later) and enrolled at Yale Law School. Asked later why he chose law school at the age of 29, he said: "[I]t seemed to be an available thing. Soon, however, I began to find it challenging and fascinating. What I liked so much was the wonderful interplay between the extremely abstract and the extremely concrete." Gilmore became Editor-in-Chief of the *Yale Law Journal*, practiced briefly in New York City ("I later had to unlearn everything I was taught in practice") and served for two years in the Navy during World War II. He was appointed to the Yale law faculty in 1946 and assigned to teach commercial law and admiralty. Karl Llewellyn of Columbia hired him to help draft Article 9 of the Uniform Commercial Code. In addition to his drafting and teaching, he produced articles in professional journals and several sets of unpublished teaching materials.

Security Interests was a multi-year project, and by the time that the Coif Award was presented, Gilmore had moved from Yale to the University of Chicago Law School. Although Chicago had pursued him for years (Llewellyn, who had left Columbia for Chicago, was one of the prime movers), Gilmore's departure from Yale stemmed from a bitter tenure fight in which he was in the distinct minority, unwilling to

compromise despite appeals from close friends on the faculty. The Chicago faculty, then distinguished more for scholarship than teaching, acknowledged Gilmore's writings but publicly emphasized his skill in the classroom. "There is a revelation of problems an ordinary student doesn't know exists," explained Philip Kurland to an interviewer shortly after the Coif Award. Kurland – expert at wielding the cutting barb – for once turned his own rhetorical tables: "Grant is a master of the Socratic method, superb in dialogue In any generation, there are three or four teachers who are the law teachers of their time, and in this generation one of those is Grant Gilmore." For himself, Gilmore discounted the enterprise. He said in accepting the Coif Award, after startling his audience by emphasizing the lonely ambiguity of the profession:³

We do something called teaching. But we all know from bitter personal experience that nothing is, or can be, taught once we get beyond the communication to small children of the basic mysteries on which civilization depends – how to read, how to write, how to count. We can of course pump students full of facts or even brainwash them – but pumping facts is a waste of everybody's time and washing brains in public is, as Justice Holmes might have told us, dirty business. Learning is what the students are there for and all we know about learning is that, on any level of complexity, it is every man for himself and by himself, imposing a perhaps delusive formal pattern on the swirling chaos by a prodigious effort of individual will. It may be that we can stimulate, or irritate, an occasional student into undertaking this arduous task – but, if we do so, it will be much more by accident than by our own design. Karl Llewellyn once observed that the function of the law teacher is not to let the true light shine: he is wise to content himself with that negative formulation.

To the world outside the classroom, Gilmore's reputation turned on his writings, a

³ Id. at 30.

sustained record of two decades analyzing and writing commercial law and culminating in *Security Interests*. The statement of the committee of selection for the Coif Award spoke in unusually admiring terms: "Grant Gilmore exhibits a lucidity and grace in this, as in his other works, that stands as a reproach to those who think that style is somehow separate from substance. The mind at work in these pages is fastidious, ironic, aristocratic. These are not qualities much in vogue today; they are qualities that are worth celebrating when brought, as here, to the solution of significant and intellectual problems."⁴

The Coif Award coincided with Gilmore's appointment as the authorized biographer of Justice Oliver Wendell Holmes, Jr. The previous appointee, Mark DeWolfe Howe, produced two volumes on Holmes but died before he was able to publish any work on Holmes as state court judge or Associate Justice of the Supreme Court. Gilmore's appointment was controversial. Many thought a constitutional lawyer would have been more appropriate than a commercial lawyer, let alone a commercial lawyer who was nearing 60. *Time* magazine nonetheless published a glowing sketch of Gilmore a month after the Coif Award was presented and noted that the Holmes project was an "enterprise that at the very least should win [Gilmore] a deservedly larger audience than *Security Interests* ever could."⁵ Fourteen years later, Gilmore died, without publishing a word of his biographical work on Holmes. His only work focusing on Holmes was the David Baum Lecture for 1980 at the University of Illinois, which he never polished for publication and which was not

printed until 1999 when a working draft appeared in the *Green Bag*.⁶ In retrospect, Gilmore's remarks about scholarship when he received the Coif Award were both reflective and prophetic:⁷

We also engage in something called research and scholarship. We write learned articles and books, we draft Code and Restatements, we publish or perish – sometimes we do both. In our articles and books and Code and Restatements we are indeed concerned to let the true light shine. We aim at a hammerlock on certainty, a stranglehold on truth. In the ecstasy of struggle it is hard not to succumb to the illusion that we have, once and for all, wrestled our adversary to the ground. But time, which outwits us all, will presently reveal the boundless extent of our ignorance, our limitless capacity for self-deception.

The Holmes project was apparently a deeply frustrating experience for Gilmore. When he first examined the Holmes archive, he said with some exasperation to a colleague, "I couldn't tell Holmes from Howe or Howe from Holmes." As time went on, other colleagues sensed that Gilmore had soured on Holmes and could not bring himself to live, as biographers must, cheek by jowl with his subject. Work was complicated further by another dislocation. Four years after getting the job to do Holmes, Gilmore moved back to Yale, this time as a Sterling Professor, the most distinguished of the university's chairs. In fact, he soon became a commuter to New Haven, not from New York like some of his colleagues, but from a vacation home in Vermont which became a year-round refuge. In 1978, Yale's then-mandatory retirement policy forced him to leave New Haven for good, and he taught at

4 Id.

5 "Teacher in out of the Cold," *Time* (Jan. 12, 1968), at 29. The headline alluded to a metaphor in the fourth and final paragraph of Gilmore's remarks accepting the Coif Award: "Still, if you can stand the loneliness, it's a good life. But it is heartwarming, I must confess, once in a while to be invited to come in out of the cold." Note 1 *supra* at 31.

6 "Reflections on Oliver Wendell Holmes, Jr.," 2 *Green Bag* 2d 379 (1999) (*posthumous*).

7 Note 1 *supra* at 31.

the Vermont Law School until his death in 1982 (which occurred coincidentally on the 112th anniversary of the birthday of one of his professional heroes, Benjamin N. Cardozo, whom, he once told students, “I admire with a reverence just this side of awe”).

Holmes haunted Gilmore, who found the justice cold, detached and elusive – a “snake who glittered in many skins.” What some viewed as Gilmore’s revenge on Holmes occurred, or at least began, in April of 1970, eighteen months after the mantle had passed from Mark Howe. Gilmore presented a series of three lectures at the Ohio State University School of Law which he entitled “The Death of Contract.” After persistent nagging by the Ohio State Press, Gilmore finally produced a footnoted manuscript of the lectures which was published in 1974. The small, slim book of less than 200 pages became a phenomenon in the profession – the most widely reviewed book on law in a decade and an unexpected windfall for the patient press, which sold more than fifty thousand copies over 22 printings between 1974 and 1995. Three years after the initial publication of *The Death of Contract*,⁸ Yale University Press published *The Ages of American Law*,⁹ based on the Storrs Lectures which Gilmore delivered at Yale in 1974. *Ages* revisited some of the same themes that Gilmore developed in the earlier Ohio State lectures, and, partly for that reason, made less of a splash professionally than *Death*.

The irony is that both sets of lectures were designed to be heard and not read, much less

dissected, and that neither was intended as a “contribution to the scholarly literature.”¹⁰ As Gilmore explained in the Foreword to the published version of *Death*: “A lecturer, out of sympathy for his audience, naturally tries to make his statement as simple and uncomplicated as possible. He avoids qualifications, refinements, and collateral developments which, although they might be both relevant and interesting, would be immensely confusing to the audience.”¹¹ Professional reviewers nonetheless skewered Gilmore’s *Death* for hyperbole, oversimplification, and sheer perversity. The text was vetted like a doctoral dissertation. Anyone who taught contracts, commercial law, or any level of legal history teed off on what Gilmore called his “reconstruction” of the rise and fall of the law of contract. Both the volume and the tone of the criticism were severe.¹²

Far from being shaken by the professional disacclaim, Gilmore was bemused. He wrote with detachment, so the vanity that propels many authors to respond in kind when attacked was simply not a part of his make-up. That the profession took literature designed for a general audience too seriously said more about the profession than the work itself. More significantly, some of his most widely admired occasional writings had been produced not for professional but for lay audiences. “Law, Logic and Experience”¹³ was an orientation lecture for entering law students at Yale, and “Legal Realism: Its Cause and Cure”¹⁴ was written for alumni – not necessarily lawyers – returning for a Yale commencement. Both have been

8 (1974; 2d ed., Ronald K.L. Collins, Columbus: Ohio State Univ., 1995), cited below as *Death*.

9 (New Haven: Yale Univ., 1977), cited below as *Ages*.

10 *Ages* at vii. Other occasional pieces by Gilmore were more about what lawyers do with history than actual exercises of historical scholarship. “Law, Anarchy and History,” 14 U. Chi. L. Sch. Rec. 1 (Autumn 1966); “The Age of Antiquarius: On Legal History in a Time of Troubles,” 39 U. Chi. L. Rev. 475 (1972).

11 *Death* at ix.

12 Collins includes a selective bibliography of reviews of *Death* in his second edition of the work at 167-169.

13 “Law, Logic and Experience,” 3 How. L.J. 26 (1957).

14 “Legal Realism: Its Cause and Cure,” 70 Yale L.J. 1037 (1961).

widely used in law schools, and the latter is viewed as essential reading about the American legal realist movement, of which Gilmore is rightly viewed as both a recipient and a practitioner – or, as he later insisted somewhat ambiguously, a “survivor.” Notwithstanding his justly admired work in secured interests and sales, perhaps Gilmore saved his best, or at least his most telling, work for occasional papers and other opportunities to teach where only ceremony was expected.

Or it may be that being a virtuoso in commercial law was no more satisfying to him than unraveling the plots in mystery novels which he claimed to read in order to “turn off” his mind. He was asked in an interview shortly after the Coif Award how he struck the balance between scholarship and teaching, and he replied: “For me, the difference between teaching and writing is the difference between playing music and composing it. I think I’d go to seed in six months without teaching.” Implicit, if the quotation is accurate, is that scholarship, sooner or later, is expendable. The occasional pieces, including the two sets of lectures, are best understood as teaching tools. They provide an insightful guided intellectual tour d’horizon, but they are not designed to help work out the knotty, and often momentary, legal problems requiring meticulous technical proficiency. They are impressionist landscapes, not ordinance maps. And like any good teaching, they are designed to jar, to throw pre-conceived notions off-course and to encourage the reader to navigate his or her way back home. The tribute to Wesley Sturges,¹⁵ one of his teachers, captures this aspect of Gilmore’s view of his job better than any other; the nod to Addison Mueller¹⁶ is a star turn of affection and grace which is more conventional.

Grant Gilmore’s occasional works stand on

their own and their context is usually clear and even predictable. There is one striking exception. The text which is reproduced below (“A Sense of Twilight”)¹⁷ can only be appreciated by understanding the nature of the occasion and the audience. The “Remarks,” as he initially labeled them (the title was added later for the law school alumni publication), were delivered February 27, 1970, at the Annual Alumni Dinner of the University of Chicago Law School. During the academic year 1969-70, Gilmore taught contracts. Seven miles away downtown, the Chicago Seven conspiracy trial took place during the Autumn Quarter. The spectacle of an abusive prosecution, a vicious prosecutor and a bumbling but vindictive judge was only leavened slightly by the antics of some of the defendants, that is, until one of them was gagged and chained to a chair. One of the lawyers for the defense was William Kunstler, the self-styled radical lawyer. His trial strategy had been severely criticized at a symposium sponsored by the Law School that fall and attended, it seemed, by the entire student body. So when Gilmore rose to address the alumni in the Green Lounge at the principal fund-raising event of the year, the fact that he avoided the usual pieties about the rule of law and the nobility of the profession was only a prelude to his admiring account of another recent episode involving Mr. Kunstler. Gilmore’s message was delivered not as a sermon but, as he so often did in the classroom, in the form of a story. The tale was a thinly veiled indictment of the bar for its duplicity – duplicity by silence – in the railroading of political defendants. When Gilmore’s brief remarks concluded, there was none of the ringing applause usually accorded speakers at the event. Most diners sat with arms sternly folded across their chests.

¹⁵ “For Wesley Sturges: On the Teaching and Study of Law,” 72 *Yale L.J.* 646 (1963).

¹⁶ “The Truth About Addison Mueller,” 22 *UCLA L. Rev.* 1013 (1975).

¹⁷ See pages 73-76 in this issue; “A Sense of Twilight,” 17 *U. Chi. L. Sch. Rec.* 15 (Summer 1970).

Gilmore, for the most part an extremely popular classroom teacher, was never invited to address another alumni event.

The lesson of the alumni dinner was clearly lost on neither the audience nor the administration of the Law School. Yet I think Grant Gilmore was a largely misunderstood figure in those precincts. He was not, as some of his colleagues thought, a self-made hero to the political fashions of his students, nor, as some of his most admiring students thought, a radical in Tory clothing. At bottom, he distrusted absolute truth in any field, suspected any theory that was propounded with uncritical confidence, and believed that the only proper constants were change and doubt. His remarks on receipt of the Coif Award betray some of those convictions, and their costs, and reveal, better than any other of his writings, the inseparable relationship between scholarship and

teaching, and in a sense, the primacy of the latter.

After the revealing remarks at the Coif Award ceremony, Gilmore's publications were limited to a casebook on contract (which in fact was a revision of an earlier work in which he had not participated) and a variety of occasional pieces – book reviews, which reveal Gilmore as a curious and kind reader but not one to allow his own interests to upstage the author's work; appreciations of former colleagues, ranging from muted¹⁸ to pained;¹⁹ and the obligatory commencement address.²⁰ His commercial law expertise was now on the shelf, dusted off from time to time only for reminiscences, usually covering the drafting period of the Uniform Commercial Code.²¹ Having mapped where the "true light shined" in commercial law, Grant Gilmore was content for the rest of his career engaged in more subversive activities.



18 For an affectionate if somewhat impersonal appreciation, see "Friedrich Kessler," 84 *Yale L.J.* 672 (1975). Gilmore also wrote a touching but rather buttoned-down account of Arthur L. Corbin's final class after a half-century of teaching, "The Uses of Disenchantment," 25 *Yale L. Rep.* 4, 5 (Fall 1978). I think Gilmore's voice failed him with respect to both Corbin and the other great influence on him, Karl Llewellyn, because he was too close to them. Detachment was impossible. And when they were gone, the wound was too raw to permit an accounting.

19 See "For Arthur Leff," 91 *Yale L.J.* 217 (1981), a brief but heartfelt notice following Leff's tragic death.
20 "What is a Law School?" 15 *Conn. L. Rev.* 1 (1982) (also published in 27 *Yale L. Rep.* 12 (Fall/Winter 1982-1983)).

21 A partial bibliography appears in the number of the *Yale Law Journal* containing memorials to Gilmore. 92 *Yale L.J.* 12 (1982). Collins notes the incompleteness of the list in "Gilmore's Grant (or the Life @ Afterlife of Grant Gilmore @ his Death)," 90 *Nw. U. L. Rev.* 7, 24 n. 17 (1995).