

REVIEW

The Death of Contract. GRANT GILMORE. Ohio State University Press, Columbus, Ohio, 1974. Pp. x, 151. \$8.00.

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From a series of elegant and opinionated lectures, Professor Gilmore has put together a superb little book on the rise and fall of nineteenth century contract law. *The Death of Contract* is not only of great historical and theoretical interest, it is also a delightful morality play, as Professor Gilmore summons his villains (Langdell, Holmes and Williston) and heroes (Corbin and Cardozo) to center stage to engage in dramatic intellectual combat.

The villains are responsible for the "rise" of contract law; the heroes for beginning the process leading to its "death." According to Gilmore, the rise of contract begins with Dean Langdell's case-book on Contracts, published in 1871. Until then, "the common law had done very nicely for several centuries without anyone realizing that there was such a thing as the law of contracts [T]he idea that there was such a thing as a general law—or theory—of contract seems never to have occurred to the legal mind until Langdell somehow stumbled across it."¹

The "death" of contract refers to a "process of doctrinal disintegration"² in the twentieth century that brought about "[t]he decline and fall of the general theory of contract."³ Gilmore traces the causes of the demise of contract to "the transition from nineteenth century individualism to the welfare state and beyond."⁴ More particularly, he carefully presents a number of doctrinal areas in which socially imposed standards of behavior have reinvaded the law of contract, so that at present, as he puts it, "'contract' is being reabsorbed into the mainstream of 'tort.'"⁵

I can only express my complete admiration for this incisive, irreverent and wonderfully readable book. And I confess that I have

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¹ G. GILMORE, *THE DEATH OF CONTRACT* 5-6 (1974) [hereinafter cited as GILMORE].

² *Id.* at 101.

³ *Id.* at 95.

⁴ *Id.* at 96.

⁵ *Id.* at 87.

nothing to add to Professor Gilmore's account of the disintegration of contract law in our own time. I do, however, wish to take issue with Gilmore's view of the process by which a general theory of contract came into being in the late nineteenth century.

Before the Langdellian passion for constructing a general theory set in, Gilmore observes, the law governing contracts consisted of a series of specialized bodies of law:

Without giving much thought to the matter, we have tended to assume that "Contract" came first, and then, in time, the various specialties—negotiable instruments, sales, insurance and so on—split off from the main trunk. The truth seems to be the other way around. The specialties were fully developed . . . long before the need for a general theory of contract had occurred to anyone.⁶

So, according to Gilmore, it was Langdell, "an industrious researcher of no distinction whatever either of mind or . . . of style,"⁷ who should be credited with "the almost inadvertent discovery of the general theory of Contract."⁸ Langdell's version of the general theory, when combined with his case method, "had nothing whatever to do with getting students to think for themselves; it was, on the contrary, a method of indoctrination through brainwashing."⁹ "And once the genius of Holmes had been enlisted in carrying the project out, the resulting theory could be guaranteed to be what the new age required."¹⁰

Holmes's participation in the nurturing of contract theory evokes a particular fascination in Gilmore. At the center of Holmes's legal theory lies a paradox of which Professor Gilmore offers an enticing reconciliation. The paradox is: how can one square Holmes's general hostility to absolute liability—his insistence on "personal fault"—with his equally emphatic championing of objective standards of liability, which are, after all, but another form of absolute liability? Within contract law, this paradox was expressed by "the fact that the nineteenth century theorists embraced both a narrow consideration theory and a narrow excuse theory,"¹¹ so that it became just as difficult to get into a contract as it was to get out of one.

⁶ *Id.* at 11-12.

⁷ *Id.* at 13.

⁸ *Id.* at 12.

⁹ *Id.* at 13.

¹⁰ *Id.* at 98.

¹¹ *Id.* at 47-48.

Gilmore traces the narrow excuse theory to Holmes's "theory of absolute contractual liability," which "discouraged any further case law development of excuse by reason of fraud, duress, coercion, and the like."¹² Contract formation, he argues, was also restricted by Holmes's "bargain" theory of consideration and by the proponents of this theory who indulged in a series of contrived readings of cases to invent such "rules" as that of *Stilk v. Myrick*¹³ (preexisting duty is inadequate consideration for fresh promise); *Dickinson v. Dodds*¹⁴ (irrevocable offer can be revoked for want of consideration); and *Foakes v. Beer*¹⁵ (a debt is not discharged by part payment). This reformation of consideration theory was reflected in "a series of subsidiary propositions or slogans, all of which, to the extent that they were taken seriously, offered ways of escape from the imposition of contractual liability."¹⁶ Two leading examples are the rules that there can be no "agreement to agree" and that an enforceable contract requires "mutuality of obligation," a principle which tended to retard the enforcement of "requirements contracts."

Gilmore is undoubtedly correct about the tendency of late nineteenth century law to narrow the range of excuses. While he traces this development to the new objectivist jurisprudence, I had supposed that it could be more satisfactorily explained as the culmination of a general attack upon "equitable" standards that began much earlier in the nineteenth century. Excuses, after all, are usually the defensive weapons of the weak and the powerless, or of those less commercially sophisticated elements in the population who have not yet fully developed the capacity to calculate future events shrewdly.

The true surprise in Gilmore's story, however, turns on his discussion of contract formation. I had always blandly supposed that commercial "progress" was inevitably tied to an increasingly easy enforcement of contracts. Gilmore's conception of Holmes's influence on the development of rules of contract formation appears at variance with this notion. His main proposition is that Holmesian objectivism led to an entirely novel "bargain theory of consideration" that tended to make the formation of contracts more difficult. Assuming that objectivism did tend to restrict contract formation—a proposition that I will have reason to question in a mo-

¹² *Id.* at 48.

¹³ 6 Esp. 129, 170 Eng. Rep. 851, 2 Camp. 317, 170 Eng. Rep. 1168 (K.B. 1809).

¹⁴ 2 Ch. D. 463 (C.A. 1876).

¹⁵ 9 App. Cas. 605 (H.L. 1884).

¹⁶ GILMORE at 33.

ment—what explanation does Gilmore offer for this development? It is possible, on the one hand, that a narrowing of contractual obligation was an entirely unintended consequence of an objectivist epistemology. If this is the case, it would still be necessary to explain the rise of objectivism. On the other hand, it is also possible that objectivism as a mode of legal thought was designed primarily to rationalize other, more clearly substantive, policies. If that was the case, it would first be essential to inquire into these policies.

Gilmore seems to straddle these two modes of explanation. First, he attempts to explain objectivism as an implementation of the Holmesian view “that, ideally, no one should be liable to anyone for anything”¹⁷ Gilmore derives this proposition entirely from Holmes’s effort to restrict *tort* liability to the fault principle. He obviously intends to offer Holmes’s views on *tort* liability as an example of the influence of *laissez-faire* ideology on late nineteenth century law and then to expand the *tort* example to establish the more inclusive proposition that “ideally, no one should be liable to anyone for anything” In this formulation, objectivism in contract theory is but one instance of Holmes’s far more pervasive desire to limit all legal liability.

I have two basic objections to this approach. First, nothing in the logic of *laissez-faire* thought required that the scope of contract (as opposed to *tort*) liability be narrowed. *Tort* liability was widely feared both as an invasion of state power into private activity and as a potential engine for the redistribution of wealth. By contrast, nothing in contract law, with the exception of equitable theories of excuse, evoked similar anxieties concerning state power. In fact, it is usually assumed that under the influence of *laissez-faire* ideology the scope of contract was expanded at the same time *tort* liability was restricted precisely because contractualism more fully expressed the individualism and anti-statism of market capitalism.

Second, even in *tort* it is difficult to find any logical connection between efforts to overthrow strict liability and the rise of objective theories of liability. To a great extent, in fact, what one theory takes away the other tends simply to restore in its place. It was not Holmes’s objectivism, but his conceptions of policy and/or morality that led him to attack strict liability in *tort*.

And this explanation may be just as relevant to contract law. One of the dogmas under which the Willistonian objectivists marched at the turn of the century was a hostility to regarding

¹⁷ *Id.* at 16.

unilateral mistake as a legitimate basis for refusing to enforce contracts. They deplored the earlier "meeting of minds" theory for promoting a subjective conception of contract formation that too easily encouraged non-liability for promises. Thus, it appears, at least in this area, that the movement from subjective to objective theory was intended to expand contract liability dramatically.

Professor Gilmore, instead, treats this area of contention as involving simply the narrowing of the excuse of mistake. This categorization preserves the original architecture of his argument, since it enables him to reaffirm his view that excuses were actually narrowed. But it is crucial that what is really happening is that arguments once structured around conceptions of formation ("meeting of minds") are now simply reclassified in terms of excuses ("unilateral mistake"). Though the categories and language have been objectivized, there is no evidence that the new guise in which these old arguments appear has restricted liability or led to the enforcement of fewer contracts. Whether the unilateral mistake issue has been categorized as an issue of "formation" or of "excuse," it seems clear that it has resulted in a pattern of more extensive enforcement of at least one class of contracts.

Thus, I do not believe that Professor Gilmore has established the necessary connections between, respectively, (a) Holmes's attack on strict liability in the name of "personal fault" and his objectivism, (b) Holmes's effort to restrict tort liability and any supposed parallel movement to restrict contract liability, or (c) laissez-faire ideology and a general restriction of contractual liability.

The best evidence for Professor Gilmore's efforts to link nineteenth century restrictions on liability in tort and contract is contained in his all too brief treatment of the development of rules of damages. Inevitably, he begins with that old favorite, *Hadley v. Baxendale* (1854).¹⁸ "[W]hy such an essentially uninteresting case, decided in a not very good opinion by a judge otherwise unknown to fame, should immediately have become celebrated on both sides of the Atlantic is one of the mysteries of legal history."¹⁹ But if Gilmore is correct in asserting that "pre-*Hadley* damage rules shared the common feature that none of them protected the expectation interest or opened to admit special or consequential damages,"²⁰ there is hardly any "mystery" at all about the importance and the novelty of *Hadley v. Baxendale*.

¹⁸ 9 Ex. 341, 156 Eng. Rep. 154 (Ex. 1854).

¹⁹ GILMORE at 49.

²⁰ *Id.* at 51.

On the other hand, if in fact there is a clear pre-*Hadley* pattern of progressive limitation of damages, then Professor Gilmore must abandon his effort to link limitations on damages to the specific content of Holmesian metaphysics. Actually, from the very beginning of the nineteenth century there is a continuing movement away from complete jury sovereignty over damages towards ever more restrictive judicially imposed damage rules. And to the extent that restrictions on damages are to be used as evidence of a pattern of restricting the scope of contractual liability, they must be seen as more general phenomena of the nineteenth century.

Gilmore shows that *Hadley* later came under attack by Holmes not for the more celebrated "negative" branch of its damage rule—that is, its restriction of liability to "foreseeable" injuries—but rather for its "affirmative" branch—its allowance of recovery for lost profits and consequential damages where "special circumstances" were communicated.²¹ Gilmore's strategy, I take it, is to portray a clear historical break in damage theory by showing that the Holmesians substantially escalated the restriction on damage recovery. Such a showing would allow him to support his view that "a restrictive approach toward damage recovery seems a necessary component of any idea of absolute liability."²²

But recall that this discussion of damage rules began by recognizing a general trend toward restricting contract damages that began at almost the beginning of the nineteenth century. This pattern seemed to support Gilmore's assertion of parallel restrictions imposed on liability in both contract and tort. The "negative" branch of *Hadley v. Baxendale* thus seems to be far more important for Gilmore's general claims than the later Holmesian attack on its "affirmative" branch. Whatever he gains for the otherwise dubious argument that there is a connection between Holmesian absolute liability and restriction of damages, he loses by ignoring a much earlier apparent connection between the development of market capitalism and the restriction of contractual liability. In any event, it is clear that American courts had established substantially restrictive damage rules well before *Hadley v. Baxendale*. Theodore Sedgwick's monumental *Treatise on the Measure of Damages* in 1847 synthesized almost a generation of judicially inspired limitations on recovery.

So the question remains: is there any connection between limitations established for contract damages and the emerging laissez-

²¹ *Id.* at 52.

²² *Id.* at 48.

faire assumptions of market capitalism? Does damage theory provide irrefutable evidence of Gilmore's general proposition that the limitations imposed on both tort and contract liability expressed the view "that, ideally, no one should be liable to anyone for anything. . . ."?

My reason for doubting Gilmore's propositions about contract liability ultimately rests on my belief that no *laissez-faire* thinker would have objected to imposing liability where individual "wills" freely coincided. Therefore, I doubt that, all other things being equal, there was anyone who believed that barriers to agreement were intrinsically desirable.

Formal barriers to agreement—like the bargain theory of consideration—were thought to be necessary only because they provided objective evidence of the convergence of wills. These barriers were not enacted for the purpose of preventing agreement. Rather, they were regarded as necessary to assure the enforcement of only "true" agreements. Thus, I believe that Gilmore is wrong in treating the "bargain theory of consideration" as generated by a general *laissez-faire* policy of promoting as few binding agreements as possible.

But, it may be asked, why are restrictions on contract damages not evidence of such a general hostility to all forms of legal liability? If we recognize that, contrary to conventional wisdom, both the rule of expectation damages and restrictions on recovery for consequential damages arose at about the same time, we are in a position to see a virtually simultaneous expansion and limitation of different components of contract damages. The point is that rules of contract damages were developed in order to discriminate between, on one hand, what were regarded as freely undertaken future risks and obligations and, on the other, retroactively imposed liabilities that were not part of the original undertaking. In this sense, *laissez-faire* ideologues regarded the imposition of damages as creating the same dangerous opportunities for state-sanctioned redistributions of wealth that they feared would flow from tort liabilities. But to convert these fears into an indiscriminate hostility to the enforcement of agreements is completely unwarranted.

Still, I am prepared to acknowledge not only that Professor Gilmore's account of the development of a pattern of "anti-formation" doctrines is persuasive, but also that he has demonstrated that they derive from the new objectivist "bargain theory" of consideration. Since I am not persuaded, however, that the new substantive doctrines restricting contract formation can be traced directly to any social theory such as *laissez-faire*, or that, unlike the

parallel restrictions imposed on excuse doctrines (fraud, duress, coercion), they can be found generally to accord with the interests of the wealthy and the powerful, I am inclined to see them as autonomously deriving from the new objectivist jurisprudence itself. This is not to say that the rise of objectivism cannot itself be explained in social and economic terms. Indeed, at the very least one would have to say that the ever more strident insistence on the existence of an objective legal method at the end of the nineteenth century was an effort to deflect that era's clear increase in social conflict and its resulting politicization of the judiciary. All that one needs to say is that the crystallization of a coherent legal ideology often leads to unintended deductions, applications and consequences.

In a sense, this is what Professor Gilmore seeks to show when he extends the clearly demonstrable *laissez-faire* underpinnings of Holmes's theory of tort liability to explain contract law as well. But the idea that *laissez-faire* could be casually extended in the interest of mere logical symmetry to limit contractual relations is contrary to numerous other well established ideas about late nineteenth century legal thought.

Objectivism, then, seems to be the proper starting point in the realm of ideas. And it seems clear to me that its origins can be traced back to the period before the Civil War, to a time when Professor Gilmore insists no general theory of contract had as yet been "stumbled across."

To one who has studied pre-Langdellian contract law, Professor Gilmore's emphasis on Langdell's "almost inadvertent discovery of the general theory of contract" seems strikingly unhistorical. While there is no reason to quarrel with Gilmore's proposition that contract doctrine becomes increasingly generalized in the late nineteenth century, it also seems clear that this process of abstraction had been going on in contract as well as in other fields of law for quite some time. And it is curious that one who, in the early pages of this book, offers a brilliant anthropology of the development and generalization of various fields of law in the wake of the Industrial Revolution should treat the imperial claims of a general theory of contract as so surprising, fortuitous and inexplicable. Modern contract law arose early in the nineteenth century to combat existing "just price" theories of value. The rising commercial interests initially responded to the claim that all value was objective by arguing that in a market economy all value was in fact arbitrary, fluctuating and subjective. The subjective theory of contract, dominant throughout the first half of the nineteenth century, arose to undermine the claims to objectivity of an earlier socially imposed theory

of value.

Thus, the "will theory" that developed in the first half of the nineteenth century was itself a "general theory of contract." But the subjectivist underpinnings of that theory converted the inquiry into whether there had been "a meeting of minds," a question which necessarily involved a particularized examination of the facts of a specific transaction. It was therefore difficult to develop an abstract and generalized system of contract doctrine when so much turned on the particular mental state of the parties.

It was the development of an objective theory in the second half of the century that made extravagant doctrinal generalization possible by freeing the law from the particularity inherent in the earlier system of thought. And, as Professor Gilmore shows, by converting questions of "fact" into questions of "law" the objective theory also effected a shift of power from juries to courts.

Now, we are in a better position to see that the movement towards objectivism—and the conversion of questions of "fact" into those of "law"—was actually presaged by earlier developments in damage theory. The earlier objectivization of damage rules served a clearly anti-redistributive function, and there is little reason to doubt that the more thoroughgoing post-bellum objectivization of legal concepts sought to perform this political function even more completely. The objective theory of law is, however, an extremely blunt instrument that often produces random and indeterminate consequences not contemplated in its original design. Any "formal and external" system of legal concepts is established for the purpose of erecting a substantial intellectual barrier between processes and outcomes—between form and substance—in order to prevent "political" decisions determined on the basis of considerations of substantive justice.

In this way the "bargain theory of consideration," created in order to objectify consideration theory and thereby to eradicate all traces of an earlier and politically threatening substantive theory of consideration, brought with it unintended formal barriers to all sorts of desirable contractual agreements. It may also be true that the "bargain theory" was applied with more particularity in specific cases to eliminate certain politically uncongenial types of agreements. For example, rules against "past" or "moral" consideration may have tended more or less uniformly to suppress the claims of commercially unsophisticated groups in the population. But this consequence may only reflect the more general truth that insistence on observance of forms always enhances the power of those who are most sophisticated and calculating. Similarly, at first glance, at

least, the rule of *Foakes v. Beer* may be the ideological counterpart of the rule preventing "off the contract" recovery by a breaching party (*contra Britton v. Turner*)²³ under which clearly onerous contracts were enforced against the lower classes despite changing circumstances. But who can define for sure the distributional consequences of a rule barring subsequent settlement of contract claims through part payment? Indeed, can we even confidently label a rule that sets up barriers to modifying an original contract as an "anti-formation" doctrine? The rule may also be characterized as being strongly geared to the enforcement of original contracts.

In any event, the formal theory of consideration created barriers to agreement that simply cannot be traced to any political or class interests. The rules barring irrevocable offers or requirements contracts, for example, must be explained in terms of some more general ideology. My argument is that far from representing any special ideological hostility to contractual obligation, these barriers to contract formation must be seen as the unintended and inadvertent consequences of the objective theory.

We are still left, therefore, with what seems to me to be two difficult paradoxes (contradictions?) in Holmes's thought. How are we to reconcile his objectivism with his hostility to strict liability? My own view is that his objectivism is the more thoroughgoing and pervasive aspect of his thought. Though his insistence on "personal fault" cannot be reconciled with his objectivism, it actually served only the relatively restrictive argumentative function of combating strict liability in tort, which he was prepared to oppose on moral and political grounds, whatever the sacrifice to his general theory.

Second, how are we to reconcile Holmesian objectivism with his well known hostility to formalism? Or are we to accept Professor Gilmore's easy identification of Holmes with Langdell and Williston? It was Holmes, after all, who, in a quite critical review of Langdell's contracts book, accused him of being "the greatest living legal theologian." And Holmes's famous contrast between logic and experience as influences on the life of the law was offered, above all, in reaction to Langdellian formalism. Finally, unlike Holmes, there is nothing in Langdell's work that leads me to believe that he was at all preoccupied with the subjectivist-objectivist debate in contract law.

One is quite surprised, therefore, that Professor Gilmore has not even attempted to explain or justify his strikingly unorthodox crea-

²³ 6 N.H. 481 (1834).

tion of a Trinity consisting of Langdell, Holmes and Williston. Only in a footnote does Gilmore acknowledge:

I do not mean to suggest that Holmes was doctrinaire in the same sense that Langdell was. Holmes kept his own theories open-ended by his reiterated insistence that law basically reflects social and economic conditions and must change as they change. However, Williston's documentation of Holmes's insights was carried out in what we might call a thoroughly Langdellian spirit.²⁴

It would require a more extensive inquiry to determine whether it is appropriate to link Langdell's formalism with Holmes's objectivism and then, in turn, to saddle Holmes with the uses that Williston made of him. Suffice it to say that Holmes's policy-based objectivism cannot easily be made the equivalent of Williston's (or Langdell's) longing for an apolitical "science of law."

American legal scholars have made surprisingly little use of the lecture form. As these lectures demonstrate so well, the form allows scholars to free themselves from the more compulsive styles of conventional scholarship and to paint impressionistically on a much broader canvas. The result is an exciting and provocative sketch of major themes in American law.

²⁴ GILMORE at 143 n.256.

