

# A Sense of Twilight

Grant Gilmore

I SHALL SPEAK TO YOU TONIGHT somberly about what I conceive to be a somber period in the history of the Republic, whose citizens we are, in the history of the law, whose servants we are, in the history of justice, toward which, as citizens and as lawyers, we aspire.

Just two years ago, suddenly, unexpectedly and, as it turned out, briefly, a new spirit of hope was at large in the land. The results of the presidential primary in New Hampshire, a state which has long been known for the almost cynical corruption of its politics, suggested that the system could, on its own terms, still be made to work. Despite the extraordinary progress that had been made in the provision of techniques for controlling the thought and predicting the behavior of the electorate, the unexpected, it appeared, could still happen. There were sources of energy, hitherto unsuspected, which could be tapped. The dead slogans, the worn-out clichés of an apparently closed political system could perhaps be invested with vitality and freshness in a newly

opened society. Previously alienated young people came, in impressive numbers, to explore the possibilities which Senator McCarthy's lonely winter travels had revealed. Their state of euphoria – and ours – did not survive the assassinations in April and in June of that year.

It was fashionable, not so many years ago, to say that ideology was dead. All the great social problems had been solved – or, at the least, their proper solution was apparent to anyone who cared to look into the matter. All that remained to be done was to maintain and service the great machine, which could be expected to go on running indefinitely. That, the technicians could do for us. This curious idea sounds suspiciously like the early Marxist fantasy about the withering away of the state, once the revolution has been achieved. It was in fact the received doctrine among the social theorists – if that is the right name for them – during the placid years of the Eisenhower administration. The world, we were told, would no longer be a particularly exciting place. The last mountain peak had, indeed,

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*Remarks by Grant Gilmore, Professor of Law, The University of Chicago Law School on the occasion of Alumni Day, February 27, 1970.*

been climbed. The quest for the Holy Grail had been indefinitely postponed; it was no longer entirely certain that there was such a thing as the Holy Grail. We might, in the future, be bored but we would be well taken care of – comfortable, secure, content, even quietly happy. Ecstasy was not in the cards – but who wants ecstasy?

Utopia, as we have always been told by the specialists who have considered the point – is an intolerable state, like some Sunset Village where everything has been conceived and designed for the comfort and convenience of its elderly, broken-down and mentally infirm residents. So we need not be surprised that the Utopia which was so confidently proclaimed in the 1950's – the decade, we might say, of the senior citizen, aptly symbolized by its genial presiding officer – promptly gave way to the turbulence of the '60's, which has been succeeded by the apparent chaos of the beginning '70's.

The peculiar genius of the American political system, which has baffled most observers, has been its ability to avoid a polarization of our society. The major political parties, throughout most of our history, have been nonideological and, indeed, almost indistinguishable one from another. They have comfortably accommodated, within their loosely structured organizations, the entire spectrum of political thought and faith. In a nonpolarized society, the spectrum is not broad; extremes, whether of right or left, have little or no role to play. In the history of the human race few societies have ever achieved or so long enjoyed a comparable success in reconciling the divergent and conflicting interests which must somehow be contained within the social fabric.

It is true in the 1850's the system broke down. The immediate price for that breakdown was four years of civil war. It may be that the ultimate price has not yet been paid. Meanwhile, it seems to me, we are well on our way toward a

second breakdown – whose price, in money and in blood, will be incalculable and which, if it is to occur, may well be final and irreversible. The pollution of our environment is matched, today, by the pollution of our political processes. Corruption has spread from the market-place to the universities. Pornography – for the old – and drugs – for the young – add confusing grace-notes to the life-style of our generation. Rational debate, which requires that the attempt be made to understand opposing points of view, has vanished with the dodo. Political and social dissent is being repressed, perhaps even more than was true in the brief hey-day of the first Senator McCarthy – who, it should be noted, never succeeded in coming even close to the real springs of power in this country.

When a society, which has for a time enjoyed success as a society, breaks down in a fatal polarization, one of the first casualties will be its system of law. As the Romans, who had much experience with this process, put it: In times of conflict the laws are silent. Indeed law, a system of law, the rule of law are ideas which are conceivable only during periods of relative peace and harmony and tranquility. During such periods the law and its institutions command an almost universal respect which is unforced, instinctive and freely given. As the course of polarization or breakdown goes its unhappy way, those who come into control of the political machine will be tempted to use the courts of law for their own political purposes. Political trials will be instituted against those who are looked on as enemies of the State. The essential point about a political trial, I assure you, is not whether it is properly or improperly conducted, from a procedural point of view. The essential point about a political trial, is that it is being held at all. A social order which tolerates political trials will not for long have a legal order with which to keep itself warm. The elaboration of a mature system of law requires the patient labors of hundreds of years. It can

be torn down overnight.

In the summer of 1969, in Hanover, New Hampshire, I attended a hearing on disciplinary charges which Dartmouth College had brought against two junior members of its faculty. During the spring there had been a controversy about the continuance of the R.O.T.C. program on the Dartmouth campus. Some felt that R.O.T.C. should be abolished immediately; others felt that it should be continued indefinitely. Eventually, early in May, the faculty of the college, apparently as a compromise, voted that the program should be phased out over several years. At that point a group of student militants performed the customary ritual of seizing the administration building. After about twelve hours of nonviolent occupation, the students were evicted from the building – once again without violence – by the state police and, in most cases, packed off to serve thirty-day jail terms for violation of a court order which the college authorities had providently procured. The two faculty members against whom the disciplinary charges were brought had, it appeared, entered the building during the period of its occupation and had remained there for several hours, fraternizing, so to say, with the students. Both had been deeply and emotionally involved in the antiwar movement. According to their testimony at the hearing, they had not instigated, nor did they approve, the action of the students in seizing the building. That event having occurred, however, they felt morally obligated to go into the building as a sort of symbolic witness of their solidarity with the aims, if not with the methods, of the student protesters. The upshot of the matter was that the two faculty members were “suspended” from teaching in Dartmouth College for a period of two years – a compromise solution which satisfied neither hawks nor doves.

The then little known Mr. William Kunstler appeared as counsel for the two accused faculty members. The first day of the

hearing was devoted to establishing what had in fact taken place. After some hesitation, the faculty committee which was holding the hearing agreed that it would also listen to testimony bearing on why the two faculty members had done what they had done. At the end of the second day, Mr. Kunstler was invited to address the committee by way of summation. I shall paraphrase some of the things he said – I do not purport to quote him directly.

The night, he said, does not fall all at once. It is not true that we are free men now and slaves the next instant. Between freedom and slavery there is a twilight period, which may be protracted, during which, arguably, nothing has really changed – during which, reasonable men may feel, things are much as they have always been – during which, it may be, we are being fitted for the chains which, one day, we will proudly bear. It is during such twilight periods that men of good will are moved to protest what seems to them to be the erosion of the liberties of all. There is no good reason to believe that the course of history will be altered by individual protest or sacrifice; if the event is foredoomed, it is foredoomed. Standing up, when it is more comfortable and perhaps safer to go on sitting down, is merely something we owe to the image we would like to have of ourselves.

I will close with a story of what today we might call a confrontation between two of our mid-nineteenth century giants – Henry Thoreau and Ralph Waldo Emerson. Thoreau, on what he conceived to be moral grounds, was deeply opposed to the war with Mexico – Mr. Polk’s war, as it was called. Many others, at the time, opposed the war. A Congressman from Illinois named Lincoln paid for his opposition by forfeiting his seat at the next election. Thoreau carried his own opposition to the point of civil disobedience, for which he was duly sentenced to serve a term in the local jail. Thoreau having been locked up, Emerson came to visit him in jail.

“Henry,” said Emerson, looking into the cell, “What are you doing in there?”

“Ralph,” said Thoreau, “What are you doing out there?” 