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Grant Gilmore and the Illusion of Certainty*

Ellen A. Peters†

There is, to my mind, no way to put into words the abysmal loss that I feel, that we all share, now that Grant Gilmore is no longer with us. I cannot eloquently address that loss, and so I will not try. Instead, let me recount some happier recollections of better days—of Grant Gilmore as a teacher and a scholar, a colleague and a friend.

In the fall of 1952, exactly thirty years ago, I was a second year student at this law school and a member of Grant Gilmore's class in commercial law. I believe the class met in the room that I still think of as room 114. I recall having the good fortune to be seated somewhat to the left of center, so that when Grant swung around in his chair as he addressed the class, I had a fair chance of catching at least the middle and almost invariably the end of the questions that were being put to us. Our agenda was the development of commercial law, principally under the then still extant Uniform Sales Act.¹ As Grant Gilmore's questions unfolded, each more penetrating and less answerable than its immediate predecessor, the class learned, painfully, to abandon its last vestiges of hope for certainty in the law. The next year a student borrowed my commercial law notes from that fall, only to return the notes the following day, in high dudgeon; they contained nothing but questions, interminable questions. The borrower was, of course, right; the notes were, however, accurate.

A student's first response to a Gilmore class was excitement, exhilaration at a masterful demonstration of the Socratic method and of legal realism—but that was only the first response. The enduring message was that abandonment of the illusion of certainty did not signal nihilism, or anarchy, or anti-intellectualism. On the contrary, we learned, as Grant wrote the following year in his celebrated article on good faith purchase, that "[t]he only legal certainty is the certainty of legal change."²

In all his teaching, and in his scholarly work in commercial law, Grant

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1. The Uniform Commercial Code, which superseded the Uniform Sales Act, became effective in Pennsylvania in 1954; however, in large part because of concerns raised by a New York study commission, other states did not adopt the Code until the 1960's, after the promulgation of further amendments to the official text of the Code. See AMERICAN LAW INST., UNIFORM COMMERCIAL CODE at xv-xvi (9th ed. 1978) (general comment).

2. Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1121 (1954).

Gilmore frequently reverted to this theme, to the illusion of certainty. In the concluding paragraphs of *The Death of Contract* he wrote of the recurrent pressures alternatively to formulate and then to annihilate “neat, tidy, and logical” theories of law.³ In the final chapter of *The Ages of American Law* he described the illusion of certainty as a curse dictated by the fallacious assumption that law is, or could be made into, a science. “If we can rid ourselves,” he wrote, “of the illusion that law is some kind of science—natural, social, or pseudo—and of the twin illusion that the purpose of law study is prediction, we shall be better off than we have been for at least a hundred years.”⁴ In his last public statement, the commencement address given last May at the University of Connecticut School of Law, he noted that “if it were possible for judges and legislators to achieve absolute clarity in their opinions and statutes, the process of adjusting our rules to reflect changing circumstances would be even more difficult than it now is.”⁵ And: “What makes law, its study and practice, qualitatively unlike most other things that human beings do is that we can never be sure of anything.”⁶

Grant Gilmore’s commitment to the idea that certainty is illusory was not merely a commitment of theory. His writings in commercial law reveal of course a searching mind probing always for flexible solutions to problems perceived to be doctrinally intractable. More importantly, the solutions that seemed acceptable after long and serious study could subsequently be found wanting after further inquiry and further reflection. How few of us, having put pen to paper, retain an open mind! We may talk of “first approximations” and “tentative proposals,” but we rarely retain the ability to reexamine our finished manuscripts or our final opinions. Grant could, and did. Nothing was ever intellectually settled. He could never understand the concern that anyone’s writing could preempt further effort in the same field, since, in his view, learning could only be enriched by further searching dialogue.

In the preface to *Security Interests in Personal Property*,⁷ which he wrote in 1965, he cheerfully acknowledged that he himself was the draftsman of Article 9 of the Uniform Commercial Code, the shortcomings of which his treatise would frequently lament. It was, he wrote, “a sobering experience for any draftsman to revisit, in later life, the scene of his youthful crimes.”⁸ Still, in 1965, these so-called youthful crimes were at most on the order of misdemeanors, sins of omission rather than of com-

3. G. GILMORE, *THE DEATH OF CONTRACT* 102 (1974).

4. G. GILMORE, *THE AGES OF AMERICAN LAW* 101 (1977).

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

6. *Id.* at 3.

7. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965).

8. 1 *id.* at x.

mission, largely attributable to the invariable time lag between scholarly drafting and legislative enactment.

In more recent years, Grant's reexamination of his earlier work was more profound and hence more startling. He began to question the wisdom and the methodology of codifying commercial law, despite his earlier advocacy of the Uniform Commercial Code. "Codification," he wrote in 1979, serves principally "to preserve the past, like a fly in amber."⁹ In his last major article, he trenchantly reviewed the law of good faith purchase, concluding, in 1981, that his own earlier scholarly work and drafting efforts had proceeded from perceptions of commercial reality that had been "in large part (although not entirely) mistaken."¹⁰ What he now found, upon reflection, to be the most successful features of the Uniform Commercial Code were the opportunities for maneuver within its confines, opportunities created on the one hand by inadvertent inconsistencies and on the other hand by reliance on overriding principles such as good faith, unconscionability, and commercial reasonableness.¹¹ No one can harbor the thought that a Code with such virtues will foster mistaken illusions of certainty.

Grant Gilmore's view of certainty as an illusion had an important carryover for his relationships with his colleagues. Unfailingly a kind and responsive critic, he was especially warm in his encouragement of junior colleagues, wherever they might be. He read widely, and not only the *Yale Law Journal* and the *Harvard Law Review*; he generously and enthusiastically supported scholarly enterprise in all its myriad shapes. In my own case, his wise counsel greatly helped to sustain my intellectual endeavors, both in the good days when I had a plausible but often underdeveloped idea for commentary on the Uniform Commercial Code, and in the bad days when I had to accept delay in my promotion to tenure. At that time, when women were a rarity on law faculties, and their need for mentors was as yet unarticulated, Grant's unstinting support provided confidence that success in the academy was possible and assurance that such success was a long term goal worthy of pursuit, no matter what the intermediate obstacles might be.

In recent years, Grant retired to teach at the University of Vermont¹²

9. Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 461 (1979).

10. Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 605 (1981).

11. *Id.* at 628-29. A similar theme was explored in an article written as part of the *Yale Law Journal* issue that honored Grant Gilmore at the time of his retirement. See Jackson & Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978).

12. Upon his retirement, the *Yale Law Journal* dedicated its April 1978 issue to Grant Gilmore.

and I went on the bench, so that, unfortunately, our contacts became more intermittent. Let me close with an excerpt from our last exchange of letters, two years ago. I had sent Grant a copy of an opinion I had written for the court in a case involving a reluctant buyer of real property, who, having breached his contract of purchase, sought to recover his down payment.¹³ What made the buyer's argument appealing, and persuasive to the trial court, was the fact that, after the buyer's breach, the value of the real estate had soared. The seller, having retained the property, was thus arguably benefitted by the buyer's breach and unjustly enriched by keeping the down payment in addition. We rejected this appealing argument, reasoning that the buyer was imposing the wrong time frame on the measurement of benefit: since the seller's injury arose at the time of the buyer's breach, so his benefit had to be measured at that same time. Grant wrote back, after noting how fascinating a problem the case had presented: "I appreciate the logic of your position. And yet I wonder whether the trial judge may not have blundered into a sort of truth (judicial ignorance is the greatest of law reformers). No doubt the economists would have an answer ready-made." I shall always treasure the comment as quintessentially Grant's, and I still wonder which answer is right.

There is no one else with whom I can hope to have such an exchange in the future. But Grant's memory serves as a constant reminder to guard against the illusion of certainty, to avoid, as misleading and wrong, any attempt to describe the broad exercise of judgment in abstract generalizations borrowed from the terminology of formal logic¹⁴ or of economic theory. It is a memory to be cherished.

13. *Vines v. Orchard Hills, Inc.*, 181 Conn. 501, 435 A.2d 1022 (1980).

14. See *United States v. Nelson*, 419 F.2d 1237, 1245 (9th Cir. 1969).

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