

For Grant Gilmore

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[N]o one spins a tale like Grant Gilmore. There were days when Room II might have been a Vermont cottage, and you were there sitting before a blazing fire with the grandfatherly figure in the front of the room. Of course, you had to sit down in front, for his face—from moustache to eyebrows—expresses rare wonder and humor. . . . Like the Chicago, Yale, Harvard, Berkeley and Columbia classes before you, you have fallen under the Gilmore spell.¹

Throughout most of the eighteenth century, the deepening crisis in the relationship of the colonies with England meant that our dawning national will and energy were principally devoted to methods of evading the clear mandate of the positive law. Such a period can hardly be expected to produce anything in the nature of a stable legal system.²

It is unlikely that there will ever again be a case involving the seller's right to stop goods in transit on discovery of the buyer's insolvency; it is pleasant, nevertheless, to have a section on Stoppage in Transit which runs on for a full page of smooth, well-varnished prose, transporting us nostalgically back to the great days of railroading.³

Is there . . . any conceivable reason why the lender should be better off if he were described as "creditor beneficiary" than if he were described as "assignee"? If there is, the law is headed straight toward madness. . . . In a state which has enacted Article 9 of the Code, it should make no difference whether the lender describes himself as assignee, third party beneficiary, Supreme Exalted Potentate, Lord of the Three Worlds or whatever other title his fancy may suggest. Under §9-102(1), the Article applies "to any transaction in goods (regardless of its form) intended to create a security interest in personal property. . . ."⁴

FOR GRANT GILMORE

ANTHONY JON WATERS**

I struggled awhile before writing this piece. Grant Gilmore was my hero, mentor, and friend. He inspired, advised, and cajoled me over the years. We shared lunches and dinners and drinks and ideas and stories and jokes. When he died, last May, he was exactly twice my age.

I knew Gilmore during the last ten years of his extraordinary career. It was a decade in which he chose to celebrate the law rather than to sculpt it, to write about the law rather than upon it, to move his colleagues to righteous indignation rather than to earn their plaudits, of which he had plenty in hand. His work in three distinct fields of law⁵ had made him a leader in each. He was not a generalist, but a specialist thrice over. With that established, he set out to have some fun.

Teaching apart, his idea of fun turned out to be the writing of some not very serious stories about law. The first of these, eventually published in 1974 as *The Death of Contract*,⁶ made him infamous overnight. Historians condemned it as bad history; scholars fell over each other to proclaim it poor scholarship;⁷ and even some of Gilmore's many and ardent admirers in what he chucklingly called "the academy" would admit, if prodded, that the Old Boy had gone soft.

It was a couple of years earlier—specifically, one morning in November of 1972—that I first met Grant Gilmore. I was a neophyte

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1. University of Chicago, *THE GLASS MANAGERIE* 46 (1973). Reproduced with permission from the University of Chicago Law School.

2. G. Gilmore, *The Storrs Lectures: "The Age of Discovery"* delivered at Yale Law School Oct. 29, 1974 (tape in possession of author). Revised version of the lecture published in G. GILMORE, *THE AGES OF AMERICAN LAW* 19-40 (1977) (quote appears in revised form in introduction at 8, 9).

3. Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 473 (1967).

4. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 1085, 1087 (1965).

5. See, e.g., G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965), winner of the Ames Prize (1966) and the Coif Award of the A.A.L.S. (1967); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* (2d ed. 1975); F. KESSLER & G. GILMORE, *CONTRACTS — CASES AND MATERIALS* (1970).

6. G. GILMORE, *THE DEATH OF CONTRACT* (1974).

7. See generally Danzig, *The Death of Contract and the Life of the Profession: Observations on the Intellectual State of Legal Academia*, 29 STAN. L. REV. 1125, 1125 n.2 (1977) (counting more than 150 pages of reviews in leading law journals).

teaching fellow at the University of Chicago Law School and had come to the faculty lounge in search of coffee. There was no one there but Gilmore, firmly ensconced in an armchair, a cup of coffee on one side of him, a smouldering cigarette on the other. The faculty lounge, I should explain, is on the corner of a building that is a great glass cube on stilts. The room is thus blessed with floor-to-ceiling glass on two sides. Gilmore was seated in the corner, his back to the glass.

I resolved to grab my coffee and run, to escape with a nodded acknowledgment to the awesome, brooding figure in the corner. He appeared to be deep in some dark thought when I made my move—a dash for Mr. Coffee. He cleared his throat, and I froze. “One of these days,” he intoned, addressing an imaginary group of ten or twelve people—a presumably captive audience—“One of these days, the Right Wing Economists who run this institution will get their ‘come-uppance.’ [I could hear the quotation marks.] And when that occurs, we shall see a brick through each and every pane of glass in this building.”

That was my baptism in Gilmorean imagery, and the first inkling that I might find in the august person of Grant Gilmore an outspoken rebel. On this occasion, he was expressing, indirectly, his disgust at Nixon’s landslide victory over McGovern just days before,⁸ an event that seemed to be a source of much satisfaction for many of his colleagues. In his mind, the institution itself was identified with that smugness, and a brick through each and every pane of glass in I.M. Pei’s world-famous building seemed to him to be just the ticket—in the world of his imagery, at least.

By this time, the astute reader will have discerned, Gilmore hated Chicago. With equal fervor—though more privately—he loved Yale, where he had been undergraduate, graduate student, a member of the romance languages faculty, law student, and, from 1946, a member of the Yale Law School faculty. In 1965, he stormed out of Yale, resigning the Townsend Professorship in a dispute with the Dean, and moved to Chicago for what became eight years of growing disenchant-

8. *See also:*

We have surely not had a good press recently. The Chief Justice of the United States views us with alarm. We have been caricatured on television. We even seem to have been held responsible for Watergate in that we had failed to inculcate a sense of ethics in the lawyers who flocked to Washington in those years. I am not sure that a three-year curriculum devoted to nothing but ethics would have done much for people who wanted to hold office under the Nixon administration. A student does have to have some natural aptitude for the subject.

Gilmore, *What is a Law School?*, 15 CONN. L. REV. 1, 1-2 (1982).

ment. In 1973, he returned to Yale as Sterling Professor and, as luck would have it, I went too, as a graduate student in the law school.

At Yale, Gilmore exuded sheer joy at being back. I was the only student he knew there, and the one person who had followed him out of the desert and into the Promised Land. Because of this, and because our views of deserts and Promised Lands roughly coincided, we gradually became friends. He shared with me his pleasure at being back and yet, in a sense, he never fully returned. He and his wife lived in Vermont, and he spent much of his time during the five years he was back at Yale commuting furiously between Norwich and New Haven.

Because Gilmore spent little time at the law school after his return, those who had joined the Yale faculty while he was in Chicago did not get to know him well. One of these was the late Arthur Leff. Gilmore had an abiding admiration for Leff's work of which, I believe, Leff was largely unaware. Until he wrote "For Arthur Leff,"⁹ an *in memoriam* piece, there was nothing explicit in Gilmore's published work to suggest any particular kinship with, or debt to Leff. And Arthur told me in the fall of 1977—four years after Gilmore returned from exile, and one year before his retirement from Yale—that he barely knew the man. Yet in conversation, Gilmore referred often to Leff's work, always with approval, occasionally with awe. Over the years, he told me several times that the way to the top was simple enough: Do what Arthur Leff did. Write *The Great American Law Review Article*, and the Harvards, the Yales, and the Stanfords will beat a path to your telephone. He considered Leff irrepressibly brilliant, and his having made the leap from Washington University to Yale, on the strength of one article, was part proof of it.¹⁰

Though the two were very different men from very different backgrounds, their work had a good deal in common. Arguably, they were the great legal humanists of their time, but I shall not dwell here on Leff, save to illuminate my sketch of Gilmore. Specifically, I believe that Gilmore's view of Leff was, to some extent, Gilmore's view of him-

9. Gilmore, *For Arthur Leff*, 91 *YALE L.J.* 217 (1981).

10. I first heard of Arthur Leff in 1967, when the *University of Pennsylvania Law Review* published his article *Unconscionability and the Code — the Emperor's New Clause*. The author's erudition was awesome; his legal analysis was formidably sophisticated; his style was graceful, witty, and irreverent. As the title itself suggested, he was out to upset applecarts, gore some respectable oxen, tilt gaily at one of the legal establishment's most admired windmills. It seemed incredible but was true that the article represented the scholarly debut of a young man who was identified by the editors of the *Law Review* as "Assistant Professor of Law, Washington University Law School."

Id. at 217 (citation omitted).

self, and that this was, in part, because their central preoccupation was the same: language.

In his wonderfully perceptive essay about Leff, Bruce Ackerman begins: "More than most, Arthur Leff struggled with a single problem throughout his scholarly life. This was the problem of legal meaning [H]e was intensely interested in the way particular words gained particular legal meanings."¹¹

Two days before Gilmore's unexpected death, he was Commencement Speaker at the University of Connecticut Law School. The question he chose to discuss was: What is a Law School? In part, he answered it thus:

What we . . . teach is principally reading and writing. The English language is not an instrument that is well designed for accurate communication [W]e must make do with words that come to us loaded with a freight of history that can never be entirely sloughed off. We are specialists in using our difficult and enchanting language in a way it was never meant to be used: as an instrument for making precise statements.¹²

The relationship between law and language was for Gilmore, as for Leff, utterly fascinating. In his view, both the weakness and the strength of the law, both its beauty and its curse, lay in the quiddities of the English language.

In the summer of 1981, in Madison, Wisconsin, I was with Gilmore when he learned the details of Arthur Leff's terrible illness. As the story unfolded, culminating in the doctors' grim prognosis, Gilmore became extremely flushed, then angry—angry as I had never seen him—and he vented his feelings on the table, pounding it repeatedly, "Damn! Damn! Damn!" He was all but overcome with emotion. I recount this not for dramatic effect, but because it tells vividly the strength of Grant Gilmore's feeling for Arthur Leff. Though they knew each other only slightly, I do believe that at some level Gilmore saw Leff as the bearer of a certain standard.¹³

When Leff died, Gilmore put his admiration on record in an elegant two-page tribute. In it, he said of Leff:

11. Ackerman, *Agon*, 91 YALE L.J. 219, 219 (1981).

12. Gilmore, *supra* note 8, at 2. "He taught us, in a way that none of us will ever forget, something—indeed a great deal—about the use and the uses of words. I can think of few things that are more central to the lawyer's craft and art." See Gilmore, *For Wesley Sturges: On the Teaching and Study of Law*, 72 YALE L.J. 646, 654 (1963).

13. Much more can be said about the common elements of Leff's work and of Gilmore's. For present purposes, however, this superficial comparison will suffice.

In all his writings, Arthur seemed incapable of saying an ordinary thing about anything He defied classification as conservative or liberal, formalist or realist, traditionalist or futurist. He was at all times his own man.¹⁴

No description of Gilmore himself could be more apt. And again:

Throughout his career, Arthur set himself against the prevalent dogmatisms. He told us many interesting, challenging, highly original things. . . . But, most of all, he left us with a shining example that the path of the law leads not to the revelation of truth but to the progressive discovery of infinite complexity.¹⁵

I said earlier that, to some extent, Gilmore's view of Leff was his view of himself. To anyone familiar with the work of each, those two passages make the case. And there is one other, from the same piece, that describes perfectly Gilmore's attitude to the reception accorded *The Death of Contract*:

If you go around upsetting applecarts, goring oxen and tilting at windmills, you must expect to be attacked. The owners of the applecarts, oxen and windmills will declare your work to be perverse, indeed unsound. Arthur expected to be attacked, was attacked, and seemed to enjoy every minute of it.¹⁶

For "Arthur," read "Grant"—and there you have it. Gilmore told me several times that he was "absolutely astonished" by the extent and the vehemence of the response provoked by *The Death of Contract*. In origin, it was more an escapade than a serious endeavor. He was invited to give a series of lectures at Ohio State University's College of Law, and did so in April of 1970. More than four years later, the little book was published, with lengthy footnotes appended to the text in an effort to add a modicum of scholarly sobriety to some rather exuberant stuff.¹⁷

14. Gilmore, *supra* note 9, at 218.

15. *Id.*

16. *Id.*

17. 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 any audience. He is also under a time limitation: whatever he has to say must be said in so many hours of fifty minutes each. There is, however, no reason why the excluded material should not be restored when the lectures are printed. When I endeavored to do this, I discovered that the original text no longer opened to accommodate many of my proposed additions. Being loath to scrap what I had and start over from scratch, I found myself resorting to the doubtful expedient of putting what could not be made to fit into the text into discursive footnotes.

The rest is history, if not exactly legal history.¹⁸ *The Death of Contract* quickly became one of those books that everybody reads and nobody praises.¹⁹ In the world of law teachers, it was surely the most controversial book of its time, generating, among other things, a review of the reviews of it.²⁰ For the better part of ten years, the literature has been replete with references to that book, as have the conferences, the workshops and the academic small-talk. Indeed, the idea that "Contract is Dead" has been firmly established in the collective legal mind.

All of this left Gilmore "absolutely astonished." Each time he told me so, he used precisely the same phrase. One day I summoned the courage to tell him that not only had he told me the same thing before, each time using the same phrase, but that—and this is what struck me most—he had, more than once, described Holmes's reaction to the reception of *The Common Law*²¹ in the same way, using that very same phrase. For once, I startled him. He was visibly taken aback, thought about it for a while, and then agreed: "Yes, you are quite right."

Many years earlier, at the University of Chicago Law School, Gilmore made the same analogy (to Holmes) himself. He chose to use his last class at Chicago to give a lecture which was, as it happens, a condensed version of what was to become *The Death of Contract*. He was about to leave the school for good. There was strong student sentiment for a party in his honor, but everybody knew that he would never attend such a party. And so, in the manner of all great surprises, the party was brought to him. As he lectured to those inside that room, some of us were on the outside, setting up decorations, food, and the

G. GILMORE, *supra* note 6, at ix.

18. Any book whose subject is "where we have come from" is likely to be treated as history. Gilmore treats Holmes's *The Common Law* that way and has a great deal of fun with it in those terms. *The Death of Contract*, like *The Common Law*, is historical in form and runs the same risk of being taken at face value, of being scoured for factual inaccuracy. That approach, in my view, misses the point of this work which, it may be, is more easily sensed than stated.

Professor Gilmore is a humanist, trained in language and in literature before coming to the law. In these four lectures, he takes an ironic rhetorical stance more literary than legal; the result is a fable about law.

Waters, Book Review, *The Death of Contract*, 36 MD. L. REV. 270, 270-71 (1976) (citations omitted).

19. In his Storrs Lecture "The Age of Anxiety," Gilmore wrote of Holmes's *The Common Law* and Cardozo's *The Nature of the Judicial Process*: "The two books . . . [have] nothing in common beyond the facts that nobody reads them and everybody praises them." G. GILMORE, *THE AGES OF AMERICAN LAW* 76 (1977).

20. See, Danzig *supra* note 7. The book has sold twenty thousand copies to date, ninety percent of them in paperback. Telephone interview with Robert Dimorest, *Ohio State University Press* (Apr. 15, 1983).

21. O.W. HOLMES, *THE COMMON LAW* (1881).

like in the hallway. As Gilmore turned from the standing ovation that followed his lecture, and strode through the door, he was indeed absolutely astonished by what confronted him. His first words, muttered rather than announced, were: "Who on Earth do they think I am? Oliver Wendell Holmes?"²² It was not clear to me whether he was reacting to the ovation, the party, or to both. In any event, he was, to repeat his own phrase, absolutely astonished at being celebrated, something he never became fully accustomed to.

I saw Grant Gilmore teach many times, perhaps one hundred; I saw him put down a student only once. The student in question knew that he was likely to be called on that day, because Gilmore called on people in alphabetical order. He also knew, or should have known, that Gilmore's version of the Socratic method was not quite what Socrates is thought to have had in mind. The role of the student called upon by Gilmore was always the same: to punctuate. More than that tended toward disruption. For example, the class might begin with:

GILMORE: Mr. Smith. Is Mr. Smith here?

SMITH: Yes, sir.

GILMORE: Well Mr. Smith, the case of *X versus Y*, which we are about to discuss, has been variously described as "An uninformed decision of a mediocre court, written by an unintelligent judge in a reactionary jurisdiction," and as "A brightly burning star in our jurisprudential firmament." Is it not obvious, Mr. Smith, that these two views, expressed by influential judges, are not entirely in harmony with one another?

SMITH: Yes, sir.

GILMORE: Well then, Mr. Smith, it is unsurprising, is it not, that we find the case-law progeny of *X versus Y* creating chaos in almost every jurisdiction in this country?

SMITH: That would seem to follow.

GILMORE: And might we then have expected the learned gentlemen in Philadelphia, through successive Restatements, to have cleaned up the mess, Mr. Smith?

SMITH: Yes. [Gaining courage by the moment.] After all, that is what Restatements are for.

22. From December 1967, until the time of his death, Gilmore was working on the official biography of Oliver Wendell Holmes, Jr., the first two volumes of which had been completed by Mark DeWolfe Howe, who died before the work was completed. M. HOWE, JUSTICE OLIVER WENDELL HOLMES, THE SHAPING YEARS 1841-1870 (1957); THE PROVING YEARS 1870-1882 (1963).

GILMORE: Quite so, Mr. Smith, quite so.

The gentleman who was to earn the rare distinction of being put down by Grant Gilmore—I shall call him Mr. Jones—failed utterly to appreciate his role. Where Gilmore wanted a yes or a no, or maybe a maybe, Jones wanted confrontation:

GILMORE: Mr. Jones. Is Mr. Jones here?

JONES: Yes.

GILMORE: In the last class, we labored with Judge Learned Hand's extraordinarily muddled opinion in the otherwise tedious case of *The Green Castle Finance Company versus Wellbeth Industries*, and I suggested, Mr. Jones, that the world, or at any rate the State of New York, would have been a better place between 1921 and 1963 had the Green Castle Finance Company not pursued its appeal. Is that much clear to you, Mr. Jones?

JONES: Yes . . . but I don't really see why Green Castle didn't rely on an agency theory.

GILMORE: Agency theory, Mr. Jones?

JONES: Yes. Why couldn't the finance company have been regarded as agent for the secured creditor? That would have solved the whole problem.

GILMORE: Well, Mr. Jones, if the Green Castle Finance Company might properly be regarded as agent of the secured creditor, then I venture to suggest that the entire topography of our law of secured creditors, indeed the whole of what is now Article 9 of the Code, would be radically disfigured. [He then explained this in painstaking detail.]

(fifteen minutes later)

GILMORE: Whether we like it or not, Learned Hand's opinion in *Green Castle* did at least serve to focus the attention of commercial lawyers on what was later to become the lynch-pin of our law of secured transactions. Now, is *that* clear, Mr. Jones?

JONES: Yes and no. I still don't see why we have to deal with the problem in these terms. I would have thought . . . [non sequitur, non sequitur] . . .

GILMORE: Mr. Jones, if we were to adopt your suggested analysis . . .

Gilmore went on to give about a dozen distinct reasons why Mr. Jones's analysis had not so much as a jurisprudential prosthesis to stand on, all explained carefully, precisely, and without condescension. Finally, as was his habit, he summarized the preceding forty-five min-

utes in the last five, taking care to repeat (for Mr. Jones's sake alone, so far as one could tell) exactly why the Jones approaches had been unsound. And then, in the dying seconds, he turned for the last time to Mr. Jones:

GILMORE: Now, Mr. Jones, is it clear to you that the *Green Castle* case, whether you approve of it or not, was a critical jumping-off point in our law of secured transactions?

JONES: Yes, but I still don't see . . .

GILMORE: Stop at yes, Mr. Jones, STOP-AT-YES.

JONES: Yes.

GILMORE: An excellent answer, if I may say so.

So saying, he swept out of the room, leaving us laughing en masse before an empty podium. It was a magic moment.

Gilmore's range of analysis comprehended the basics of life as well as the heights of abstraction. One memorable conversation concerned "the third man," an as yet unselected person who would, Gilmore hoped, join Kessler and Gilmore in preparing the third edition of their classic book of cases and materials on contracts.²³ Speaking about the proposition generally, Gilmore said that it was by no means clear to him who would decide on "the third man" in case of dispute, for example, between the editors and the publisher. I suggested, with some trepidation, that perhaps the contract between the editors and the publisher specified who had the right to select an additional editor. If so, then that would resolve the matter. This struck Gilmore as ludicrously funny. He pushed his chair back from the table and let out a wonderful belly-laugh. "Oh, yes," said he, still laughing, "I am sure you are right. But if Fritz ever had a copy, he has surely lost it. If I ever had one, I never read it. And in any case, you may rest assured that the contract reserves each and every right to everything to the Little, Brown Company of Boston."

One cool August evening in 1981 I was, in the words of the quotation,²⁴ in "[his] Vermont [house] . . . sitting before a blazing fire with the grandfatherly figure" who was Grant Gilmore. During the lull between semi-serious dinner conversation and silly, alcohol-assisted after-dinner talk we sat, seven or eight of us, mesmerized by the flames, quiet. One of our number pierced the crackling silence with this question: "Grant, if there had been an Article Ten, what would it have been about?" "Transition!" he replied, without a moment's pause.

23. F. KESSLER & G. GILMORE, *supra* note 5.

24. See *supra* text accompanying note 1.

Perhaps we are better off without Article Ten, because without such a statute, or even a Restatement of Transition, we must fall back on Gilmore's exquisite work, whose pervasive theme is that life's constant state of flux is and must be the key to understanding what our law is and what it is not.²⁵

He told me not so long ago that he would hate to stop teaching. He never did, and there is little prospect that he ever will.

*Ashes to ashes, dust to dust
Restate, codify, freeze them if you must
But laws divorced from ebb and flow
And then arranged in grand tableaux
Are apt to foster the illusion
That rules writ right end all confusion
And yet schemes like these do not last long
For all too soon, life proves them wrong
Ashes to ashes, dust to dust
In law, the future wins
Indeed, it must*

25. See, e.g.,:

The pleasant and comforting myth of the law's internal consistency and external stability cannot, for long, sustain itself. The facts of life cannot, for long, be suppressed. Every Blackstone must have his Bentham; every Langdell must have his Llewellyn. The specifics of the breakdown, like the specifics of the original construction, are determined by the accidents of time and place.

G. GILMORE, *THE AGES OF AMERICAN LAW* 68 (1977).

The statute provides a new starting point from which exploration can be undertaken. The law will continue to evolve; new issues will appear in litigation; the statute will in time be buried under an accumulation of cases; the flood of cases will again threaten to overwhelm us. The time will have come for another round codification, in the course of which the recodifiers will point out that the old statutes were obsolescent, if not obsolete, when they were drafted. As indeed they were.

Gilmore, *supra* note 3, at 476-77.