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INTRODUCTION TO THE SYMPOSIUM: SOME CAUTIONING IMPLICATIONS OF LEGISLATIVE TORT REFORM

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A few years before his untimely death my friend and colleague Grant Gilmore wrote a book entitled *The Ages of American Law*.¹ It was, in my opinion, the high point of his extraordinary career — an encompassing sweep of American legal history, cannily retold by a scholar who got away with deriding it only because he so obviously loved it. Gilmore himself was an altogether interesting fellow, outspoken and dubious about nearly everything (except about the uselessness of the empirical social sciences; of that, he was never in doubt).² In the classroom he lectured with a gravelly, almost shy wof that became trapped in his moustache as often as not, affording a virtuoso education to generations of law students who happened, as *Time Magazine* once described it, to sit in the first two rows.

The book is like the man — elegant, literate, unencumbered by facts contrary to its theme, and profoundly insightful. It describes the whole history of American law, from the Founding to the present, in three ages: the Age of Discovery, the Age of Faith, and the Age of Anxiety. During the Age of Faith (roughly, the middle of the nineteenth to the middle of the twentieth century) we of the legal profession believed almost monotheistically in the intrinsic compass of the common law, in its ability to govern with a principled consistency elaborated through the art of judicial opinions. As Gilmore's friend Guido Calabresi would later put it, we trusted the topography³ of the law mostly to the judges, no one of whom could depart very far from the gently moving center of gravity itself created by the tomes of opinions which had come before.⁴

While some, like Calabresi perhaps, might have preferred that we remain forever in judicial empyrean,⁵ Gilmore's history puts us, like it or not, squarely in statutory perdition. Our age, the Age of Anxiety, is a

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

2. See, e.g., G. GILMORE, *THE DEATH OF CONTRACT* 4 (1974).

3. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Calabresi uses the term topography as a metaphor for a "mapping of societal desires or values" onto the substance of the law. *Id.* at 98-99.

4. *Id.* at 96-100. See also B. CARDOZO, *LAW AND LITERATURE* 44-47 (1938).

5. G. CALABRESI, *supra* note 3, at 5.

time of skepticism about the sufficiency of the common law's gyroscopes. It is an age of increasing interest in, even preference for, our society's fashioning responses to matters of policy from the whole cloth of legislation. America's recent legal history has been, so say the appellate-court-groupies among us, an "orgy of statute-making."⁶

Gilmore seemed resigned to it. "Every Blackstone must have his Bentham" he said,⁷ thereby confounding with parable what otherwise would have been clear enough. But if his reading of history is right, then there is in Gilmore's theme a reason for us to begin this Symposium's analyses of tort reform — the Age of Anxiety's latest anxiety — with some perspective on the more general implications of what it is we do and how it is we do it.

Some who read the articles in this Symposium may conclude, as some trial lawyers' associations have argued,⁸ that the "crisis" in civil liability has been a media extravaganza staged by firms in the insurance industry acting, if not in concert, then at least in harmony. The issue, however, is not whether we have experienced an insurance crisis; we have.⁹ What is genuinely at issue is whether there has or has not been, beneath it and driving it, a crisis in the law. Mr. Nader denies it.¹⁰ For him the causes lie rather in the financial management of the insurance companies. *That* is what is to be legislated about, not the set of judge-grown rules by which (according to Mr. Nader) the moral and ethical fibre of the marketplace is reinforced.¹¹ The tort-compensation system itself (assuming that compensation is what tort law is for)¹² is working efficiently, adds Mr. Habush.¹³ Seldom, he might have pointed out, have the media in their coverage of the law identified any of the dangerous articles which have *not* come to market because of the deterrent ef-

6. G. GILMORE, *supra* note 1, at 95.

7. *Id.* at 68.

8. See, e.g., Baldwin, *Setting the Standards*, 21 TRIAL 4 (1985); Habush, "My Window to Shout Out of," 23 TRIAL 5 (1987); Perlman, "It's as American as the Fourth of July," 22 TRIAL 5 (1986).

9. See generally R. Willard & R. Willmore, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, 6-15 (U.S. Dep't of Justice 1986). And for one state in particular, see J. Kezer, Special Report to the Colorado General Assembly on the Insurance Availability Problems in Colorado 1985-1986 (Colo. Div. Insurance, Feb. 2, 1987).

10. Nader, *The Assault On Injured Victims' Rights*, *infra* pp. 625-39. See also Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983); M. GALANTER, *THE DAY AFTER THE LITIGATION EXPLOSION* (1986) (disputing empirically the existence of the litigation crisis).

11. Nader, *supra* note 10, at 631.

12. While compensation is a purpose of tort law, it is not *the* purpose. There are a myriad of possibilities for effecting compensation. Deterrence and allocative efficiency are more likely candidates for *the* purpose, if we were forced to choose only one. The tort system is that process which appears on both lists — i.e., it accomplishes both compensation and deterrence/allocation at the same time. For a further discussion of this point, see Dauer and Nichols, *Economic Considerations in the Case for Casualty Insurance Price Regulation*, (to be published by YALE J. REG.).

13. Habush, *The Insurance "Crisis": Reality or Myth?*, *infra* pp. 641-50.

fect of torts: "NO-ONE INJURED BY FAULTY POWER TOOL IN SPRINGFIELD TODAY — TORT SYSTEM TAKES CREDIT!"

Pressler and Schieffer's focus on the joint and several liability rule¹⁴ exemplifies the clarion from the other side: There is no sufficient brake in judicial law-making to cabin the growth of once good rules. To Schwartz and Mahshigian the causes of the crisis are different but equally plain¹⁵ — an underlying tort system which creates rather than minimizes uncertainty and instability. Is that unpredictability something new? Or has it been there all along, only masked until now by the happier side of the well-known insurance pricing cycle?¹⁶

The argument for predictability is attractive enough: Rules which change between the time a risk is insured and the time its liability tail is satisfied create uncertainties in the costs and therefore in the pricing of future risks. Protective underwriting results. Jury awards which are outliers to "normal" statistical variation (and Mr. Nader would say that no significant number are)¹⁷ require adequate reserves, and all of that goes one way — not even insurers are risk-preferring.

It would seem, from looking at the results in many states over the past year, that the argument for predictability has obtained.¹⁸ It is the single best hypothesis, I believe, to explain why some substantive revisions were enacted and others were not. Joint and several liability, for example, is not unarguably either fair or unfair. The question is that of who bears the risk of a co-defendant's insolvency — the plaintiff, or the other defendants.¹⁹ But it is as to this rule that in virtually every legislature a proposal for abolition has been made²⁰ (and in a large number, been enacted²¹). The rule requires a solvent insurer to respond for

14. Pressler and Schieffer, *Joint and Several Liability: A Case For Reform*, *infra* pp. 651-84.

15. Schwartz and Mahshigian, *A Permanent Solution For Product Liability Crises: Uniform Federal Tort Law Standards*, *infra* pp. 685-702.

16. Underwriting profits and losses in the casualty insurance business show a clear cyclic trend, at least since the early 1950's — three years of profits followed by three years of losses, repeated five times from 1953 to 1984, with the swings of each cycle greater than those preceding. See Report of the Special Task Force on Tort Liability and Insurance, *Liability Insurance and the Law of Torts in Colorado — Problems and Remedies*, A-2 (1986); and *The Property and Casualty Newsletter* (June 1985).

17. Nader, *supra* note 10, at 634-35; see also Daniels & Martin, *Civil Jury Awards are Not Out of Control*, *THE JUDGE'S J.* 10 (Winter 1987).

18. As of June 1987, 45 states have enacted some form of legislation in response to the "insurance crisis." In 13, punitive damages were restricted or limited; in 32 states, joint and several liability was amended; and in 10 states caps were enacted on "noneconomic" damage awards. Private communication from Brenda Trolin of the National Conference of State Legislatures (May 3, 1987).

19. Pressler and Schieffer, *supra* note 14; Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J. 61 (1985). But see Steinberg, *The Doctrine of Joint and Several Liability is Properly Concerned with the Rights of Victims Rather than the Economic Well-Being of Wrongdoers*, 9 L.A. Law. 35(3) (1986).

20. Some 46 states have had bills proposed in the last five years which deal with the modification or repeal of joint and several liability. California repealed its joint and several liability rule through a general referendum. (Proposition 51). Private communication with Brenda Trolin of the National Conference of State Legislatures (May 3, 1987).

21. Pressler and Schieffer, *supra* note 14, at nn. 26-31 and accompanying text notes that at least 33 states did enact statutes which have eliminated or restricted joint and several liability.

damages caused (or at least contributed to) by an insolvent defendant whom it did not know and whose behavior it had no chance to assess, to control, or intelligently to underwrite.²² Caps on noneconomic harms²³ (those not amenable to strict financial quantification), and on punitive damages²⁴ (not heretofore limited by the size of the economic risk), their proponents declaim, will confine "lottery-like" jury awards²⁵ and can therefore also be understood as devices not just to make losses smaller, but to make the variability of losses less uncertain, the efficiency of insuring higher, and the fidelity of insurance pricing to the real risks of every activity greater again. Maybe so.

Vandall²⁶ and the Morrisons²⁷ display another contrast. For Vandall, the market is the balm. Let there be free entry and there will be supply-side correction.²⁸ Departures of prices from marginal costs can persist only when there is out-and-out collusion,²⁹ or when there are barriers to competition from new players.³⁰ The insurance industry is too big for explicit collusion, but too "protected" for there to be free entry in a run much shorter than half of the pricing cycle.³¹

For the Morrisons the corrective balances of the market have their analogues within the law itself: What the legislature can take away, the

22. My colleague Stephen Pepper disagrees with this argument. To him, one is negligent in most jointly-caused torts at least partly because the other tortfeasor's behavior was predictable and the harm from it avoidable by the person being charged with the full cost. For example, it is negligent to let the bushes grow to block the sight line of the intersection partly *because* the risk of a drunk driver running the light on the crossing road is a predictable event. If the bushes are in fact a "but for" cause of the accident, then the owner's negligence caused all — not just part — of the loss; and leaving all of the loss on him is not quite so offensive as some might otherwise believe.

Professor Pepper may be right, but I think the point is inapposite. For insurers to *underwrite* (not for the courts to allocate) risks at prices faithful to the true cost of the risk requires information. While the bush-grower's negligence may be predicated on the probability of a drunk's running the light, that is a gross, retrospective figure. Unless the joint and several rule operates on a "but for" basis, the insurer is not able to modulate its pricing prospectively with respect to actual degrees of risk, *nor to affect the behavior of the drunk by pricing or withholding coverage*. Private correspondence with Professor Stephen Pepper (Apr. 15, 1987).

23. *See, e.g.*, COLO. REV. STAT. § 13-21-102.5 (Supp. 1986) which limits noneconomic damages to \$250,000 unless the court finds by "clear and convincing evidence" that the award should be higher. In no case, however, can the noneconomic award be over \$500,000.

24. *See, e.g.*, COLO. REV. STAT. § 13-21-102 (1974 and Supp. 1986) which caps punitive damages at the amount of actual damages awarded to the party.

25. The National Law Journal, June 9, 1986, at 15, col. 1 (critics of legal system claim that "huge jury awards" . . . resemble lottery jackpots" (quoting Galanter, *Landscape of Disputes*, *supra* note 10, at 62-63)).

26. Vandall, *Our Product Liability System: An Efficient Solution to a Complex Problem*, *infra* pp. 703-17.

27. Morrison Jr. and Morrison, *Constitutional Challenges to Tort Reform: Equal Protection and State Constitutions*, *infra* pp. 719-31.

28. Vandall, *supra* note 26.

29. P. SAMUELSON, *ECONOMICS* 484 (11th ed. 1980).

30. *Id.* at 489.

31. *See* Joskow, *Cartels, Competition and Regulation in the Property-Liability Insurance Industry*, 4 BELL J. OF ECON., No. 2, at 375 (1973). One example of an entry barrier is the requirement that adequate financial reserves be posted before the first policy is even written. *See, e.g.*, CAL. INS. CODE § 700 to 700.05 (West 1972 and Supp. 1987); ILL. REV. STAT. ch. 73, § 625 (1965 and Supp. 1986).

courts under color of constitutions can give back³² — within limits of course. (Some already have.)³³

The point to notice about the articles which form the dialogues of this Symposium, however, is not just whose view of reality embraces more evidence or whose view of justice commands more support. Neither is it my intention in this Introduction to cheer, Bronx or otherwise, what any particular legislature has done or is about to do. The point I do wish to make is about a fact so obvious that it may otherwise be lost in the din: These arguments, this evidence, these verities about stability and markets and competition — they are all being addressed to *legislatures*.

Before the crisis was upon us, Torts was very largely the province of the judiciary. We lived in an Age of Faith. Tending to the innards of a large body of important social policy was a matter of deliberate, decentralized and incremental judicial effort. Torts is now somewhat more statutory than it has been (and, to the extent that it is a body of legislative law, more stable too). That, quite apart from the substance of the new rules, is a fairly significant fact. It poses other kinds of questions, and challenges, to those of us who care about (or help in) the making of the law.

Its implications are three.

The first comes from a fundamental difference in the attributes of legislatures and courts. In matters of legal principles courts are expert, and nonmajoritarian. Legislatures are majoritarian, and non-expert.³⁴ Certainly there are individual experts within (and lurking around the lobbies of) the legislature, but as an *institution* a legislature is supposed to be something like a jury — more *vox populi* and less self-consciously jurisprudential than an appellate court is required to be.

That difference implies that once a legislature has taken a matter up, it is both likely and appropriate that the outcome will be at least resonant with the views of the constituents whom the legislators serve. (Even special interest lobbyists cannot long prevail against the conscious wishes of more numerous voices.)³⁵ Those views are in turn shaped by the information which the wider public has (or is fed) about the matters being debated. And where does that information come from?

32. Morrison Jr. and Morrison, *supra* note 27.

33. See *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (limits on medical malpractice awards in Virginia struck down); *Boswell v. Phoenix Newspapers, Inc.*, 730 P.2d 178 (Ariz. App. 1985) (law prohibiting emotional distress damages in defamation action held unconstitutional); *Pfost v. State of Montana*, 713 P.2d 495 (Mont. 1985) (statute limiting state tort liability invalidated); *White v. State of Montana*, 661 P.2d 1272 (Mont. 1983) (law prohibiting recovery of noneconomic damages from state, and law limiting economic recovery from state held unconstitutional).

34. This statement is very general, of course. It does not take fully into account intricacies such as coalition building, committee structure, or the power of experienced committee chairs in legislative lawmaking. For a comprehensive analysis of the legislative process, see, F. DICKERSON & C. NUTTING, *CASES AND MATERIALS ON LEGISLATION* (1978); O. HETZEL, *LEGISLATIVE LAW AND PROCESS* (1980); M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* (3d ed.1977).

35. See *supra* note 34.

The media. Most particularly, the morning paper and the evening news. Whether they would choose the sobriquet or not, the news media are the adult education system of the United States. Yet the contents of their lessons are often more dependent upon factors relevant to the medium than they are to the subject being taught. Normally, the need to sell papers does no harm. Although one fiery crash makes the headlines while a trillion miles of accident-free transportation never even gets mentioned, most newspaper readers are savvy enough about highways and automobiles to be able to put the headline into the context of ordinary driving life. Commercial journalism may be macabre and perversely entertaining, but it is not misleading to anyone about the overall sinews and synapses of the highway system. The pupils come to the lesson already equipped with a useful experiential background.

In areas where the public is *inexpert*, the selection process employed by the media lacks such external sources of correction. There is no sufficient background in the public mind, equivalent to that of highways and cars, on questions concerning the relationships among legal rules, social policy and economic activity.³⁶ The public's ability to place into context what is reported about lawsuits and lawyers and litigants and liability lines is therefore vastly less. The amazing cannot be distinguished from the ordinary, nor be understood within the context of the necessary, by someone who has little prior sense of what the ordinary or the necessary is.

Nonmajoritarian experts — courts — may have the (dis)advantage of being relatively more isolated from public opinion and therefore from the effects of its more transitory and malleable potentials, but a deliberately majoritarian institution — a legislature — depends sensitively for the quality of its product upon the quality of the ongoing education attained by its constituents.

Over the past two years the insurance industry has surely used the press to its advantage.³⁷ Mr. Habush would call it media hype.³⁸ Others might say it was an attempt to inform. Either way, in many states it did have the effect it was meant to have. Thus from the insurance industry's point of view, legislating with the aid of the press "worked" to various degrees in various jurisdictions, a fact which should be of some satisfaction to that industry's attorneys. There is, however, for them and everyone else an implication to ponder: The ingredients of stirring headlines may change over time. It is not a good thing for each new legislative pen to write against a virgin slate. *Good* public education is by

36. Throughout the course of the debates in Colorado, for example, I did not once see in any of the media a discussion of what the underlying issues in civil liability really are. Total safety, as Arthur Best has reminded me, is impossible. The ultimate question is therefore that of defining and efficiently implementing the optimal amount of safety — and even more importantly, determining by the selection of a compensation system *who* it is that will make this decision. Private correspondence with Professor Arthur Best (Apr. 10, 1987).

37. See, for example, the series of ads sponsored by Aetna Life and Casualty Co. on civil justice reform in *Time* magazine from April to June of 1987.

38. Habush, *supra* note 13, at 644-45.

contrast a policy rudder in an ocean of shifting political currents. Members of the legal profession in particular have an interest and an obligation in this regard — lawyers are not only operatives of the legal system, they are an integral part of it. The goodness of the legal system is the source of the goodness of lawyers.³⁹ In an age of statutes, the quality of the public's legal education is a matter of increasing importance. Building that foundation should therefore be a matter of the legal profession's particular concern.

The second of the three implications has to do with how courts and legislatures make decisions. A legislature has the advantage of being able to look at a problem comprehensively, of being able to set rules which deal with all of it,⁴⁰ while courts have the ability to modulate rules to make good, just sense in individual cases.⁴¹ That is the usual comparison. But there is another aspect to it, the induced drag of one element of the stability already discussed: A court gets to revisit *its* rules almost anytime a litigant wants to bring an argument about obsolescence to its attention. If the court is convinced by the argument, the statement of the rule can be modified just enough to reflect the new circumstances (while respecting the old principle, of course.) The camel's nose destabilizes the legal tent. A rule of statute law has the contrasting advantage of stability, but the disadvantage of being fixed in time. Grant Gilmore put it this way:

One of the facts of legislative life . . . is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions . . . The most difficult period in the life of a statute — as in the life of a human being — is middle age. The statute is no longer what it once was but there is life in the old dog yet. An occasional subsection still has its teeth [and] there will [always] be cases in which even the most disingenuous construction will not save the day . . . Once the legislature has taken over a field, only the legislature can effect any further change.⁴²

The legislature does not, however, revisit its work often enough. As time passes the coalition of fervors which caused the statute to be enacted will have passed on to other things leaving, as Calabresi suggests, a governing rule which would not likely command majoritarian support as it enters its dotage.⁴³ There are, moreover, some interesting side effects, perhaps the best example of which is told by Calabresi's own work in torts.⁴⁴ When Workers' Compensation statutes were first en-

39. See Dauer and Leff, *The Lawyer as Friend: A Reply to Professor Fried*, 86 YALE L. J. 573 (1977).

40. See *supra* note 34.

41. B. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* (1921); B. KAPLAN, *ENCOUNTERS WITH O.W. HOLMES, JR., IN HOLMES AND THE COMMON LAW: A CENTURY LATER* 2 (1983).

42. G. GILMORE, *supra* note 1, at 96-7.

43. G. CALABRESI, *supra* note 3, at 6.

44. Calabresi, *Product Liability: Curse or Bulwark of Free Enterprise?*, 27 CLEV. ST. L. REV. 313 (1978); Calabresi and Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

acted they included, typically, fixed schedules of benefits — so many dollars for a lost arm, so much for this injury or that.⁴⁵ The schedules may have been adequate when they were passed, and the tradeoff for them was the exclusivity of the remedy against the employer;⁴⁶ but as time went on inflation and our changing social valuation of the costs of accidents caused many states' benefits schedules to become grossly inadequate. Courts could not amend the statutory schedules and legislatures did not; and so, during the statutes' middle age, there was a very stable but very unsatisfactory system.

Then an odd thing happened. Some courts, faced simultaneously with an inability to amend the statute and the problem of affording a reasonable remedy to injured workers, developed an alternative not foreclosed by the statute's exclusivity language.⁴⁷ Namely, they allowed the employee to bring an action not against the employer, but against the manufacturer of the lathe which injured him. That is how, in the machine tool industry, the products liability explosion began.⁴⁸ It was, in retrospect anyway, predictable.

The third and final implication of statutory law-making has to do with a much more delicate and difficult subject. Every author of American jurisprudence has had something to say about the proper role of courts in a system committed to the separation of governmental powers.⁴⁹ Most of them agree on two things (and not much else): First, is the requirement of judicial restraint — the passive virtue⁵⁰ of deciding only cases which need to be decided, and to be limited in the judicial law-making function to the needs of that one particular case.⁵¹ Therefore if an area of the law is ready for a wholesale rethinking, then a legislative review is surely appropriate. Courts utilize policy to make law. Legislatures utilize law to make policy. Both are essential.

The second area of scholarly agreement, made all the more powerful by the surficial paradox of Jerome Frank⁵² being its champion, is that a broad and deep public *respect* for the work of the courts is an element essential to efficient governance, and to domestic peace.⁵³ There is, on

45. See A. LARSON, 2 WORKMEN'S COMPENSATION LAW § 58.10, at 10-311 (1987). For an interesting historical essay on Workmen's Compensation laws, see, Epstein, *The Historical Origins and Economic Structure of Workmen's Compensation Law*, 16 GA. L. REV. 775 (1982).

46. See A. LARSON, *supra* note 45, at § 65.10, at 12-1.

47. G. CALABRESI, *supra* note 3, at 143.

48. *Id.*

49. See, e.g., A. ADAMS, JUDICIAL RESTRAINT: THE BEST MEDICINE, IN HANDBOOK FOR JUDGES 135 (1984); C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 67 (1969); B. CARDOZO, *supra* note 4, at 42; H. WELLINGTON, THE NATURE OF JUDICIAL REVIEW, IN POWER AND POLICY IN QUEST OF LAW 157 (1985).

50. "Passive virtues" is a term first used by Alexander Bickel to describe judicial techniques for avoiding untoward law-making activity. See A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

51. *Id.*, at 133.

52. J. FRANK, LAW AND THE MODERN MIND (6th ed. 1949).

53. J. FRANK, *supra* note 52, at 227. Frank quotes Demogue as saying:

On the whole it is to be desired that this ideal respect for the law, although it rests at bottom on a mistake which the shrewd do not make, belief in the omnipotence of law, be developed as far as possible; that it become a sort of religion because of

the other hand, no question that in areas other than constitutional law the superior branch is the legislature.⁵⁴ When the courts have gone astray, when the syllogism of the precedents leads to an end beyond the public's tolerance, it is the prerogative of the legislature to declare what is trump. The trick then is to serve both of these goals at the same time — to respect the hierarchy of the branches, yet to preserve to the courts the public's respect. Whether that can be done depends upon how the trump cards are seen to be played. If the debate is cast in terms of where the law is going and where it should go, then the public is appropriately engaged. But if the colloquy is reported (ah, the news media again) not in terms of the law, but in terms of the behavior of the judges and the lawyers — the word “scoundrels” is the layman's collective noun — then the delicacy of that important balance is put at risk. Law reform then comes not in a way compatible with respect for the judiciary, but in a way antagonistic to it. It does not help in our efforts to achieve a just and workable law for the public's interest in the process to be whetted by an unwholesome view of the profession which is, inevitably, its husband.

What I have described as three implications of statutory law reform are, again, not meant as kudos or critiques of any particular law revisions, or of their absence. (Me too, Queen Gertrude.) What they are instead are some curious observations prompted by my recalling with fondness the wily visage of the essential Gilmore. Yet to lawyers they may be more than curiosities. They may, in fact, be very serious challenges not ever faced by our profession during its Age of Faith.

The first and third points may combine. The bar itself has an abiding interest in the quality of the legal education offered to the public by the media. And an understanding style of reportage about the *institutions* of the law is as important as is accuracy in reporting about the law itself. The organized bar is the best and perhaps the only institution with both the incentive and the ability to respond to those needs.⁵⁵ While individ-

the resulting tranquility and economy of social forces, for then more profitable and efficient action will be possible in other directions.

Id. at 227-28.

54. This, of course, is apart from certain fascinating issues fostered by the last sections of such U.S. constitutional amendments as XIII, XIV, and XV, which provide Congress with the “power to enforce” each amendment “by appropriate legislation.” Arguably, on the basis of these provisions, Congress can “go further” than the courts in creating (some would even argue in eliminating) constitutional rights. See *Rome v. United States*, 446 U.S. 156 (1980) (city of Rome, Georgia forced to comply with preclearance procedure of Voting Rights Act of 1965); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (provision in Voting Rights Act of 1965 allowing Puerto Ricans to vote despite inability to read or write English upheld); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (provisions of the Voting Rights Act Amendments of 1970 forbidding the use of literacy tests in the election process held constitutional); G. GUNTHER, *CONSTITUTIONAL LAW* 1059-1104 (1985) (discussion of congressional power to change constitutional rights); J. NOWAK, R. ROTUNDA, J. YOUNG, *CONSTITUTIONAL LAW* 802-26 (1986) (analysis of Congress' power to enforce civil rights). Private correspondence and quoted from Professor George Pring (Apr. 15, 1987).

55. As the Model Code of Professional Responsibility points out, lawyers must strive to improve the legislative system. See *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* EC 8-7 (1979) (“lawyers are a vital part of the legal system”); *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* EC 8-8 (1979) (“lawyers are uniquely qualified to make significant contri-

ual lawyers will continue to exercise their jealous zeal on behalf of their clients — in the newspapers, if the matter is in the legislature⁵⁶ — the bar associations are able to take a more capacious view. The public, and the press, must understand things rightly. Legislative power is the trump suit; its responsible exercise depends upon the sound education of those whose tempers limit it.

As to the second point — the “fixedness” of statute-made law — the bar has equally useful opportunities. One, for example, would be to support (and where they do not exist, to create) working groups, of lawyers and others who can on an ongoing basis attend to whether the statute law is aging gracefully or not⁵⁷ — to review and report on coming obsolescences and other needs for updating and reform, lest we find ourselves caught again (as we did with Workers’ Compensation) between the Scylla of injustice and the Charybdis of judicial legislation.

One of the characteristics of the tort reform movement, as it is chronicled in the papers of this Symposium, is that everywhere except in the law reviews the issue is one more of crisis than of reflection.⁵⁸ Crises seldom bring about the quality of results which more considered action in anticipation could have attained. Review and revision in the age of statutes could therefore benefit from being done in regular course and apart from the context of urgency which inevitably takes its adverse toll. It is indecent for Lady Justice, of all people, to marry in haste and repent at leisure.

If the events of the Insurance Crisis and of Tort Reform in the 80’s are any indication, then the Age of Anxiety should be a very lively time. It will by the same light be a time of challenge, as members of the legal profession come to accept the need to exercise individually their customary zeal yet collectively to indulge in some passive virtues of their own⁵⁹ with respect to championing legislation.

There is a final irony, a fit ending for a symposium introduction built upon the thoughts of a departed colleague who enjoyed nothing more than irony. Long ago, Grant Gilmore wrote a book review, an es-

contributions to the improvement of the legal system”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-9 (1979) (“lawyers should encourage, and should aid in making, needed changes and improvements”).

56. But not for a matter in the courts. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1979) and MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (Discussion Draft 1983) (which prescribe acceptable levels of trial publicity).

57. There are at present nine states which have permanent law revision commissions: California, (CAL. GOV’T CODE §§ 10300 to 10340 (West 1980)); Connecticut, (CONN. GEN. STAT. §§ 2-85 to 88 (Supp. 1987)); Florida, (FLA. STAT. ANN. §§ 13.90 to .996 (Supp. 1987)); Louisiana, (LA. REV. STAT. ANN. §§ 24.201 to 08 (West 1975 and Supp. 1987)); Michigan, (MICH. COMP. LAWS ANN. §§ 4.322 to 24 (West 1981)); New Jersey, (N.J. STAT. ANN. §§ 1:12A-1 to 9 (West Supp. 1986)); New York, (N.Y. LEGIS. § 70-2 (McKinney 1952 and Supp. 1981)); Oregon, (OR. REV. STAT. §§ 173.315 to 35 (1985)); and Washington, (WASH. REV. CODE ANN. §§ 1.30.010 to .060 (1987)).

58. A small sample: Keopp, *Insurance Shock*, 126 TIME 55 (Sept. 16, 1985); Powell, *Sorting Out the Liability Debate*, 107 NEWSWEEK 60 (May 12, 1986); Szabo, *No Relief from the Liability Crisis*, 74 NATIONS BUS. 69 (Oct. 1986); Tompkins, *Going Bare — America’s Insurance Crisis*, 129 READER’S DIGEST 49 (Oct. 1986).

59. Sorry, Alex. [Editor’s Note, see, A. BICKEL, *supra* note 50.].

say which I can no longer find. He ended it by saying that he wanted to repeat a favorite quotation. The quotation bore repeating but, Grant warned, it had nothing whatsoever to do with the balance of the review. He was right on both counts.

I too want to close with a quotation, which may be to this Introduction what Grant's quotation was to his review. It epitomizes that irreverent intellect which single-handedly resulted in Grant Gilmore's law school being known as a home of old Turks and young fogeys. Its sardonic charm justifies, I hope, my abusing the privilege of the pen for one more paragraph. Here, with the usual disclaimer of endorsement, is how Grant Gilmore finished "The Ages of American Law" — or, Dauer quoting Gilmore paraphrasing Holmes:⁶⁰

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be scrupulously observed.

60. G. GILMORE, *supra* note 1, at 110-11.

