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Graduation  
May 23, 2011

## A Confession

Owen Fiss

Grown men should not confess their love in public, especially when it is the love of an institution, even worse, a law school. But this, I fear, is the last opportunity I will have to be true to myself and to you.

Soon after I started my legal education at that other law school, I realized that I had made a mistake. I could not bring myself to transfer, but I wore my heart on my sleeve. When I first was interviewed for a position at Yale, almost a lifetime ago, Ralph Brown put the first question to me – and what a question it was: “Your professors at Harvard say that you belong at Yale. What do they mean by that?”

I started teaching at Yale in 1974 and only now fully realize how lucky I have been. The Yale faculty enjoys a freedom of which others can only dream. We are free to decide what to teach, when to teach, and how to teach. The risks of this freedom are well known to every student who has spent one month, no two months, no three months, parsing *Goldberg v. Kelly*.

I began my teaching career in 1968, not at Yale but at Chicago and was then assigned to teach a course that had been

entitled “Equity.” Before starting to teach, I had been involved in civil rights litigation, and in response to my new assignment, eagerly put together a course I called “Injunctions.” The Dean of Chicago found this course title unacceptable and since he controlled the catalog, he insisted I call the course “Equitable Remedies,” which mystified my students since I only knew of one equitable remedy.

In moving to Yale, I was anticipating another go-around over the title of the course with the then Dean, Abe Goldstein, the most imposing of them all. Much to my surprise, but in keeping with the traditions of this school, he expressed complete disinterest in the subject. So, after teaching for six years and after having published a casebook on the subject, I was finally allowed to give the course I taught the name I wanted.

Bruce Ackerman also joined the Yale faculty in 1974, and at a lunch soon after we had both arrived in New Haven, he asked what course I was teaching in the fall. I proudly said, “Injunctions.” He then said, in the manner that all of us have come to know and love, “That’s the worst course title I have ever heard. It is completely inappropriate for the Yale Law School. At Yale it must be ‘The Activist Judiciary Meets the Bureaucratic State in the Post New-Deal Era.’”

Soon after this encounter and many others of a similar nature, I had a better sense of what to expect from colleagues during my time here, and I secretly adopted as the theme song of

the Yale faculty a new album that Paul Simon had just released. It was entitled, “Still Crazy After All These Years.”

Yes, the Yale faculty is crazy, but crazy in a good sense: intellectually restless, unwilling to accept any conventional accounts of the law, boldly and defiantly crossing all disciplinary boundaries, and determined to push and push the law, sometimes even beyond all sensible limits. These were the norms that governed my elders – the giants of the Yale Law School - and these were norms that defined the culture of the place. It was this culture – a culture that prizes above all else the innovative and idiosyncratic - that nourished me all these years and helped me understand what it means to be a professor at the Yale Law School.

A community of individuals so very strong minded (surely a euphemism) is likely to spin out of control at any moment. We need a leader, but it has to be one who is capable of governing an anarchy. Here, too, I have been fortunate, though until this very moment, I stubbornly refused ever to acknowledge my gratitude to the Deans – three are sitting before you – under whom I served.

My love for this school is the kind of love that belongs to a convert, which as St. Augustine teaches, is the most passionate of them all. So, for almost 40 years I have been an unqualified pain in the neck to each and every Dean under whom I served, sending them endless memos accusing them of betraying the most sacred traditions of the school. No doubt, all of these memos, known in some quarters, as “Fissiles,” wound up in the Deans’ circular file,

yet they were always received in a gracious manner, which of course only egged me on.

One Dean, desperate to find a way to deal with me and the other self-appointed keepers of the faith, started a practice of calling each and every faculty member on his or her birthday and singing “Happy Birthday,” with a few refrains in Italian. Can you imagine? A Dean who sang “Happy Birthday” to each member of his faculty and who continues this practice to this very day, more than fifteen years after he left office and became a federal judge.

One of the foundational principles of the Yale Law School declares that it is up to each individual faculty member to decide what is educationally required and that it is the responsibility of the Dean to find the funds needed to support and implement the individual faculty member’s plans. This principle may strike the fiscally responsible as bizarre, as indeed it is, but it makes perfect sense in an institution that values the autonomy of each individual faculty member and demands that this autonomy be used in bold and inventive ways, not subject to decanal or even peer review.

Guided by this precept, Abe Goldstein funded in an instant the Legal Theory Workshop when it was first proposed in 1974, and in the 1990s Tony Kronman – only partly corrupted by our friendship – did the same for the Global Constitutionalism Seminar and the Latin American and Middle East programs that have been at the center of my attention in recent years.

I am also immensely grateful, my dear students, for the opportunity to have been one of your teachers, grateful not just for your brilliance, but even more, for your attitude toward learning. I have been moved by your willingness to discard your preconceptions of what law is or might be, and to fully engage the lessons of the day – at first bewildered, maybe resistant, but also open and indulgent and finally stirred to forge for yourself an entirely new stance on the law. You soon became comfortable – maybe too comfortable – in speaking back, and whenever you did, you transformed the exchanges in Room 129 into a learning experience for everyone, including the instructor.

The faculty likes to tease one another. In that spirit we often proclaim, usually as part of the faculty recruitment process, that the best thing about the Yale Law School is the students. This is supposed to be a self-deprecating joke, but like any good joke, it has a kernel of truth. The other day Muneer Ahmed, one of our newest recruits, acknowledged the truth of this tease and reformulated it eloquently. The specialness of Yale Law students, he said, derives from the fact that they do not feel encumbered or limited by the law, but rather sees themselves as masters of the law, entitled to reshape it in ways that will make it a more perfect instrument of justice.

Last fall, I once again taught first year procedure here at Yale. It was almost the 40<sup>th</sup> occasion, and as soon as the students sensed that the end was near, I was invited by one small group, then another, then another, and so on, to have drinks late in the afternoon

at Mory's. These were special occasions. They allowed for an intimacy never achievable in Room 129. Students asked about different phases of my career, delicately inquired about my family life, and probed some of my heretical views on procedure. The french fries were also great.

Then one student turned to me and asked with startling simplicity: "Professor Fiss, what is your proudest achievement?" I paused for a second, maybe long enough to start scrolling in my mind's eye my list of publications, and then I suddenly realized that the answer lay in an entirely different domain. I answered, with remarkable clarity and firmness, "You." Yes, you are my proudest achievement.

You are the ones that have been at the center of my professional life. You are the ones for whom I write. You are the ones I have in mind as I sit in the library each morning preparing for class. You are the ones with whom I am in conversation in the still hours of the morning as I lie half awake imagining how the class that is to be held later in the afternoon will unfold. You are the ones I am often thinking about, sometimes even when my children or now my grandchildren pull on my sleeves. You are the ones I count on to realize my deepest dreams and hopes for the law.

I have devoted my entire life to make the world a little bit more just, but always with a clear understanding that as a teacher, I will only achieve this purpose through you. Today, you go forth in the world and when you do, remember that you carry not only your

dreams and those of your family and parents, but also those of your teachers.

I realize that this is a difficult time to achieve these larger purposes; so much of the law is in shambles and needs to be righted. We live so far short of our ideals. The challenge before you is staggering, but perhaps even for this endeavor, Yale may have one more lesson to teach – a lesson first told to me by Grant Gilmore.

Grant Gilmore was one of the greatest teachers of this Law School. His subject was Contracts, indeed Article 9 of the Uniform Commercial Code. He had visited Harvard when I was a student there, and as it turned out, was on the Chicago faculty when I first joined it in 1968 – his time at Chicago was a short, self-imposed exile. He returned to Yale in the early 1970s and I soon followed him here.

Once Grant was pressed to define the difference between Harvard and Yale and in response, he said that the essential difference was a frame of mind or attitude toward the law. At Harvard, the Golden Age is always the present, but at Yale, the Golden Age lies in the past and awaits us in the future.

The Golden Age of American law began on May 17, 1954, and continued until the mid 1970s, when a newly-constituted Supreme Court began its disheartening project of emptying *Brown v. Board of Education* of its generative meaning. I came to Yale as this process of retrenchment began and lived out my career here



during an era of American law that is, as you so often heard me declare in class, anything but golden. Yet I know – I know in my heart of hearts – that someday soon the Golden Age of American law will once again come into being and will arrive on your shoulders and as a result of brave efforts to turn the lessons you have learned in these halls into a living reality.