Law, Anarchy and History

By Grant Gilmore
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This seems to be the anarchists' spring. This is the spring when all over the world people described as students have been marching with banners in angry protest against whatever is. This is the spring when all the people under thirty have decided that no one over thirty should ever be listened to—which must leave people who are just turning thirty, like Professor Staughton Lynd of Yale, in an immense hurry to say what they have to say before they cross the great divide and are never heard from

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Judicial Clerkships

Mr. Phillip E. Johnson, JD'65, has been appointed law clerk to the Honorable Earl Warren, Chief Justice of the United States. During the past year, Mr. Johnson has been law clerk to the Honorable Roger J. Traynor, Chief Justice, Supreme Court of California.

Most practicing lawyers and law teachers are agreed that a year's service as law clerk to a judge is one of the most valuable experiences a young lawyer can have. In recent years, between fifteen and twenty members of each graduating class of 125 or so, have had the opportunity to extend their education in this manner. The records show great variety as to individual judges served, geographic location, and nature of courts involved. The members of the Class of 1965 who served as law clerks in the year just past were:

Alec P. Bouxein. Clerk to The Honorable Richard B. Austin, U.S. District Court, Chicago.
Bruce J. Ennis, Jr. Clerk to The Honorable William Miller, U.S. District Court, Nashville, Tennessee.
Henry F. Field. Clerk to The Honorable Walter V. Schaefer, Supreme Court of Illinois, Chicago and Springfield.
Robert J. Goldberg. Clerk to The Honorable Thomas E. Kluczynski, Illinois Appellate Court, Chicago.
Carl A. Hatch. Clerk to The Honorable John C. Harrison, Supreme Court of Montana, Helena.
Phillip E. Johnson. Clerk to The Honorable Roger J. Traynor, Chief Justice, Supreme Court of California, San Francisco.
Chester T. Kamin. Clerk to The Honorable Ulysses S. Schwartz, Illinois Appellate Court, Chicago.
Michael B. Lavinsky. Clerk to The Honorable John Pickett, U.S. Court of Appeals, Tenth Circuit, Denver.

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again. This is surely the spring when all the people over thirty have given up even pretending to understand what is going on. There are of course the pundits of the Great Society who make a profession of explaining the truth of the matter—but I dare say that no one paid much attention to them, even as far back as last spring.

My own generation, in its youth, went through what was then conceived to be a period of revolutionary ferment. The Great Depression of the 1930’s, which was our deepest intellectual possession, had taught us that Society—it was not yet the Great Society—must be rebuilt. Wherever we clustered, from right to left of the political spectrum, we were all rebuilders. The one article of faith which no one questioned was that you must have clearly in mind, before you started the demolition, what you proposed to put in place of the structure you were getting rid of. There was to be no destruction just for the dreadful joy of seeing things go up in smoke, the awful ecstasy of seeing them come tumbling down in ruins. We knew that, in the great nineteenth century debate between Marx and Bakunin, Marx had triumphed. You had to have what came to be called an ideology. In this sense the president of General Motors was every bit as good a Marxist as the chairman of the Communist Party—although it is true that the details of their ideologies were not at all points in agreement.

But this year, I take it, ideologies are for the birds and we are all for the dreadful joy and the awful ecstasy. There was a French anarchist who, as he was being led off to execution, told his followers: If you want to be happy, hang your landlord. There is much to be said for this, even from the landlord’s point of view. It concentrates your mind wonderfully, as Dr. Johnson remarked, to know that you will be hanged tomorrow and a short, happy life is on all counts to be preferred to a long, dull one. Smash now, build later must be our slogan; Back to Bakunin our watchword.

In this forward-looking Law School, where we pride ourselves on keeping up with the times, we must set about constructing an anarchist theory of law, fit for the season. I have no doubt that the the incoming editors of the Law Review already have this project well in hand and that we may confidently look forward to a symposium issue next fall on The Rule of Law in an Anarchist Society.

Perhaps the most useful contribution that our young friends can make to our anarchist jurisprudence will be the destruction of the myth that predictability is what law, and the study of law, are all about. The myth has obsessed us ever since Holmes told us, the better part of a century ago, that what he meant by law was the prediction today of what the courts are going to do tomorrow based on a study of what the same courts did yesterday. That is, from a study of the past we ought to be able to foretell the future. If we know the last decision, we know the next one too. It is true that Holmes cautioned us, without explaining what he meant by either term, to pay more attention to experience than to logic—but that seemed to mean merely that there is a wrong way, as well as a right way, of studying the past. If we go about it the right way, Holmes assured us, we will undoubtedly pull off the predictability trick.

The nineteenth century historians, of whom Holmes was a typical representative, were happy optimists—much as the social scientists are today. Their mission, which would be accomplished as soon as they had had time to look through the archives, was simply to tell us, as a German historian put it, exactly what had happened. Once that had been done, we would know—although there remained a central core of ambiguity about what it was that we would know. From much of the German writing it appeared that we would know that all history had been a triumphant progress toward the ideal of perfection embodied in the Prussian state. Lord Acton devoted most of a long life to a monumental history, which he never quite finished, of the idea of freedom and its progress—an English version of Prussianism. Marx, and early drop-out from society, became the apostle of a somewhat different synthesis.

Common to all this writing was the assumption that everything is a progress toward a predetermined goal. The inevitability of history became the brooding omnipresence of the age. What was had to be. Having been so, it could not have been otherwise. From which it followed that what will be has already been plotted, the course has already been set, our destiny is truly written in the stars. There was, in most versions, one more river to Jordan but the Promised Land was already in sight.

Historians today have become a sadder, but, I am sure, a wiser, lot, as perhaps even the sociologists will have become after another generation or two of seeing their reach exceed their grasp. Exactly what happened will never be known, even when the last document in the last archive has been analyzed in accordance with the most refined techniques. Except in broadest outline the past escapes us. There are the bare bones, bleached white with time—dramatic and terrible events of which we have heard so often that we believe them to be true—but it is a madman’s folly to try to clothe the dead bones with living flesh. The inevitability of history has become, except for a nostalgic Victorian like Toynbee, a series of unrelated traffic accidents. What was could perfectly well have been something else. What will be, God, if he is not already dead, only knows. Knowing who won the last election, the last war, the last revolution tells us exactly nothing about the next election, the next war, the next revolution—except that there will in all probability be
more wars and more revolutions. Whether there will be more elections is a closer question. Meanwhile, as an English poet has remarked,

The situation of our time
Lies round us like an unsolved crime.

An historian is someone who writes about the past. History is not what happened, but what is written about what happened, in the past. History is a formal discipline, like sonnet writing or law. The historian is not absolutely free to improvise. If he chooses to write about what we oddly call the middle ages, he must take account of the fact that Rome fell. But we know so little about what Rome was or what its fall consisted of that the historian's imagination has as free a range as the sonneteer's within his fourteen lines or the lawyer's within his library of bound reports. Rome fell, we may say, because of corruption and immorality in high places—which teaches us to treasure austerity and a high moral tone among our elected officials. Or Rome's fall represented the triumph of barbarism and Christianity—which makes us love our own enlightened rationalism all the more. Or the truth is that there was a long-continued drought in central and southern Europe; let us keep our irrigation systems in good repair. Or that a population decline, which began during the second century of our era, went on until the Empire no longer had the strength to withstand attack: there seems to be no particular moral there for us. Or that a strong central government in China in the third century drove the barbarian tribes westwards from the Asian steppes until they poured in helpless terror across the Roman wall; perhaps a strong Chinese state and civilization in the rest of the world are incompatible. And there are a good many other theories which have been put forward at one time or another to explain why Rome fell—if indeed it did fall.

History, let us conclude, is a systematic distortion of the past, designed to tell us something meaningful about the present.

As lawyers, we are all historians, whether we like it or not. We are bound to a discipline which requires us to justify whatever is to be done now on the ground that it resembles something that has been done in the past. We must search out the precedents. We must ascertain the true intent of the legislature. The lawyer's insistence that nothing absolutely new can ever be allowed is, I am sure, socially useful: it acts, to some extent, as a brake on progress and slows down a rate of change which might otherwise become intolerable. It satisfies a profound psychological need. Almost the first legal business of any successful revolution is to legitimize the new regime—which is mostly a matter of proving that the revolution changed nothing but merely recognized what had in fact already taken place. The proof, indeed, is usually persuasive.

But, since we must be historians, let us try to be good historians. Let us stop pretending that from the past we can predict the future. Let us stop teaching students that the point of studying cases is to guess how the next case is going to come out. The point of studying cases is the same as the point of studying why Rome fell. For one thing the cases, like the fall of Rome, are in themselves intellectually fascinating. It is fashionable in some circles today to heap contempt on what is called merely narrative history—I think that the contempt is largely overdone. A good story has never been a waste of anyone's time. For another thing, given the necessary inadequacy of our knowledge, there is—there always will be—room for an infinite number of hypotheses about what went on and why it went on and what caused it to move in the implausible direction it did rather than in the plausible direction it didn't. Our hypotheses never tell us what is going to happen next. They tell us about patterns of response to circumstance. They give us a reason for arguing that, at this juncture, we ought to do this, rather than that. They give us a way of channeling our behavior so that it will be something more than helpless panic or random improvisation. A chess-player knows what he plans to do next if his opponent makes the move that is expected of him. If his opponent makes an unexpected move, he may be wise to change his plan and do something else. The more carefully he has studied the celebrated games of the past, the better equipped he will be to adjust, quickly and confidently and rationally and flexibly, to the new situation. He has something to go on. And that is the point of studying cases.

Let us also, as good historians, stop pretending that once we have learned all the facts about everything—or even all the facts about anything—we shall be in a position to control our destinies or make the world a green and pleasant place or even do our opponents in the eye. Fact-gathering is a comforting occupation: it makes us feel scientific and the more facts we gather the more scientific we feel. The number of facts one man can gather in a lifetime is sadly limited. Therefore we must have teams to do cooperative research. We must have research institutes. We must have squads and platoons of research assistants. We must have batteries of computers. We must pile up the facts until they reach the sky. And when they have reached the sky, we shall sadly discover that our arduous and expensive labors have been for naught. Last year's fact is no more helpful than yesterday's newspaper. Nothing so obscures vision as too many facts, dancing like spots before our eyes. Facts give us, not truth, but the illusion of truth, and those who know they are right have always done a great deal of harm in the world and always will. The facts, or the fancies, which one man can harvest, unaided, are the limit of wisdom.

Let us, finally, stop pretending that the law is more than it is. Let us stop talking, each May Day, about the
Rule of Law in a Democratic Society—as if all the good things we like to think we have in our way of life come from a strict observance of the positive law and as if the more law we have the more democratic we will be. Let us stop talking about World Peace through Law: conceivably we might get World Law through Peace—of which there appears to be little present prospect—but not the other way around. The law—our system of law—is wonderful enough as it is without being packaged like a television commercial to show how much better it is than poor old Brand X. Law never creates society; society creates law. Law never makes society better; a better society will improve the law.

Law is not a positive good; it is a necessary evil. In Utopia there will be no law. The lion will lie down with the lamb and the forms of action will not longer rule us from the grave. Happily for us, no doubt, Utopia is not yet in sight and we shall have need of law even after we have turned the next corner. But we may judge of the excellence of our society not by how much law we have but by how little we can make do with.

Law is our attempt to control the chaotic and exuberant spontaneity of life. Law is formal, rigid, analytical, rational. Law is, as we say, a discipline. Life is undisciplined, irrational and forever overflowing the banks and dikes we have built to contain it. The study of law, I tell my students, tends to corrupt what is human in us; the ideal lawyer would have left his humanity quite behind. We shall be wise to stop well short of that bleak goal.

In constructing our new jurisprudence for the season, let us be careful to reserve a part for life. The demonstrations of this troubled, but not uninteresting, spring should serve to remind us that reason, which is our stock in trade, has never been enough. A wise lawyer once said to me that he had concluded, after a lifetime of observation, that all outstandingly successful men are insane. Their insanity is, indeed, their most precious asset. If they had not been insane, they would have been like the rest of us. The lawyer's function, therefore, when he counsels such a man, is to try to make sure that his client does not go quite off the rails, without doing anything to cure or curb the insanity which is the secret of his success. We are—all of us—by our profession, the purveyors of reason to a world that is unreasonable, if not insane. We try to impose a degree of order on the swirling chaos. We perform a necessary, if somewhat disagreeable, task. By our training we come instinctively to prefer tradition, continuity and ordered change. But let us bear in mind that our true function is to preserve, protect and defend the insanity which, while it terrifies us, is yet our greatest and our only hope.

My fellow anarchists, I salute you.

Gilmore Honored

Grant Gilmore, Professor of Law at the University of Chicago Law School, has been awarded the Ames Prize for his book, Security Interests in Personal Property. The catalogue of the Harvard Law School describes this coveted and infrequently awarded prize as follows:
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