

Book Review of *The Death of Contract* - By Grant Gilmore

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Repository Citation

Timothy J. Sullivan, *Book Review of The Death of Contract - By Grant Gilmore*, 17 Wm. & Mary L. Rev. 403 (1975), <http://scholarship.law.wm.edu/wmlr/vol17/iss2/10>

BOOK REVIEW

THE DEATH OF CONTRACT. By GRANT GILMORE. Columbus, Ohio: Ohio State University Press, 1974. Pp. 151. \$8.00.

TIMOTHY J. SULLIVAN*

This is an important book. Professor Gilmore summarizes and extends the legal analysis of a company of scholars who have argued for some time that classical contract theory—as taught to generations of American law students—no longer has much relevance to the reality of exchange transactions in this country.¹ Professor Gilmore achieves, however, more than simply the able restatement of existing scholarship; by supplying an historical framework and a careful analysis of specific cases, he makes his argument more persuasive for lawyers and law teachers of a traditional turn of mind. Scholars who adhere to the “death of contract” view frequently justify their theory by resort to empirical evidence of business practice and commercial expectations.² They frequently manifest a none too well-disguised contempt for what they might describe as the abstract irrelevance of the typical appellate contract decision. Because Professor Gilmore is willing to trace the decline of classical contract theory by fresh interpretation of the traditional cases, however, his argument is more likely to reach the mainstream members of a profession trained to believe in the vital function of appellate decisions in shaping the law.³

The classical contract law whose death Professor Gilmore’s book describes is classical only in a narrow sense. By classical contract

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1. Professors Lawrence Friedman and Stewart Macaulay are two of the most prominent members of the death of contract school. See Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present and Future*, 1967 WIS. L. REV. 805.

2. See generally L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 198-202 (1965); Macaulay, *Non-Contractual Relations In Business*, 28 AM. SOC. REV. 55 (1963).

3. Fine examples of Professor Gilmore’s new treatment of older cases may be found at pages 49-53 (*Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854)) and at pages 35-42 (*Raffles v. Wickelhaus*, 2 Hurl and C. 906, 159 Eng. Rep. 375 (Ex. 1864)). Professor Gilmore’s witty analysis of the issues and principles in *Raffles* alone justifies the purchase of the book.

theory, Professor Gilmore means the theory of general contract law that he contends had its origin in the work of Dean Langdell, whose casebook on contracts was first published in 1871. Professor Gilmore describes Langdell as a man of limited scholarly imagination who became infatuated with the notion that law was, in essence, a science and that the careful application of scientific analysis to the raw materials of the law would reveal the clear outlines of a logical, internally consistent body of contract principles. Although Gilmore only grudgingly credits Langdell, the undistinguished intellect, for stumbling across a heretofore undiscovered general law of contract, Gilmore more generously identifies Holmes and to a lesser extent, Williston, as the greater minds who seized upon a somewhat weak Langdellian idea and transformed it into a robust body of rules that governed the minds of scholars and judges for two generations.

Before discussing the content and function of classical contract theory, it is important to note that Professor Gilmore believes that much of classical contract learning was the product not of what the law was, but rather of Langdell's imagination and of Holmes's view of what the law should be.⁴ Langdell's "discovery" of a general contract theory and its later elaboration by Holmes are traceable, according to Professor Gilmore, to a combination of economic and social conditions in the late 19th century and to the philosophical bent of Justice Holmes, itself undoubtedly shaped by the economic and social theories then prevailing: "[T]his [was] the law . . . the Industrial Revolution left in its wake."⁵ The Holmesian view represented "a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy or the completely free market in the name of social policy."⁶ The essential aim of classical contract theory, as interpreted by Holmes, was to restrict the reach of contract liability within the narrowest possible compass; the ideal was to create a legal scheme in which "no one should be liable to anyone for anything."⁷

4. Holmes's great contribution to classical contract theory is found in the three chapters (7-9) devoted to contract law in his brilliant work, *The Common Law*. It has long been understood that *The Common Law* was as much an expression of Holmesian philosophy as it was an explication of legal history. See Howe, *Introduction to O. HOLMES, THE COMMON LAW* at xx (1881, Howe ed. 1963).

5. G. GILMORE, *THE DEATH OF CONTRACT* 8 (1974).

6. L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 6-7 (1965).

7. G. GILMORE, *supra* note 5, at 14. Holmes argued that any rational legal system must fully allow for the fundamental character of human nature. The Holmesian vision of human nature was not romantic: "But it seems to me clear that the *ultima ratio*,

At the core of classical contract theory was the idea of consideration. There was nothing new, of course, in the proposition that consideration must exist as a condition for rendering a promise enforceable. Long before Langdell and Holmes began to fashion classical contract theory, the concept of consideration occupied a central position in the firmament of Anglo-American contract law. What was new was the Holmesian definition of consideration. No longer would any benefit or detriment suffice to support a finding of consideration; it was necessary, according to Holmes, that the promisee show that the asserted consideration was the product of *bargain*. A promisee might suffer real and substantial detriment in the course of performing an agreement but absent that indispensable element of bargain, no agreement made by the promisor could be enforced judicially. As Holmes wrote: "[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement . . . for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise."⁸ According to Professor Gilmore, the Holmesian gloss on the received doctrine of consideration was no mere restatement of existing law. It was, instead, a revolutionary redefinition of the term. The revolution was successful, for Holmes's bargain theory of consideration, though asserted "naked of . . . authority," was adopted enthusiastically by lawyers and judges of Holmes's own and later generations.⁹ The bargain theory of consideration is embodied today in section 75 of the *First Restatement of Contracts* and remains substantially intact in the tentative drafts of the Second Restatement. The effect of Holmes's successful redefinition of consideration on the body of contract law is not difficult to see. If only *bargained-for* consideration will suffice, the range of cases in which contractual liability may be imposed is reduced considerably. This narrowing of the boundaries of consideration well served the fundamental purpose of Holmes and his intellectual adherents: to insulate to the maximum possible extent individual action from the sanctions of the law.

not only *regum*, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can." O. HOLMES, *supra* note 4, at 38.

8. O. HOLMES, *supra* note 4, at 230.

9. G. GILMORE, *supra* note 5, at 21.

Although new and more restrictive notions of consideration were fundamental, there was much more to Holmes's elaboration of classical contract theory. For example, Professor Gilmore notes that the classicists aimed to keep contract damages low. In pursuing this objective, Holmes and his adherents had the help of history and a substantial body of decided cases. Modern courts routinely protect the "expectation interest,"¹⁰ however, and lawyers take for granted the idea that the aim of contract damages is to compensate the aggrieved party by putting him in a "full performance" position. Professor Gilmore suggests that the typical contract damage standard applicable in the first half of the 19th century did not protect the "expectation interest" and that only after the celebrated decision of *Hadley v. Baxendale*¹¹ did the "expectation interest" begin to receive legal protection. In retrospect, the conditions under which the court in *Hadley* suggested that it might sanction a recovery of expectancy damages seem restrictive. Baron Alderson, writing for the court, said that only when special circumstances were communicated to the defendant—and these must be found to have been within the contemplation of the parties at the time of contracting—would the plaintiffs be entitled to recover expectancy damages. To Holmes and his contemporaries of the late 19th century, the historical significance of *Hadley* looked very different than it does to modern lawyers. Professor Gilmore contends that in Holmes's view, the terms on which Baron Alderson was prepared to hold the defendant liable for lost profits were dangerously liberal. More must be shown, reasoned Holmes, than the bare fact that the plaintiff may have brought to the defendant's attention the existence of facts that upon breach, could result in more than ordinary injury. What Holmes insisted must be established was a showing that the breaching party consciously and deliberately had assumed the special risks of loss that the aggrieved party sought to recover. This strict construction of the holding in *Hadley* became another weapon in the classicists' armory of rules and glosses on rules designed to protect the individual actor from the potentially powerful impact of legal sanction.

10. The term is Professor Fuller's and is drawn from the classic article, Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 373 (1937).

11. 9 Ex. 341, 156 Eng. Rep. 145 (1854). Professor Gilmore's analysis of *Hadley* is irreverent as well as original: "Since 1854 the starting point for all discussion of contract damage theory has been *Hadley v. Baxendale*—although why 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." G. GILMORE, *supra* note 5, at 49.

The adherents of classical contract theory developed a comprehensive scheme of contract doctrine. Holmes, for example, devoted much attention to the law of mistake and excuse for nonperformance. Professor Gilmore treats each of these subject areas in detail and with great learning. Enough has been written here to give the reader some sense of the objectives and methods of Langdell, Holmes, and others who shared their views.

The success of classical contract theory had at least one immediate effect: it was fatal to the subjective school of contract analysis that had enjoyed wide acceptance prior to the publication of *The Common Law*. The subjective approach placed great emphasis upon what the parties to a purported contract actually intended; the crucial inquiry was to determine whether there had been a "meeting of the minds." This analysis was rejected by the classicists, who, though they did not deny that the intention of the parties was crucial to ascertaining the existence and extent of contractual liability, altered radically the means by which the intent of the parties was assayed. For Holmes, any attempt to gauge what the actual parties to a real transaction actually believed was irrelevant. Intention and meaning were to be assessed against the hypothetical understanding of the reasonable man. Thus, the post-Holmesian objectivists, typified by Williston, formed their analysis on external factors.

The effect of objective analysis, according to Professor Gilmore, was to transform into questions of law issues (such as actual intent) that were questions of fact for the subjectivists. The repetition of fact patterns, in objective analysis, yielded rules of *law* by which intent became ascertainable. This emphasis on externals had one curious effect; it may be recalled that the principal aim of the classicists was to restrict the field of contract liability, but by their rejection of subjective analysis, the Holmesians narrowed significantly the basis upon which a party might be discharged for contractual liability on the grounds of mistake. The objectivists would not permit a party seeking relief from contractual liability to be heard to say, "I didn't really mean what I seemed to say." What mattered was not what the contracting parties said they meant, but what a reasonable man might think they meant. "Evidently," as Professor Gilmore writes, "a free and easy approach to the problem of contract formation goes hand-in-hand with a free and easy approach to the problem of contract dissolution or excuse, and *vice versa*."¹²

12. G. GILMORE, *supra* note 5, at 48 (emphasis supplied).

The whole system of classical contract law was, in Holmes's phrase, "formal and external"; the classicists' rules were logical, largely consistent, and quite inflexible, and they were meant to be so. Holmes and his brethren, Professor Gilmore tells us, had no intention of tempering the wind to the shorn lamb. Under Holmesian analysis, for example, the fact that a promisee had relied reasonably and substantially upon words of promise was legally insignificant. If the promisee could not show bargained-for consideration, he had no claim to legal relief against the asserted promisor. This wintry logic might do for Holmes, but few other judges before, or since, have possessed either Holmes's steely spine or his steely intellect. Judges attempting to apply classical contract theory kept colliding with the reality that conclusions required by the logic of classical contract theory seemed unfair. Slowly and surreptitiously at first, quickly and more explicitly later, the courts undertook the demolition of classical contract theory.

It may be argued, as indeed Professor Gilmore does, that the classical system of contract law was in decline almost from the date of its birth. Despite appropriate invocations of the principal tenets of the faith, even courts in the late 19th century occasionally ignored the strictures of the Holmesian system in order to produce results that seemed sensible under the circumstances. Such judicial heresies had little contemporary impact, because, Professor Gilmore indicates, the scholars who wrote the treatises and edited the casebooks chose not to incorporate in such works cases that did injury to the orthodox structure of classical contract thought. As Professor Gilmore suggests, it remained for scholars closer to our own time—Professor Fuller notable among them—to re-examine the fabric of late 19th and early 20th century law and to report their conclusions that even in its infancy classical contract theory did not occupy the field alone.

The decline of classical contract theory in all of its aspects is too complicated to trace here; for our purposes it will suffice to concentrate on the erosion of the concept of bargained-for consideration—that part of the classical system described by Professor Gilmore as its "great balance wheel." We are told by Professor Gilmore that the decline of the idea of bargained-for consideration is linked closely to the rise of two related, but distinct concepts: reliance and quasi-contract. If the result of Holmes's addition of the requirement of bargain and of the concept of consideration was to restrict the reach of contractual liability, the

cumulative impact of the ideas of reliance and quasi-contract has been to broaden greatly the range of legally enforceable promises.

Section 90 of the *First Restatement of Contracts* establishes the relevance of reliance as a basis for enforcing promises. Professor Gilmore describes in interesting detail how, through the insistence of Professor Corbin, the draftsmen of the *Restatement* were persuaded to include section 90 after they had adopted the Holmesian definition of bargained-for consideration in section 75. Professor Gilmore aptly describes the *First Restatement* as "schizophrenic." How otherwise is it possible to explain a document that, on the one hand, requires bargained-for consideration as a basis for enforcing promises and, on the other, asserts that a promise that induces reliance of a substantial character is binding if injustice cannot otherwise be avoided? The paradox of sections 75 and 90 cannot be explained rationally, for as Professor Gilmore observes: "Perhaps what we have here is Restatement and anti-Restatement or Contract and anti-Contract. . . . The one thing that is clear is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up."¹³ It is quite certain which of the two conflicting sections the draftsmen of the *Restatement* expected to fade into obscurity; the belief was widespread that the concept of reliance as articulated in section 90 would be confined to the backwaters of noncommercial transactions and donative promises. The draftsmen were not alone in their belief; it was shared by other influential shapers of the law. Professor Gilmore quotes Judge Learned Hand arguing for the limited relevance of reliance.¹⁴ Judge Hand and the many legal luminaries who shared his views could not have been more wrong. The expansion of reliance, since its explicit recognition in the *First Restatement*, has been steady, even spectacular. In contrast, section 75, embodying the classical contract idea of bargained-for consideration, has been cited rarely, if at all. Indeed, so great has been the appeal of section 90, that Professor Gilmore has discovered some recent decisions, rooted in notions of reliance, that impose liability without reference to the law of contract at all.¹⁵

As Professor Gilmore observes, the growth of the concept of reliance has eroded classical consideration theory on the detriment side. The idea

13. *Id.* at 61.

14. *Id.* at 66. Judge Hand's restrictive view of reliance is well illustrated by his opinion in *James Baird Co. v. Gimbel Bros. Inc.*, 64 F.2d 344 (2d Cir. 1933).

15. Professor Gilmore cites *N. Litterio & Co., Inc. v. Glassman Constr. Co., Inc.*, 319 F.2d 736 (D.C. Cir. 1963).

of unjust enrichment as expressed in the law of quasi-contract has had a similar effect on the benefit side of the Holmesian concept of consideration.¹⁶ Professor Gilmore surely would concede that others before him have noted the damage done to conventional notions of consideration by the idea of unjust enrichment. Professor John Dawson, writing 25 years ago, noted:

Yet once the idea [of preventing unjust enrichment] has been formulated as a generalization, it has the peculiar facility of inducing quite sober citizens to jump right off the dock. This temporary intoxication is seldom produced by other ideas, such as "equity," "good faith," or "justice," for these ideals themselves suggest their own relativity and the complexity of the factors that must enter into judgment. The ideal of preventing enrichment through another's loss has a strong appeal to the sense of equal justice but it also has the delusive appearance of mathematical simplicity. It suggests not merely the need for a remedy but a measure of recovery. It constantly tends to become a "rule," to dictate solutions, to impose itself on the mind.¹⁷

Like reliance, the law of restitution has enjoyed steady growth at the expense of classical contract theory. Unlike reliance, the expansion of restitutionary remedies into areas previously governed solely by the law of consideration has not been as much celebrated by scholars. Thus, the impact of this easier access to restitutionary remedies as an alternative to traditional contract relief has not been well understood.¹⁸ The great

16. Quasi-contract is a term historically limited in its application to law actions for the recovery of money. Modern usage has expanded the meaning of quasi-contract to reach a wide range of restitutionary actions both at law and in equity. Although the modern usage has been criticized as misleading and historically inaccurate, see Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1135 n.88 (1971), it is the meaning most often attributed to the term in the modern cases. See generally Comment, *Restitution: Concepts and Terms*, 19 HAST. L.J. 1167 (1968).

17. J. DAWSON, UNJUST ENRICHMENT 8 (1951).

18. The confusion surrounding the law of quasi-contract is attributable to its tangled historical origins and to its application as a supplement to conventional remedies in both tort and contract actions. The more traditional view is that quasi-contract principles constitute a body of law separate from either tort or contract and thus are uniformly applicable to any relevant set of facts. In recent years, some scholars have argued that quasi-contract actions based upon the existence of an express contract should be resolved separately and more in accordance with conventional contract law. See Childres & Garamella, *The Law of Restitution and the Reliance Interest in Contract*, 64 NW. U.L. REV. 433 (1969); Perillo, *Restitution in a Contractual Context*, 73 COLUM. L. REV. 1208 (1973). But cf. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175, 189 (1959).

stimulus to the growth of quasi-contract has been the inability of courts to frame any common definition of benefit. In the absence of any clear concept of benefit, courts so disposed have been free to make restitutionary relief available to plaintiffs who would have no realistic chance for recovery under standard contract theory.¹⁹ Confusion has permitted a large measure of judicial discretion. The concepts that underlie the doctrine of quasi-contract are fully as open ended as those that support the idea of reliance; establishing what constitutes *substantial* reliance is no less subjective than the search for what is *sufficient* benefit in the law of quasi-contract. Together, reliance and restitution have provided alternate but equally irresistible grounds for the judicial emasculation of consideration as a significant legal concept.

Professor Gilmore does not confine his account of the decline of classical contract doctrine to describing the eclipse of consideration. He acknowledges, for example, the importance of the Uniform Commercial Code in hastening the decline of conventional ideas.²⁰ This is not the occasion to dwell at length on the details of Professor Gilmore's careful analysis; it is enough for present purposes to state his conclusion that classical contract law is effectively dead, that the carefully constructed 19th century obstacles to broadened liability have been swept aside, and that the law of contract is being quickly reabsorbed into the body of tort law from which it was artificially separated not much more than a century ago.

This analysis of *The Death of Contract* has been lengthy. Perhaps justification for the comprehensive exposition of Professor Gilmore's ideas may be found in the special quality of his scholarship. We are all too familiar with the work of scholars who write in deadening detail about some forgotten (usually with good reason) backwater of the law. As has been observed elsewhere, habitual readers of contemporary law journals are learning more and more about less and less. It is no small part of Professor Gilmore's achievement that *The Death of Contract* can actually be read with pleasure. His aim has been not to overanalyze some minute aspect of contract law, but to weigh the experience of

19. See generally Sullivan, *The Concept of Benefit in the Law of Quasi-Contract*, 64 GEO. L.J. 1 (1975).

20. The nearly universal adoption of the Uniform Commercial Code symbolizes the failure of the Holmesian faith. Under Code theory the crucial inquiry is not to determine the existence of bargain in the Holmesian sense but rather whether there was an intention to contract. See Speidel, *Contract Law: Some Reflections Upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822, 830.

three generations of scholars, lawyers, and judges in order to offer explanations, some tentative and some quite unequivocal, as to what the modern law of contract has become and how it attained its present form.

One may dispute some of Professor Gilmore's particular assertions,²¹ but the substance of his portrait of contemporary contract law is sound. Some of what Professor Gilmore has revealed, however, has profoundly disquieting implications. It may be true that those who labored in the Holmesian faith of classical contract theory were too concerned with logical symmetry and with analytic form. Yet we do a real disservice to the great builders of classical contract theory—Holmes, himself, chief among them—if we dismiss their work as simply academic or unrealistic. Holmes's devotion to the rigors of legal analysis was real but surely he was no cloistered intellectual incapable of connecting ideas with reality. He was no believer in the existence of universal truths that governed forever in the affairs of men.²² Quite to the contrary, his skepticism was profound; he was a man of action as well as a man of ideas. The Langdellian system he adapted and elaborated did emphasize legal logic and analytical rigor. Its purpose, as Professor Gilmore establishes, was to limit the scope of contractual liability as a means of maximizing freedom; in this sense, the classical system was quite practical and wholly in keeping with the unbridled entrepreneurial spirit of the late 19th century. One may dispute the values of that time, but the system of contract doctrine that Holmes activated was wholly in concert with the spirit of his age. Holmes and the more thoughtful classicists built their system upon the conviction that the law's function must be modest. In no circumstances, they believed, should legal rules unduly restrict the free play of the "self-preference" principle that, in Holmes's view, was the governing principle of human conduct.²³

21. Professor Gilmore's assertion that, historically, contract has been merely a dependent offspring of tort is debatable. Professor Gilmore understates the significance of the independent development of contract. The imperfections in Professor Gilmore's historical analysis are documented exhaustively in Gordley, Book Review, 89 HARV. L. REV. 452 (1975). The cited book review is devoted almost exclusively to the revelation of Professor Gilmore's historical errors. The validity of Professor Gilmore's thesis does not depend, however, upon the accuracy of his excursions into early English or continental legal history.

22. Among the papers inserted between the pages of Holmes's own copy of *The Common Law* is this statement: "As Ibsen picturesquely puts it: 'Truths are by no means the wiry Methuselahs some people think them. A normally constituted truth lives—let us say—as a rule, seventeen or eighteen years; at the outside twenty; seldom longer. And truths so stricken in years are always shockingly thin.'" Howe, *Introduction* to O. HOLMES, *supra* note 4, at xii n.3.

23. *Id.* at 38.

The values of our time are fundamentally different from those of Holmes's generation. Legal rules are assumed to have relevance to an ever-widening circle of human relationships. This expansive tendency of modern law is reflected, for example, in the growing range of transactions to which constitutional due process standards are now applicable.²⁴ This "legalization" of modern life has had its effect upon contract law as well; what we have seen is what Professor Gilmore describes "as an explosion of liability." The classical rules of contract, designed to restrict liability, have almost all been laid flat.

The full impact of the difference between the classical and modern laws of contract cannot be grasped simply by noting that the analytical constructs of the Holmesian system have largely been discarded; it is equally important to understand the particular character of the doctrines that have supplanted those that gave the classical system its special flavor. The emphasis in modern contract law is upon concepts comparatively lacking in distinguishable analytic content; subjective judgments and judicial intuition are the order of the day. Professor Gilmore admirably describes the flexible character of reliance and quasi-contract, two principles that he believes have been chiefly responsible for the displacement of classical theory. There have been other agents of change, however; the doctrine of unconscionability now makes frequent appearances in the reports; likewise, careful inquiries into the relative bargaining power of the parties are quite common; even the economic and educational status of parties to agreements sometimes explains the result in a particular case.²⁵ In this sprawling and subjective body of doctrine that dominates the modern law of contract, the role of careful, traditional legal analysis is limited. The articulation of discernible legal standards applicable to even a narrow range of cases has become almost impossible in the new jurisprudence of contracts. The judge's role is sometimes more that of a sociologist than a legal craftsman, and the instruments of dispute resolution often are not those that belong peculiarly to law.

There is no intention here to condemn the impact of modern contract law. Certainly the classical system—to the extent that it was ever strictly applied in the cases—was inward looking and quite uninterested in determining the real intent of real parties to a contract; moreover, the judges who acted in the Holmesian tradition frequently seemed more

24. The striking growth of the law of procedural due process is ably traced in Rendleman, *The New Due Process: Rights and Remedies*, 63 Ky. L.J. 532 (1975).

25. See Childres & Spitz, *Status in the Law of Contract*, 47 N.Y.U.L. REV. 1 (1972).

concerned with the form than with the substance of a transaction. The efforts of Professor Llewellyn and the realists have supplied a much needed corrective to the excesses of the classical faith; by shifting the emphasis of judicial analysis away from abstract rules toward the "real law" that emerges from a careful study of the expectations and assumptions of the contracting parties,²⁶ the realists truly rebelled against the classical establishment. Rarely has the success of a revolution been more complete; emphasis on commercial practices and the parties' actual assumptions has become the new orthodoxy of contract analysis, and Holmesian doctrine has ceased to be a meaningful influence in the development of contract law. What is ironic is that the classical system, conceived as a means to insulate individual action from the consequences of legal sanction, should be overthrown chiefly because its evolution had made it an obstacle to effectuating what were perceived to be the legitimate purposes of real transactions.

In describing the displacement of classical contract law, perhaps it is not strictly accurate to speak of revolution. The process of change has been gradual; the decline of the Holmesian system has been genteel. Lawyers are usually not competent historians, and therefore, their use of historical terminology is sometimes inept. Habitual emphasis on the particular facts of a particular case tends to cloud long range focus, and consequently incremental changes often are mistaken for major upheavals. Professor Richard Morris aptly described this phenomenon when he wrote that in general lawyers "tend to view every inroad on habit as a catastrophic revolution."²⁷ Yet it is true that the assumptions of modern contract law vary significantly from the dominant values of the classical system. Classical theory sought to secure maximum protection for freedom of individual action, but the thrust of modern contract jurisprudence is to assure equality. This quest after equality is reflected only obliquely in the doctrines of reliance and quasi-contract, which Professor Gilmore identifies as the distinguishing features of modern contract law. The concern for justice or equality in contemporary contract cases is more apparent in the increasing prominence of doctrines such as unconscionability and in the frequency with which courts, by inquiring into the equality of bargaining power, seek to protect the

26. Professor Llewellyn's conviction that "law" is to be found in the minds and conduct of men rather than in immutable rules of logic suffuses almost all his major work. See, e.g., Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

27. R. MORRIS, *SEVEN WHO SHAPED OUR DESTINY* 86 (1973).

weaker party from what is deemed unacceptable exploitation by the stronger party. Such concerns likely would be disdained by a court acting consistently with classical theory; even in classical contract law, of course, exceptions were allowed for weaker parties in special circumstances, but the disposition to set aside a hard bargain was then a judicial impulse much weaker than it is today.

The conflict between the older contract law, which valued freedom, and the newer rules, which promote equality, has its analogue in other fields. Indeed the origin of this tension may be traced to economics. Arthur Okun, in *The Political Economy of Prosperity*, defines the central dilemma of modern economics as the attempt to balance the need for efficiency against the desire for equity:

A democratic capitalism must perform a perpetual juggling act to keep the balance between equity and efficiency. In a society with egalitarian principles, substantial inequality in income and wealth is tolerated only as a concession to efficiency. The inequality arises through the carrots and sticks of the market system. Sometimes the carrots are awarded to the wise, the energetic, and the ingenious; such results square with society's sense of fair play. . . . In many instances, however, rewards and penalties are not neatly equated with personal merit.²⁸

The conflict between classical contract theory and the new law of contract is very much a product of the clash between the Holmesian faith in freedom (a faith that assumes the triumph of the strong) and the contemporary conviction that the strong are not always just or deserving of reward. Thus, courts have used modern contract doctrine to protect the weak against the strong with little regard for what are perceived as antiquated and unrealistic notions of freedom. There may be nothing wrong with such an approach to contract law, but informed judgment is difficult. Rarely do courts attempt to assess the costs they impose upon society by their well-intended efforts to promote equality or, as Professor Okun would have it, justice. This seeming lack of concern for economic efficiency is curious, as one of the most persuasive arguments for the overthrow of the classical system was that it was too preoccupied with narrow rules of law. Modern courts quite casually make judgments rooted in sociological or philosophical concepts, and there is no reason why they should not give equal attention to considerations of economic efficiency.

28. A. OKUN, *THE POLITICAL ECONOMY OF PROSPERITY* 10 (1970).

Fortunately, the academic branch of the legal profession is beginning to discover the relationship between law and economics; owing much to the pioneering work of Richard Posner,²⁹ many scholars are attempting to assess the economic impact of legal rules in a variety of fields.³⁰ The perspective of the economist should provide much needed insight into the real import of the new contract learning, because the economist is concerned with efficiency and with the most rational means of allocating scarce resources. Although considerations of economic efficiency should not dominate judicial decisions in the field of contract law, the economic perspective—considered in its proper place—might provide a useful means of restoring concern for efficiency to a respected place in the law of contract. The Holmesians, in their devotion to freedom and their attachment to efficiency, may have carried a good thing too far; the excesses of the modernists, however, with their implacable bias in favor of equality, are also very real.

Professor Gilmore accurately and ably has recorded the death of classical contract. In his closing paragraphs he hints at the possibility of resurrection. Resurrection may not be the most appropriate description, for it implies the restoration of an antique doctrine unaltered by experience. What seems more likely is a counterrevolution whose aim is the creation of a law of contract sensitive to the need for justice but equally cognizant of the legitimate claims of economic efficiency. Should such a hybrid contract law appear, those among us who have argued the relevance of economics to law will deserve to be remembered as the vanguard of the revolutionary army.

29. The most notable work yet published in the field of law and economics is R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

30. The relevance of economic insights is much broader than many may imagine. For an original and unusually able treatment of economic issues in the area of constitutional law, see Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975).