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Grant Gilmore and the Golden Age*

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Grant Gilmore once said that the Golden Age of the Yale Law School always seemed to lie in its immediate past, in the time of those who had just gone, while another Golden Age could be achieved in its immediate future if only a few things were done, if only a few things worked out. With a gentle sarcasm, born of intense loyalty, he would contrast this state of affairs with that which obtained at other great law schools whose Golden Age seemed always to be present, and whose past achievements in retrospect seemed dull. He liked the Yale Law School that way. It bespoke an unwillingness to rest—which is not to be confused with the restlessness—that informed his view of teaching, of scholarship, and indeed of law.

When I began teaching at Yale, I was so nervous that I could not eat before my classes. I asked my fellow teachers when the nervousness would end, when I could approach my classes with confidence in my knowledge, in my capacity to arouse and to explain. Different teachers gave different answers. But Grant replied: "If it ever does, get out of the profession . . . at once!" A teacher so complacent—so confident that he or she is living in the Golden Age of his or her achievements—may indeed explain, may indeed seem to the students of the moment to be a great teacher. But such great teachers (as Grant said elsewhere) "should be hunted down and shot." Openness to students and their ideas can exist only in self-doubt, in the knowledge that the last year, the last class went well, that all could so easily go well again—but that the next time could also be a disaster. It is uncertainty that prompts the restless intellect needed to encourage students to think for themselves.

Grant opposed the teaching of social sciences in law schools on analogous grounds. It was not because he thought those fields irrelevant but

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because we could not teach our students to be as skeptical, as uncertain, about those fields as they should be, as we taught them to be about the law. The danger—here as everywhere—was in not questioning, in false certainties.

His view of scholarship was the same. Recently a young teacher spoke to me about some articles that, because they were good syntheses of today's thought, were widely acclaimed. His own work, which struggled with the future, which did not quite speak today's language, he feared would not get the same reception. I thought of Grant, and what he deemed good scholarship. The Golden Age of the synthetic work is now; it will seem dull tomorrow. Important scholarship is that which perceives what is to come and hence is not easily accepted, which only in retrospect is of the Golden Age. Uncritical reviews mean usually that one's work is banal; troubled reviews (respectful, perhaps, but troubled) are those in which the scholar should rejoice.

And so it was with law itself. The statutes which seek to resolve a problem "forever"—those are the enemy; they are to be feared. The restless quality of the common law—again not restlessness, but never at rest, always seeking, always incomplete—that is what suits the human condition. Its past achievements: perhaps a Golden Age; its present state: muddled, troubled, unclear but striving; its future: golden, if only we keep trying.

A person like that also never rested. His scholarship, his teaching, his struggles with law never stopped, through his last day. Unlike so many he was just as innovative, as perplexing, as troubling in the works of his old age as he had been in those of his youth—of his past Golden Ages. In the last page of the last work he wrote, Grant said (two days before he died):

[W]e must not only seek out new theories of liability; we must find a way of doing so despite the fact that the older theories, which no longer make sense, have been frozen into place by legislative fiat. The tradition of legislative supremacy and judicial subservience which we inherited from a time when the statutory product was, by present standards, meager is already causing great difficulties, which will increase.

The judges have of course always had, and have exercised, the power to achieve necessary reforms by the process of disingenuous, even deliberate, misconstruction of statutory texts. That is a bad way of dealing with the problem: it leads to a state of law which is fragmented, obscure, inconsistent, incomprehensible. A major problem of law reform over the next half century will be the reformulation of our theories about the allocation of power between court and

legislature.¹

Pretty dangerous stuff! It calls into question all the received wisdom about courts, legislatures, and the separation of powers. A distinguished senior judge reading about an analogous suggestion wrote, “at the start I wondered whether [the author] had taken leave of [his] senses. However, by the time I finished [thinking and reading] I thought there was a good deal in [the suggestion], even though I would prefer to let a younger judge put his or her head on the chopping block.”²

The judge had done his service, he could aspire to rest, to let someone else, someone younger, put his or her head on the block first. Grant instead remained young to the end. He was still willing to put *his* head on the block first. His earlier scholarship had surely helped create the Golden Age just past, but his last works are not of the present—they, like him, strove for the Golden Age of the future.

1. Gilmore, *What is a Law School?*, 15 CONN. L. REV. 1, 5 (1982) (address at the 1982 commencement exercises of the University of Connecticut School of Law).

2. Letter from Judge Henry Friendly to Professor Guido Calabresi (June 14, 1982).