Book Review


Grant Gilmore's writing has illuminated many parts of the lawscape, from thorny thickets in which he is expert,¹ to bleak backwoods of which he knows nothing and, better yet, is known to know nothing.² This little book plays on an acre or two of which he knows a good deal. It tells, simply, the story of the rise and fall of the American classical theory of contract. For Professor Gilmore's countless former students, there is little new here; it is, as he would say, "old hat." But even for them, this is a rare find: a beautifully written story about law. For those new to Gilmore's work, it is that and more; it is an ideal introduction to the work of one of today's great American common lawyers.

The Death of Contract³ is a difficult book to categorize. Its stated goal is to refute the argument that: "Contract, being dead, is no longer a fit or worthwhile subject of study."⁴ Professor Gilmore concedes that the American classical theory of contract⁵ is but a relic of time past, but suggests that: "In plotting our course, the best we have to go by is some knowledge of where we have come from."⁶

Any book whose subject is "where we have come from" is likely to be treated as history. Gilmore treats Holmes's The Common Law⁷ that way and has a great deal of fun with it in those terms.⁸ The Death

2. Gilmore, Products Liability: A Commentary, 38 U. CHI. L. REV. 103 (1970), which begins with an expression of "blank astonishment" at being invited to give this paper: "In speculating on what the committee on arrangements could have had in mind the only plausible explanation I have been able to come up with is this: it was decided that the Conference would be enlivened by a contribution from a lawyer who knew nothing — and was known to know nothing — either about economic theory or about current trends in what has come to be called Products Liability. . . . My function is evidently to comment, in a childlike fashion, on these mysteries — more or less, it may be, like the little boy who, rightly or wrongly, cried out in mid-procession that the Emperor had no clothes on." Id.
3. Hereinafter referred to as GILMORE.
4. GILMORE at 3.
5. Hereinafter, "Contract" refers to the American classical theory.
6. GILMORE at 4.
8. See, e.g., text accompanying notes 37, 40, 43 and 70 infra.

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of Contract, like The Common Law, is historical in form and runs the same risk of being taken at face value, of being scoured for factual inaccuracy. That approach, in my view, misses the point of this work which, it may be, is more easily sensed than stated.

Professor Gilmore is a humanist, trained in language and in literature before coming to the law. In these four lectures, he takes an ironic rhetorical stance more literary than legal; the result is a fable about law. It happens to be about American contract law, about Langdell and Holmes and Williston and Cardozo and Corbin. But its moral goes beyond the law of contract; it is, in essence, that: “Law, by its nature, reflects what is — not, except to the extent dictated by the idea of cultural lag, what was and never what will be.”

Or, as he puts it elsewhere: “Let us stop talking about World Peace through Law: conceivably we might get World Law through Peace . . . but not the other way around.” In this view, any attempt to tinker with the common law from on high, to purify it, to resolve its ambiguities, to overhaul it according to the decided preferences of one man, or two, or three is doomed to reversal by the tides of time. And that is roughly how Gilmore characterizes the creation of the general theory of contract advanced by Langdell, developed by Holmes and Williston, and subjected to a “lingering death” by Cardozo and Corbin.

The story begins with Christopher Columbus Langdell, Dean of Harvard Law School, making the “great discovery” that “there was such a thing as a general law — or theory — of contract,” an idea which “seems never to have occurred to the legal mind” before, but which Langdell “somehow stumbled across” while putting together his casebook on Contracts, published in 1871. This is, of course, the purest hyperbole. There were relatively mature formulations of a general contract theory in England before Langdell’s time, and Professor Gilmore would have done well to alert his readers to the dangers of reading him literally. As a literary device, however, this use of hyperbole is effective in giving the author the rhetorical stance from which to develop his theme.

9. This book is based on lectures delivered at the Ohio State University Law School in April, 1970.
10. GILMORE at 9.
12. GILMORE at 6.
13. C. LANGDELL, CASES ON CONTRACTS (1871).
14. Perhaps the first effort at such a formulation was the vain attempt to organize English contract law according to Roman law principles: H. BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND (S. Thorne ed. 1968); J. SEDLON, AD PLLETAM DISSERTIO (1647, D. Ogge. ed. 1925); In more modern times, J. POWELL, LAW OF CONTRACTS (1802); C. COMYN, THE LAW OF CONTRACTS (1807), J. CHITTY, THE LAW OF CONTRACTS (1826), J. SMITH, THE LAW OF CONTRACTS (1847), preceded Langdell.
Langdell's classical theory was that of a scientist. A product of his age, he believed that law "consists of certain principles and doctrines" and that it was "possible to take such a branch of law as Contracts, for example, and . . . to select, classify and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines . . .." And that is roughly what he did. His product, contained in the casebook of 1871 and the Summary of the Law of Contracts (1880), was a highly logical construct. Gilmore comments: "It is fair to say that the theory of contract did not come as a natural result of a continuing case-law development; in fact it represented a sharp break with the past, even the recent past." It was put together with "whatever bits and pieces of case law, old and new, could be made to fit the theory," the "wrong" cases being ignored or dismissed with "Langdellian certitude." The theory "was in its origins, and continued to be during its life, an ivory tower abstraction. Its natural habitat was the law schools, not the law courts." The particular school in which Contract was cultivated was Langdell's Harvard. His introducing a full-time faculty there made possible, as never before, the teaching and development of a highly abstract law, unfamiliar to the courts. So too did the case method. Langdell was not, strictly speaking, the "inventor" of this way of teaching, but he was the first to shape the approach of an entire school to it. Whether by accident or design, this method of teaching facilitated the formation of Contract. Putting together a selection of cases is an excellent way to edit the law; attorneys do it every day. Teaching from selected cases is an excellent way to advance an edited version of a whole field of law.

But Langdell "did little more than launch the idea that there was — or should be — such a thing as a general theory of contract." Holmes, mainly through The Common Law, and Williston, in his "magisterial treatise," developed the theory; Holmes "in broad philosophical outline," Williston "in meticulous, although not always accurate, scholarly detail." The resulting body of doctrine, most completely reduced to writing in Williston's multi-volume treatise, was nothing if not internally consistent. It was, at once, the product of and a shrine to certainty; that was its great strength. Logic was its guiding principle, inflexibility its fundamental

17. Id. at 17-18.
22. These lectures, originally delivered at Harvard Law School, were published in 1881.
23. S. Williston, Contracts (1920).
failing. Time brought changes in the way commerce was conducted and exposed the certainty as dogma. For "[t]he 'general theory' required that, always and everywhere, things remain as they had, in theory, always been."25

Professor Gilmore describes the content of the Holmes-Williston construct "impressionistically rather than scientifically" and, having completed "that chore," returns to "the far more interesting business" of speculating on why it was so influential.26 There is a warning here: his description of the "construct" is in much the same vein as the hyperbole with which he began his story27 and should be treated accordingly. It is the first of several doctrinal caricatures, designed to emphasize the thinking behind the doctrine rather than the doctrine itself.

According to Gilmore, the theory "seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything."28 The ideal was unattainable, but a very narrow range of liability — a certain range — was not only desirable, it was concomitant with a strict notion of Contract. The contract was the bargain. Before it was struck, neither party was liable to the other; afterwards, liability was that, and only that, which the bargain encompassed. There could be no liability for damage suffered beyond the confines of the bargain. The parties could, indeed should, place its limits where they pleased. But beyond them, Contract had no application. The only legitimate test of liability was the bargain itself. Foreseeable, or likely, consequences of breach were not a part of the agreement solely by virtue of their natural relationship to it. Natural relationships were the province of tort. Contractual relationships accorded with nothing but the desires of those who created them. In a burgeoning free-enterprise system, that was, after all, how it had to be.

Just as the bargain was the measure of liability, liability was no more than the price of the bargain. There was no morality involved, no punitive element to damages. "In every case," said Holmes, the law leaves the contracting party "free to break his contract if he chooses."29 There could be no material distinction between a willful breach and an innocent breach, for the price of breach was agreed at the outset.

The corollary of limiting liability to these narrow confines was that, within them, obligations were absolute. If merchants were to transact precisely as they chose, without obeisance to some amorphous societal standard, then, having chosen, they were bound. Natural relationships were no more appropriate as an excuse for non-performance than as a measure of liability for breach. As Holmes put it: "The only universal consequence of a legally binding promise is, that the law makes the

25. Id. at 34.
26. Id. at 14.
27. See text accompanying note 12 supra.
28. GILMORE at 14.
promisor pay damages if the promised event does not come to pass.”

Excuses such as impossibility and mistake were frowned upon; contracts were to be enforced as made. If performance was impossible, damages would have to do. If a mistake had been made, it would prove expensive.

Pervading this approach was a suspicion of implied terms. Courts were no more than neutral umpires lending enforcement powers to the contract. To imply terms was to go beyond what was written, to introduce values from without, to run the risk of subjectivity in enforcing a bargain which others had created.

At the heart of this construct, the “balance-wheel of the great machine,” was Holmes’s “bargain theory” of consideration. According to Professor Gilmore, the prevailing view of consideration before Holmes was that developed by the English courts: “Any benefit would do; any detriment would do.” If the promisor either conferred a benefit on the promisor, or incurred a detriment to himself, in response to the promise, then there was consideration; the promise was binding. For this, Gilmore cites Kent’s Commentaries. But: “The new day dawned with Holmes.”

According to Holmes, “The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.” Any benefit, any detriment, simply would not do. “[T]he promise and the consideration must purport to be the motive each for the other....” Only such benefit or detriment as had been bargained for could bind. Hence, the “bargain theory.” In Gilmore’s view, this formulation had no support in the cases. It was put forward as the theoretical underpinning for the strictly limited notion of contractual liability propogated by the Holmesians. “It seems perfectly clear that Holmes was, quite consciously, proposing revolutionary doctrine and was not in the least interested in stating or restating the common law as it was.”

Gilmore continues: “[T]he next step was the extension of the newly-minted theory of consideration to the entire life-history of a contract, from birth to death.” It was used to explain why offers expressed to be irrevocable were revocable until accepted; why the modification of an ongoing contract, by which A promised to pay B more than originally agreed, was not binding on A; and why a release from part of an obliga-

30. Id., quoted by Gilmore at 14.
32. Id. at 19.
34. Gilmore at 19.
38. Id. at 21.
tion to pay money did not release at all. Each "rule" was supported by an English case, but: "[A]ccommodation of the cases to the newfangled theory required something like major surgery on the cases themselves."

Professor Gilmore demonstrates the extent of this "major surgery" in a fascinating and instructive analysis of the three English cases from which Holmes extracted his "rules." For example, Holmes took his "rule" on revocability of offers from Dickinson v. Dodds. In that case, an offer to sell real property was to be "left over" until Friday. On learning of an earlier sale to a third person, the offeree attempted to "accept" the offer before the Friday deadline. Upon Dodds's refusal to convey, Dickinson sued. The Court of Appeals held for the offeror, Dodds, on the grounds that the two parties had not agreed to the same thing at the same time. By the time Dickinson had agreed to buy, Dodds was no longer willing to sell to him. There had been no "meeting of the minds."

Holmes, scorning such "subjective" analysis, offered want of consideration as the true ground of decision. There had been no consideration for Dodds's agreeing to wait. Later, Williston went further, applying the Holmesian "rule" to situations where irrevocability was expressed more explicitly than in the principal case. Professor Gilmore's analysis of this, and the other two cases which bore Holmes his "rules," is designed to show that they "had been generalized into abstractions that had little or nothing to do with the cases themselves." This case analysis is one of the high points of the book.

One of the prime characteristics of the Langdellian-Holmesian-Willistonian school was what Gilmore terms "objectification." We have already encountered one example: the avoidance of "meeting of the minds" as an appropriate criterion for formation of a contract. This is a particular example of the general displacement of subjective inquiry by "objectification." This was an effort to limit factual inquiry by the formation of clear legal "rules" which were to be applied with absolute consistency. Ideally, the "rule" would preclude any appeal to the subjective.

A further example of this process, demonstrating a distaste for mistake as an excuse, may be helpful. Professor Gilmore offers the Holmesian formulation of Raffles v. Wichelhaus ("which . . . is to the

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39. Id. at 21–22. Professor Gilmore is actually referring here to the later development, by Williston, of these "subsidiary propositions" which were "unquestionably faithful to the spirit of the master's thought." Id. at 114 n.43.

40. Id. at 22.

41. Id. at 22.

42. The actual language of Lord Justice Mellish is "[T]he two minds must be in agreement at some one time, . . . ." But, in fairness to Holmes, Mellish also said: "He was not in point of law bound to hold the offer over . . . ." and referred to the offer as "a mere offer" and "a mere nudum pactum." Id. at 474–75.

43. GILMORE at 22.

44. Id. at 22–34.

ordinary run of case law as the recently popular theatre of the absurd is to the ordinary run of theatre" as characteristic. The facts of the case are simple, if bizarre. Buyer and seller agreed to the purchase and sale of cotton "to arrive ex Peerless from Bombay." The buyer refused to accept delivery on the grounds that the cotton was from the wrong ship Peerless. Indeed there were two, each sailing from Bombay and each, presumably, carrying cotton. The case was decided, so far as one can tell, squarely on the "meeting of the minds" grounds argued by buyer's counsel Mellish. In this analysis, since neither party meant the same thing, there was no meeting of the minds and no binding agreement.

Of Holmes's analysis of Raffles, Gilmore says: "The magician who could 'objectify' Raffles v. Wichelhaus... could, the need arising, objectify anything." Holmes had determined that the "true ground of decision" was not that the parties "meant" different things but that "each said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another." Standing alone, this is hardly a satisfactory explanation of the case, but for those who chose to accept it, or who knew no better, Holmes had deftly converted a question of fact into a rule of law. The factual inquiry had been: What did the parties intend? The rule of law was: No enforceable agreement can exist where there is no reference to a common subject-matter.

A fundamental defect of the "objectivist" approach was its inability to deal with anything as subjective as mistake. But so long as this defect could be swept along in a logically defensible scheme, the problem could be thought to have gone away. This would close the door on laborious, factual inquiries which threatened disorder in an orderly, abstract world.

46. GILMORE at 35.
47. All we have is: "PER CURIAM. There must be judgment for the defendants." 2 Hurl. & C. at 908, 159 Eng. Rep. at 376. Presumably, defence counsel's argument prevailed.
48. Later Lord Justice Mellish wrote the "meeting of the minds" opinion of the Court of Appeal in Dickinson v. Dodds, as good an example of the subjective approach as may be found. See text accompanying notes 42-43 supra.
49. GILMORE at 41.
51. Holmes explained the case again, many years later, in this way: "In such a case [where a proper name is used] we let in evidence of intention not to help out what theory recognizes as an uncertainty of speech, and to read what the writer meant into what he has tried but failed to say, but, recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he has said. It is on this ground that there is no contract when the proper name used by one party means one ship, and that used by the other means another [citations to Raffles]. The mere difference of intent as such is immaterial." Holmes, The Theory of Legal Interpretation, 12 HARV. L. REV. 417, 418 (1899).
52. For an example of the disorder which the subjective approach can lead to, if taken to extremes, see National Presto Indus., Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964), cert. denied, 380 U.S. 962 (1965).
The immediate aftermath of the Industrial Revolution demanded efficiency; rules of law would assist the unhindered flow of commerce where factual inquiry would only hold things up. And with the arrival of the corporate person, there was perhaps as much sense to an objective approach as to asking what the corporate party thought, or believed, or intended. The move for abstraction was in large part a product of the times.

The purpose of "objectification" was, in a word, certainty. Abstracted law can be controlled more readily; questions of law by-pass juries and yield ultimate formative influence to appellate courts. The more law can be objectified, the greater the chance it can be unified. The more it can be unified, the more sense it makes to have "national" law schools. The more sense it makes to have such law schools, the more influential they become. And if an influential school, like Harvard, has an influential ally in this endeavor, like Holmes, then a highly abstract, cohesive general theory of law can take root as though spontaneous. For so long as the two extremities of judge-made law, the schools and the ultimate court of appeal, were under like influence, there was a good chance that a logical construct like Contract could be transplanted into the common law system. Who was there, after all, to object?

According to Gilmore, the classical theory of contract existed in its pure form only in the heads, the books and the classrooms of certain men. Although not generally found in the courts of law, it was accurately reflected in Langdell's "laboratory" — the law library. The publishers, handmaids to the "national" law schools, and dependent on their influence, had organized the cases along the lines of the great theorists. If the academic organizer was Williston, the "grass roots" organizer was the West Publishing Company. The first generation of lawyers trained in the newly "nationalized" schools — and these were the most influential practitioners of the day — came to believe instinctively that to each fixed, immutable and universal principle West had assigned a number. Every true and worthy thought in the legal universe could be tracked down to the very end of its world. All was accounted for. The scientific legal environment left behind by the Langdellians, the libraries which are to this day more like laboratories than like libraries at large, were not a benign environment for original thought. By their very organization, they fed the theory into the practice of law so that Holmesian history became, paradoxically, a self-fulfilling prophecy.

53. Judge Frank, concurring in Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 761 (2d Cir. 1946), put it this way: "The objectivists transferred from the field of torts that stubborn anti-subjectivist, the 'reasonable man'; so that, in part at least, advocacy of the 'objective' standard in contracts appears to have represented a desire for legal symmetry, legal uniformity, a desire seemingly prompted by aesthetic impulses."

54. "Whether the West Publishing Company, like the discoverer of the atomic bomb, should be looked on as a benefactor of mankind or as an enemy of the human race is a problem of moral philosophy with which a lawyer is ill equipped to deal." Gilmore, Legal Realism: Its Cause and Cure, 70 Yale L.J. 1037, 1041 (1961).
Having spent his first two chapters tracing the origins and development of the theory whose death he sets out to chronicle, Professor Gilmore moves, in chapter three to the Decline and Fall. It was to take unusually perspicacious and determined scholars to penetrate the armor which West, after the theorists, had thrown around the law. It was one thing to assault the whole, to make doctrine itself the foe; the Legal Realists did this and found nothing to put in its stead. But it was quite another to challenge from within, to seek out what Gilmore calls the "case law undergrounds" by developing respectable theories which ran right across conventional categories. Lon Fuller's work on the reliance interest in contract damages, and Friedrich Kessler's on good faith, are offered as outstanding examples. More broadly, the classical theory was undermined by the work of Cardozo and Corbin, "the engineers of its destruction." In judicial and academic guise, these engineers correspond nicely to Holmes and Williston, the judicial and the academic construction engineers.

Corbin was at Yale and became Williston's second-in-command in drafting the first Restatement; Cardozo was Chief Justice of the New York Court of Appeals and, like Holmes, went on to the Supreme Court. The law of contract propounded by the Court of Appeals under Cardozo was far more responsive, flexible and uncertain than the "correct" contract law which Harvard had marketed half a century before. No one knows quite how mischievous Cardozo thought he was being as he seemed to employ chutzpah as a jurisprudential device, playing his game with their rules and so standing the good Williston's best intentions on their heads. That this is what he did is best seen in a series of New York cases with which he lovingly dug the grave of classical consideration theory, all the

56. *Gilmore* at 56.
59. *Gilmore* at 57.
60. [F]or within the hollow crown
   That rounds the mortal temples of a king
   Keeps Death his court, and there the antic sits,
   Scoffing his state and grinning at his pomp,
   Allowing him a breath, a little scene,
   To monarchize, be fear'd, and kill with looks,
   Infusing him with self and vain conceit,
   As if this flesh which walls about our life,
   Were brass impregnable; and humour'd thus
   Comes at the last with a little pin
   Bores through his castle wall, and—

*W. Shakespeare, Richard II, Act III, Scene II.*
while professing to apply it with full rigor.61 While others looked to Williston (and to West), who had mapped out all paths of inquiry, Cardozo surreptitiously left behind him a little trail of case-law markers, then turned to point at these "signposts on the road."62

The occasion of this revelation was a case concerning the power of one Mary Yates Johnson to revoke her pledge of a charitable contribution to Allegheny College, payable after her death. After referring to Holmes's observation that the courts were failing properly to distinguish between that detriment which was merely a consequence of the promise and that which was bargained for, Cardozo continued: "The tendency toward effacement had not lessened with the years. On the contrary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled 'a promissory estoppel' (citing Williston)."63 Neither of the cases he then referred to as "signposts on the road" used the term "promissory estoppel"; each was decided in terms of consideration.64 Indeed, he decided the Allegheny College case on the grounds that the college assumed "a duty" "to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial."65 The duty arose when a part payment was accepted during her lifetime and before her revocation. This implied promise bound the donor so that she could no longer revoke her pledge. Thus, by weakening the consideration requirement beyond measure, and referring to promissory estoppel as an alternative ground of recovery, Cardozo laid the foundation for the doctrine to develop. Its recognition and adoption, first by the New York Courts then, through Corbin, by "national" common law, was the crucial factor in the demise of the classical consideration theory.

Corbin's attack was "more forthright"66 than Cardozo's as he challenged the stubborn Williston and persuaded him to recognize promissory estoppel by the inclusion of Section 90 in the Restatement First. Gilmore offers a remarkable anecdote about how this occurred.67 The enormous expansion of Section 90 between Restatements First and Second indicates the extent to which promissory estoppel became a "mainstream" doctrine in the courts.

Professor Gilmore's perceptions of Corbin, under whom he studied, are noteworthy: "Corbin's abiding interest was in what he called the 'opera-

63. Id. at 373-74, 159 N.E. at 174-75.
65. 246 N.Y. at 376, 159 N.E. at 175.
66. GILMORE at 57.
67. Id. at 62-65.
tive facts’ of cases; he had no love for, indeed little patience with, doctrine.”68 His belief that certainty in the law is an illusion, that the mechanical application of doctrine derives from “the delusion that law is absolute and eternal,”69 set him on a collision course with Williston. As Gilmore puts it: “Corbin’s entire discussion of consideration theory is essentially a demonstration that the Holmesian model was wrong — wrong as a matter of historical fact (which, of course, it was) and also wrong as a matter of social policy (which is a different question entirely).”70

Corbin’s main ideas, formulated around 1910, were far from conventional. By 1950, when his treatise on Contracts (which Gilmore describes as “the greatest law book ever written”71) was published, it looked like the work of an Establishment figure. His role as second-in-command of the Restatement also looked like an Establishment position, and Gilmore concedes that he cannot explain the apparent paradox.72 After all, the Restatement was devoted to doctrine, designed to shore it up against attack.

Professor Gilmore chronicles the fate of the three mainstays of Holmesian classicism (consideration, absolute liability and restrictive contract damages) during the period of Corbin’s domination. He compares the First Restatement with the Second to show how the law had been “Corbinized.”73 And in doing so, he demonstrates that Restatements are useful evidence of current thinking at the time of their drafting. It may even be that their main value is historical; they are the common law’s sealed chests of everyday artifacts, certain to be found by some future generation bent on understanding the past.

The author makes no secret of his alignment with the revisionists; for him the Second Restatement, the revised law of contract, was a reflection of the inevitable: “The future, of course, won, as it always does.”74 He characterizes the “Corbinization” of law as a relief from the unwarranted confines of “the construct” and clearly prefers a fluid and adaptable common law, freed from the bonds of doctrinal certainty — chaos and all. The twenty-odd pages in which he traces the process of doctrinal disintegration are among the most rewarding of the book. So ends Professor Gilmore’s survey of “the brief, happy life of the general theory of contract.”75

I suggested early in this review that Professor Gilmore’s book is better described as fable about law than as a history. I think that characterization accurately conveys the author’s purpose, explains his particular

68. Id. at 58.
70. GILMORE at 58.
71. Id. at 57.
72. “Why was he not outside on the barricades leading the revolutionary troops . . . ? I simply do not know the answer to that question.” Id. at 60.
73. Id. at 70.
74. Id. at 65.
75. Id. at 85.
use of rhetoric and puts into perspective his frequent appeal to hyperbole. At the very least, this is not a book to be read straight-faced.

At the same time, there is a historical message here. Roughly stated, it is that the Holmesians subjected the law of contract to a logical construct having little or no common law legitimacy. The revisionists, Corbin and Cardozo, came to the rescue. Doctrine was eased aside by factual inquiry and by judicial juggling. Certainty was made to yield to the needs of a changing commerce. And at the heart of it all, consideration gave way to promissory estoppel. This was the objective notion of "the bargain" being usurped by the founding of liability on the creation of a reasonable expectation. From that central appeal to the subjective came the end of Contract.

So far as this historical message is concerned, the author pays a price for the pleasure of his particular style. His pleasure is our delight, so the price may not be too high. But we should recognize that by dealing in universals, Professor Gilmore has obscured the very parochial nature of his book. This is perhaps its greatest shortcoming. A useful way to redress the imbalance, to place this American experience in the broader scheme of things, is to look at the present state of English contract law. Langdell and Holmes began with selected English cases from the middle of the nineteenth century. Professor Gilmore makes particular reference to the English cases which Holmes used to develop his "rules" and later suggests that: "[T]he doctrinal statement of contract theory was carried to much greater extremes in this country than it ever was in England." But he does not follow through, comparing today's English law with today's American law in an effort to isolate those American strains which are vestiges of "the construct" and its repercussions.

If we take seriously the reasons given by Gilmore for the rise of the theorists in this country, it is not surprising that English law experienced nothing similar. The work of the Langdellians made sense in the face of disunity. There was no need to promote "national" law schools in a country blessed with a single jurisdiction. Order need be imposed only where disorder makes life difficult. Nineteenth century England experienced nothing comparable with the legal difficulty which America's burgeoning national commerce encountered in crossing state lines. There was no English counterpart to the tensions of the movement toward federalism. And the jury, the bane of the objectivists here, was soon out of harm's way — banished from civil causes. In the short space available for this comparison, I shall limit myself to a look at English consideration doctrine since, in its Holmesian formulation, it was "the balance wheel" of Contract, and the development of its "anti-matter," promissory estoppel, was

76. Id. at 22-34.
77. Id. at 99-100.
78. This began as early as 1854 with the Common Law Procedure Act which severely curtailed the role of the jury in civil causes. See 15 W. Holdsworth, A History of English Law 112 (A.L. Goodhart & H.G. Hanbury eds. 1965).
central to the theory's decline. It is important to understand the relationship of estoppel to any traditional formulation of contract, particularly the way in which a consideration requirement is undermined once expectation becomes an alternative ground for recovery. Any strong contract doctrine, in traditional mold, must control its own domain. Alternative grounds for recovery, on purely "contract" facts, necessarily undermine that doctrine.

If we turn to English law today, we find two notable features. First, consideration looks much more like the product of Holmes's "bargain theory" than what remains of that theory in this country. Second, promissory estoppel hardly exists. Two questions suggest themselves. First, how false was Holmes's theory, how far a departure from tradition? Second, why has promissory estoppel never really developed in English law?

For brevity, and because I believe it to be accurate, I shall let the current edition of Cheshire and Fifoot\textsuperscript{79} speak to the first question:

The antithesis of benefit and detriment, though reiterated in the courts, is not altogether happy. The use of the word 'detriment,' in particular, obscures the vital transformation of \textit{assumpsit} from a species of action on the case to a general remedy in contract. So long as it remained tortious in character, it was necessary to prove that the plaintiff had suffered damage in reliance upon the defendant's undertaking. When it became contractual, the courts concentrated, not on the consequences of the defendant's fault, but on the facts present at the time of the agreement and in return for which the defendant's promise was given. Detriment is clearly a more appropriate description of the former than of the latter situation. Nor is this criticism of merely antiquarian interest. The typical modern contract is the bargain struck by the exchange of promises.\textsuperscript{80}

In the language of purchase and sale, the authors say:

The plaintiff must show that he has bought the defendant's promise either by doing some act in return for it or by offering a counter-promise.\textsuperscript{81}

This definition of consideration as the price paid by the plaintiff for the defendant's promise is, they say, preferable to "the nineteenth century terminology of benefit and detriment." It is easier to understand, it corresponds accurately to the everyday exchange of promises and it emphasizes "the commercial character of the English contract." What is more:

When, in the sixteenth century, the common lawyers evolved a general law of contract, they based it unhesitatingly on the idea of bargain; and save when they wavered under the influence of Lord Mansfield, they have not departed from it.\textsuperscript{82}

\textsuperscript{79} G. \textsc{Cheshire} \& C. \textsc{Fifoot}, "\textit{Law of Contract}" (8th ed. 1972), generally taken to be the leading English work on the subject.

\textsuperscript{80} \textit{Id.} at 59-60.

\textsuperscript{81} \textit{Id.} at 60.

\textsuperscript{82} \textit{Id. Compare} \textsc{Gilmore} at 18-19.
If this, the traditional English view, is accepted, it throws a very different light on our story. It suggests that at least where consideration is concerned, Holmes had more history on his side than Gilmore generally allows. For in this view, it is the "bargain theory" which is traditional, "the nineteenth century terminology of benefit and detriment" aberrational. Let us complete the picture by considering our second question: Why has promissory estoppel never developed to any extent in English law?

Interestingly enough, the doctrine made its first modern English appearance in a case similar to *Foakes v. Beers,* from which Holmes took his "rule" that a release from liability to pay money was not binding without independent consideration. In the *High Trees House* case, landlords had agreed to accept only half the agreed rent if the tenants would remain in occupancy. This was wartime London; tenants were likely to leave. When the war was over, the landlords sued for the "other half" of the rent for part of 1945 because the tenants had refused to pay the old rent after London returned to normal. In giving judgment for the plaintiffs, Denning J., then, as now, one of England's more imaginative judges, ventured the suggestion, *obiter,* that a suit for monies owed in respect of the wartime years could be met with the defence of promissory estoppel. Although lack of consideration would have been fatal to an action on the promise, it was no bar to a defence.

An effort to expand this limited notion of estoppel was made three years later in *Combe v. Combe.* Defendant's ex-wife sued for breach of a promise to make maintenance payments. The promise was unsupported by consideration but, as intended by the defendant, plaintiff had relied on the promise in refraining from seeking a permanent maintenance order. At trial, Mr. Justice Byrne upheld the ex-wife's claim, following the *dicta* of Mr. Justice Denning in *High Trees House.* On appeal, Lord Justice Denning set the matter straight:

Much as I am inclined to favour the principle stated in the *High Trees* case, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings between the parties.

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83. 9 App. Cas. 605 (H.L. 1884).
86. "L.J." means Lord Justice, a member of the Court of Appeal. Subsequently, Denning was promoted again, to become a law lord, but later "demoted" himself to Master of the Rolls (head of the Court of Appeal) in the belief that this is a more influential position from which to effect change. *See England's Most Revolutionary Judge,* The Sunday Times (London), June 17 and June 24, 1973, at 33, col. 1
Thus spoke one of England’s great judicial innovators.88 His formulation was later referred to by a member of the House of Lords as too broad: “I do not wish to lend the authority of this House to the statement of principle which is to be found in Combe v. Combe and may well be far too widely stated.”89 But only last year, Denning, M.R., restated the principle more narrowly: “[I]f the plaintiff makes the promise knowing or intending that the other will act on it, and he does act on it, then a court of equity will not allow him to go back on that promise . . . .”90 As is commonly said, in English law promissory estoppel is a shield, not a sword. And, one might add, a mighty narrow shield at that.

Now all this is at a far remove from the doctrine enshrined in section 90 of the Restatement First, and in a different world altogether from the expanded version of Restatement Second.91 In England, it would be section 75 which accurately states the law.92

With the advantage of this added perspective, we may now retrace our American steps, looking particularly at the development of promissory estoppel.93 Bearing in mind that it is the English doctrine, not the American, which is in line with the rest of the common law world,94 our question becomes: Why did promissory estoppel develop so broadly and so rapidly in this country?

Accepting Professor Gilmore’s chronicle of its development,95 it seems that promissory estoppel developed as a way of escaping the confines of the particularly narrow Holmesian consideration doctrine. It may be that this was the only, or as good as any, way around the logical construct, that working from within was a hopeless task. Either way, this suggested analysis goes beyond Professor Gilmore’s implication when he says:

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91. Gilmore discusses the expansion at 71-72 and concludes: “Thus the unwanted stepchild of Restatement (First) has become a basic principle of Restatement (Second) . . . .” (referring to language in the Commentary to § 90 (Second)).

92. G. CHESHIRE & C. FIFOOT, supra note 79, at 60 n.1, which also cites WILLISTON, supra note 21, with approval.

93. See cases cited at note 61 supra.

94. See generally Seddon, Is Equitable Estoppel Alive or Dead in Australia?, 24 INT. & COMP. L.Q. 438 (1975), an article which discusses the subject more broadly than the title suggests.

95. GILMORE at 62-65.
The trouble was that businessmen, adapting to changing circumstance, kept doing things differently. The "general theory" required that, always and everywhere, things remain as they had, in theory, always been.\footnote{Gilmore at 34.}

While agreeing with his diagnosis, I resist the implication that what followed was a cure, that the law, after Cardozo and Corbin, was more reflective of commercial reality. My own characterization is a little different.

The English \textit{corpus juris} which the American theorists seized on was a living thing, a flexible body of common law. In the interests, let us say, of certainty, the Langdellians pinned certain joints. Consideration, excuse and damages were selected; their pinning at once limited movement and prevented growth. As time passed, the real world changed. But the \textit{corpus} could not change with it. Increasingly rigid, it became vulnerable. And in the event, it took just a stiff revisionist breeze to blow it flat.\footnote{Gilmore puts it thus: "Had the structure itself been, so to say, modernized or made more habitable, the courts, in making good their escape, might not have been compelled to tear the whole thing down." \textit{Id.} at 101.}

Now look at England. No pinning, no trauma, no surgery; rather, a body of law quite able to withstand assaults. Such is the nature of the common law. But much more impressive in our scheme of things is that the body is still standing: English contract law is alive and well.

Indeed, when America relented, recognizing frustration as an excuse and reasonable expectation as a basis for contract damages, it adopted English developments.\footnote{The development of frustration, as distinct from impossibility, as an excuse for non-performance is generally attributed to "the coronation cases," Krell v. Henry, [1903] 2 K.B. 740 and Chandler v. Webster, [1904] 1 K.B. 493. In Krell v. Henry, Vaughan Williams, L.J., purported to apply the rule set down by Blackburn, J., in Taylor v. Caldwell, [1853] B.&S. 826, 122 Eng. Rep. 309, 313, namely that a condition was to be implied as to "the continued existence of a given person or thing." But Vaughan Williams shifted the formulation to "the existence of a particular state of things," [1903] 2 K.B. at 749, which, it may be, is the entire distinction between impossibility and frustration. For a discussion of the development of doctrine in this area, see Corbin, \textit{Recent Developments in the Law of Contracts}, 50 \textit{Harv. L. Rev.} 449, 464–65 (1937). The damage formula which finally overcame resistance was that of Hadley v. Baxendale, [1854] 9 Ex. 341, 156 Eng. Rep. 145. \textit{See Gilmore} at 49–53 and 83–84.}

England’s unhampered common law had permitted their development; the Langdellians had denied them. Such flexible doctrine never gave rise to the search for an alternative theory of liability, so that promissory estoppel, seized upon here as an escape, is barely acknowledged in England.

With this added perspective, it becomes clear that American contract law owes as much of its uniqueness in the common law world to the revisionists as to the theorists. True, it was the theorists who first formulated an American doctrine, separate and distinguishable from the English. But in throwing it over, the revisionists cut more fundamental doctrinal...
ties than the Langdellians ever did. They were no less revolutionaries than those they dispossessed.

In his final chapter, "Conclusions and Speculations," Professor Gilmore speculates that in this country "'contract' is being reabsorbed into the mainstream of 'tort.'" With "the bargain" effectively displaced by expectation as the notion from which contractual liability proceeds, his observation is fair enough. If contract is moving toward tort in this country, it is worth observing that in England it is the other way about. In English law, it is tort, the traditional category of residual liability, which is moving toward contract through the hesitant development of negligent misstatement.

Of course, liability for negligent misstatement and liability flowing from a promise, by estoppel, are not the same thing. They are separated by that divide with which we choose to distinguish our two "halves" of civil liability. But each deals with a two-party situation in which one party's expectations are affected by the other. Each has developed to overcome traditional contract limitations. And each moves one half of civil liability toward the other. But it is the English experience which is the more traditional, with tort expanding, contract staying put.

The Death of Contract is an unusually rewarding book. At one level, it offers a marvellously readable, impressionistic picture of the first hundred years of American contract law. At another, it suggests a broader view: "What went on in Contract is merely a special instance of what went on everywhere." What went on everywhere was the Americanization of the common law under the influence of Federalism. Another phenomenon of the period was the socialization of law, its transition from an instrument of laissez-faire economic theory (which Gilmore characterizes as: "If we all do exactly as we please, no doubt everything will work out for the best") to a reflection of the welfare-state notion that we are "all


100. Negligent misstatement is a very recent doctrine in English law, generally attributed to Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465; 3 W.L.R. 101; [1963] 2 All E.R. 575. There the House of Lords established the principle that a bank negligently misstating the credit-worthiness of a customer to an inquiring party could be liable for damages suffered in reliance on that statement. This is tort liability. Compare Mutual Life & Citizens' Assurance Co. v. Evatt, [1971] A.C. 793. Of particular interest are the comments of the majority upon what the two dissenting law lords in Mutual Life meant in their opinions in Hedley Byrne. See also Esso Petroleum Co. v. Mardon, [1976] 2 All E.R. 5, particularly the discussion of contract and tort (Denning, M.R.), id. at 15; (Ormand, L.J.), id. at 22; and (Shaw, L.J.), id. at 26C-G.


101. Gilmore at 102.

102. Id. at 95. Voltaire's Docteur Pangloss put it this way: "[L]es malheurs particuliers font le bien général; de sorte que plus il y a de malheurs particuliers, et plus tout est bien." ([P]rivate misfortunes constitute
cogs in a machine, each dependent on the other." Implicit in this idea of the socialization of law is the belief that, in the long run, law reflects life, not life law. That is where this story began and, of course, where it ends. In between is the clearest demonstration that Contract, though dead, is even yet a worthwhile subject of study.

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the general good; so that the more private misfortunes there are, the better is the whole.) *Candide*, Ch. 4.

There has been a recent resurgence of the view that legal rules ought to serve a laissez-faire function, now in the interest of market efficiency. *See generally R. Posner, Economic Analysis of Law* (1973).

103. Gilmore at 95.

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