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The Death of Contract

Robert W. Gordon
Yale Law School

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BOOK REVIEW

THE DEATH OF CONTRACT. By Grant Gilmore.* Columbus: Ohio State University Press. 1974. Pp. x, 151. \$8.00.

The Death of Contract collects Professor Gilmore's lectures given at Ohio State University Law School in 1970, with footnotes added to provide further explanation, qualification, and documentation. It is easy to tell that these were lectures, not because of their tone of urbane chattiness (Gilmore's gift of style makes some of his most technical work sound like Talleyrand's table talk), but because of the looseness of their design and casualness of their execution. The speaker frequently drops the thread of his narrative to break into anecdote or digression and, when he again picks up the narrative, it is not always by the same thread. But for all their informality these lectures are of extraordinary interest. They tell us how a great commercial lawyer (who is also a legal historian and contracts casebook editor¹) views what happened to the law of contract in the 20th century. Though expounded with rare felicity and supported by an unusual breadth of historical learning, this perspective is, I believe, a common one among scholars of contract law. I shall be arguing here that it is also a fundamentally distorted one—not so much erroneous as myopic. But first, a summary of the book.

I.

The "Contract" whose demise this book describes is the systematic theory of contract law pieced together by academic lawyers in America in the late 19th and early 20th centuries. Before 1871 contract law was a loose confederation of subspecialties such as negotiable instruments and sales that was not yet a "systematically organized, sharply differentiated, body of law."² Dean Langdell, "an industrious researcher of no distinction whatever either of mind or . . . of style,"³ proposed the idea of a general theory of contract in his casebook⁴ and "Summary";⁵ Holmes sketched the

* Sterling Professor of Law, Yale University. A.B., 1931, Ph.D. 1936, LL.B. 1942, Yale University.

1. See F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* (2d ed. 1970).

2. G. GILMORE, *THE DEATH OF CONTRACT* 9 (1974) [hereinafter cited as GILMORE].

3. *Id.* at 13.

4. See C. LANGDELL, *CASES ON CONTRACTS* (1st ed. 1871).

5. See C. LANGDELL, *Summary of the Law of Contracts*, in *CASES ON CONTRACTS* (2d ed. 1880).

outline of the theory;⁶ and Williston's treatise⁷ filled in the theory with "meticulous, although not always accurate, scholarly detail."⁸ Says Gilmore:

The [Holmes-Williston] theory seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything. Since the ideal was not attainable, the compromise solution was to restrict liability within the narrowest possible limits. Within those limits, however, liability was to be absolute Liability, although absolute—at least in theory—was nevertheless to be severely limited.⁹

One "tool for narrowing the range of contractual liability" was Holmes' "bargain theory" of consideration, from which Williston went on to deduce such absurdly impractical consequences as the revocability of firm offers before acceptance and the unenforceability both of modifications of going contracts (unless supported by further "consideration") and creditors' agreements to release debtors for less than the full amount due.¹⁰ Holmes' famous repudiation of the notion that contracts result from the subjective meeting of the parties' minds and his insistence upon restricting legal inquiry to the external sayings and doings of the parties made it hard to prove excusing circumstances such as mistake, thus tending to make liability, once assumed, absolute.¹¹ To narrow the extent of such liability, *Hadley v. Baxendale*¹², which had already limited recovery for consequential damages to those defendant could have foreseen at the time of contracting, was read to deny recovery even for foreseeable losses unless defendant had assumed the risk of their occurrence.¹³

But "[a]lmost from the very moment of its birth," the Holmes-Williston theory started to break down, and Gilmore is "tempted" to call Corbin and Cardozo its destroyers.¹⁴ Courts persisted in deciding cases in ways that did not fit the theory; Cardozo in particular nearly always managed to squeeze enough "consideration" out of the facts to support a relied upon promise. At Corbin's insistence, the authors of the *Restatement of Contracts* took account of these wayward cases, and thus produced a document shot through with

6. O.W. HOLMES, *THE COMMON LAW Lectures VII-IX* (M. Howe ed. 1963).

7. S. WILLISTON, *THE LAW OF CONTRACTS* (1st ed. 1920-22).

8. GILMORE 14.

9. *Id.* (Citations omitted.) It is not clear whether Gilmore is saying that these effects upon liability were aimed at by the theory or were incidental consequences of it.

10. *Id.* at 21-22.

11. *Id.* at 41-42.

12. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

13. GILMORE 49-53.

14. *Id.* at 57.

self-contradictions.¹⁵ Since the first *Restatement*, statutes and exceptions have whittled away the rest of the old structure. There has been an "explosion" of both scope and extent of liability and also of excuses from it.¹⁶ In fact, Gilmore speculates, contract is well on its way—on the backs of unjust enrichment and reliance doctrine—to being merged with tort into a "unified theory of civil obligation."¹⁷

That is basically Gilmore's story. As one would expect, he tells it well. He is perhaps at his best demonstrating how Holmes and Williston ruthlessly chopped and stretched the English case law to fit their system—there is an eight-page¹⁸ analysis of the apparently immortal *Peerless case*¹⁹ that no one who still teaches it can afford to pass up. But when the magic of the speaker's voice has faded, one begins to realize that this has been a very curious performance.

II.

To begin with, in what sense is Contract—that is, the academic "classical" system of Holmes and Williston—really dead? To be sure, no one now subscribes to it whole, as a system. Yet its categories (unilateral v. bilateral offers, promises v. conditions, etc.) are still used to organize casebooks and hornbooks; its principal cases and those of our contract teachers are the same; and the problems it tried to solve (offer and acceptance crossing in the mails, mistake as an excuse, etc.) are still the standard diet of the first year law student. *Williston on Contracts* is in its third edition. Contract, in the academy, seems to be alive and well. Indeed, there is a school of thought that holds that the academy is the only place where it survives. Gilmore addresses himself directly to the members of this school in his introduction:

We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing anymore. The leaders of the Contract is Dead movement go on to say that Contract, being dead, is no longer a fit or worthwhile subject of study. Law students should be dispensed from the accomplishment of antiquarian exercises in and about the theory of consideration. Legal scholars should, the fact of death having been recorded, turn their attention elsewhere. They should, it is said, observe the current scene and write down a description of what they see. They should engage in sociological analysis rather than in his-

15. *Id.* at 60-64. Gilmore illustrates the "schizophrenia" of the *Restatement* through § 75 (restating Holmes' bargain theory of consideration) and § 90 (providing for recovery for unbargained-for reliance on a promise).

16. *Id.* at 65-83.

17. *Id.* at 90.

18. *Id.* at 35-42.

19. *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

torical or philosophical synthesis. It is at this point that I find myself not so much in disagreement with their aims as completely uninterested in what they are doing.

Describing what you see is undoubtedly a useful exercise However, when you have finished describing something, all you really have is a list. In itself the list is meaningless The list takes on meaning only as it is related to other lists The most lovingly detailed knowledge of the present state of things . . . begins to become useful to us only when we are in a position to compare it with what we know about what was going on last year and the year before that and so on back through the floating mists of time We are not scientists—nor even social scientists—nor were meant to be. Let us not be overly depressed at that not altogether depressing thought.²⁰

The tone is that of a Headmaster of Eton who has heard of a proposal to abolish compulsory Greek. But the substance is even more remarkable. The "leaders of the Contract is Dead movement", it is made clear in a footnote,²¹ are Professors Stewart Macaulay and Lawrence Friedman.²² Gilmore's response to their views is not by way of traverse but confession and avoidance: he agrees with them that "Contract is Dead" but is "uninterested" in what they are doing. They are pictured as committed to a mindless Baconian empiricism, and their approach is condemned as ahistorical.

But this really won't do. Friedman and Macaulay would mean something quite different from Gilmore by an assertion that Contract is dead—not the demise merely of a theory of contract law, but the waning of the contract decisions of courts as a significant factor in American commercial life. Far from being mindless fact-gathering, their empiricism has been devoted in part to substantiating this assertion. And the assertion has a historical dimension: Professor Friedman's thesis of the "decline of the court" in regulating commercial disputes in the 20th century and of the displacement of the case law of contract by statute, administrative regulation, and private bureaucracy.²³ Gilmore says Friedman and Ma-

20. GILMORE 3-4.

21. *Id.* at 105 n.1. Gilmore refers his readers to a 1967 symposium on contract law in this review as containing "[o]ne of the most comprehensive statements of the approach which I am tendentiously and no doubt unfairly characterizing. . . ." and in particular to the lead article in that symposium, Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present and Future*, 1967 WIS. L. REV. 805.

22. Respectively, Professors of Law at the University of Wisconsin and Stanford Law Schools.

23. L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 184-215 (1965). The thesis is discussed in detail at text accompanying notes 54-56 *infra*. Gilmore praises this book, GILMORE 105 n.1 and even quotes extensively from it, *Id.* 6-7, but oddly neither refers to nor uses those passages of the book that specifically treat the period of his concern.

caulay's approach is uninteresting; they say his is unimportant. What we have here are not varying temperamental preferences but fundamental differences in perspective.

Gilmore's perspective on the history of contract is probably that of the dominant mode of thought in our law schools, which might be called Case-Law Realism. Friedman and Macaulay's is a distinctly minority approach that I shall call Behavioral Realism.²⁴ The content of both is heavily influenced by the work of the Legal Realists of the interwar period.

Case-Law Realism is a compromise religion. It is as if out of the academic quarrels of the 1920's and 30's a treaty resulted by the terms of which Langdellians agreed to give up trying to construct logically consistent systems of doctrine in return for the retention of appellate cases as the intellectual focus of law study; and the Realists replied that, though they stressed function over logic as the thing to look for in a legal rule, they would look for it in the rules of appellate courts and therefore, though they regarded the

24. Though I could not come up with a better label, I acknowledge that this one is somewhat defective. Its scope is roughly co-extensive with what is called the "problem" approach to contract law in Friedman & Macaulay, *supra* note 21, at 806: "The goal of research [via this approach] was to analyze case law in order to lay bare the various situations or problems reflected and to solve them by explicit use of principles of policy." That is, the goal of legal scholarship is to develop sound doctrine to apply to transactions of the kinds engaged in by litigants in appellate cases. It seemed to me that the word "Realism" adequately conveyed this school's concern with policy issues. I wanted a label that also stressed the centrality of case law study in this approach. The label is misleading in some respects. As Friedman and Macaulay point out members of this school do not shun statutes as Langdell did. *Id.* at 808. They should really be called Case-Law-and-Code Realists. They drafted the Uniform Commercial Code (Professor Gilmore among them) and accord its provisions the same status as case law in their law review analyses. "Realism" must also be taken broadly as shorthand representing characteristics such as (a) awareness that law serves certain social purposes, (b) concern to make it serve those purposes better, (c) skepticism about the utility of rules expressed in conceptual form, and (d) preference for explicit articulation by the courts of rules in terms of their relationship to the social purposes they are framed to serve. This sense of "Realism" would be broad enough to include, for example, Professor Lon Fuller, who would normally be classified as a jurisprudential opponent of "Legal Realism" if it were narrowly conceived as a specific historical movement.

Professor Ian MacNeil's label for the present orthodoxy is "neo-traditional," which is accurate enough but not very expressive. MacNeil classifies both traditional and neo-traditional approaches to contract law as "transactionism," which he criticizes for assuming that "a contract is a discrete transaction . . . an event sensibly viewable separately from events preceding and following it . . . [and] one engaging only small segments of the total personal beings of the participants." He argues that contracts in our society and economy are increasingly "relational" (e.g. automobile franchises, leases of IBM machines)—ongoing engagements involving "many aspects of the total personal beings of the participants." MacNeil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 693-94, 805 n.320 (1974).

study of law as the study of behavior, the behavior they would concentrate on would be that of appellate judges in the act of deciding cases. What sets apart the Case Lawyers from other descendants of the Realists, then, is simply their choice of how to draw the lines limiting the range of social phenomena of interest to them. They draw them around cases. Case reports supply most of their data. Rationalizing, explaining or criticizing the reasoning and results of cases is their principal activity and their ultimate purpose is the design of sound policy for the decision of cases.

This may be illustrated by pointing to some attitudes and activities characteristic of this school's work in contract law. "Killing Contract", or demonstrating the inadequacy of the classical theory, has been (as Gilmore's book shows) a central preoccupation of the Case-Law Realists. The chief method of refutation has been finding clusters of decided cases—"case law undergrounds," Gilmore calls them²⁵—reaching results plainly at odds with the theory.²⁶ Another enterprise has been the discovery in the "case law undergrounds" of regular patterns of decision-making. Some of the best work in Contracts has been in this tradition.²⁷ In this kind of research, involving empirical inquiry into what the courts in fact do, decided cases are obviously the appropriate data. But in other Realistic endeavors the case-law bias puts strange restraints on research effort. The Realist's "abiding interest," as Gilmore remarks of Corbin, is "in what he called the 'operative facts' of cases."²⁸ The Realist method makes nearly all facts vaguely connected with the parties or their business operative: the informal behavior of contracting parties (course of dealing, course of performance, parol remarks outside the standard form), trade custom and usage, and so forth.²⁹ The article on sales in the Uniform Commercial

25. GILMORE 56.

26. See, e.g., Cook, Book Review, 33 ILL. L. REV. 497, 512-513 (1939) (cases on life insurance contracts at variance with Williston's strictures as to when acceptance becomes effective); and Fuller, Book Review, 18 N.C.L. REV. 1, 3-4 (1939) (Williston's insistence that contract law cannot reimburse for detrimental reliance ignores many cases in which courts have done so).

27. See, e.g., Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936); Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964). Professor Kessler, incidentally, is very difficult to pin down with any classifying label, even to those employed in this review and intended to describe only approaches to Contracts. This article and his casebook set him among the Case Law Realists, his studies of automobile dealer franchises and contracts of adhesion among Behavioral Realists. He has also a comparative law breadth and a philosophical and social-theoretical depth, unusual in academic lawyers of any school.

28. GILMORE 58.

29. See Friedman & Macaulay, *supra* note 21, at 806:

[The realists argued] Why ask whether a unilateral contract could be revoked by the offeror prior to full performance? Better to know who the parties were, the circumstances of the bargain, and any relevant background or consequence. Was it a consumer sale? A brokerage contract? A construction contract? Of what type?

Code was drafted so as to generate a rich outpouring of facts about the conduct and business background of the litigants for courts in commercial cases to consider.³⁰ But in explaining or criticizing cases, the Case Lawyers rarely look outside the cases themselves for operative facts, even though the statement of facts in their cases may have been constructed by counsel and a court interested only in the much smaller universe of facts necessary to operate Willistonian doctrine. Case Lawyers will gratefully make use of the studies others make of trade practices, and even on occasion advocate conducting such studies, but *only to find out facts helpful in deciding cases*.³¹

The basic policy ambition of the Case Lawyers, then, seems to be education of the judge. Their articles, case-notes and treatises inform and sharpen the mind of the court. But close attention to the work of appellate courts does more than that:

It is the case method which provides the student with a vicarious experience in the task of conceiving, explaining, justifying, and applying the rules by which society is enabled to function successfully. Karl Llewellyn used to talk about the "law job". This is a complex job, and those who have not directly or indirectly participated in it are badly equipped to discharge any social role affected by it.³²

In other words, understanding the process of deciding appeals is the key to understanding the role of law and lawyers in society. The process is not the only legal process, but it is the master process whose study reveals the rest, as the microscopic study of a beetle was believed in the 18th century to unlock the pattern of the mind of God. And the process secretes not only the basic legal tasks but the basic legal norms "by which society is enabled to function successfully." "If our objective," Professor Fuller has written, "is to achieve an economic order based on free exchange, that order will, as it develops, tend to reveal in litigated cases the principles necessary to sustain it."³³

The main difference between Case Law and Behavioral Realists³⁴

30. See, e.g., UNIFORM COMMERCIAL CODE §§ 1-102(2)(b), 1-205, 2-202, 2-208, 2-302(2), and innumerable other sections.

31. One of the articles in the Wisconsin Symposium that Gilmore refers to, GILMORE 105 n.1, exemplifies this approach:

If one reason for nonuse of courts by businessmen is unrealistic rules and standards for decision, would not a concerted effort to improve that phase of contract law in courts change the entire perspective? . . . [O]ne question should be this: How can law and social science together assist courts in making more rational decisions in the adjudication of contract disputes?

Speidel, *Contract Law: Some Reflections upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822, 826.

32. L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* xiii (3d ed. 1972).

33. L. FULLER, *ANATOMY OF THE LAW* 109 (1968).

34. Friedman and Macaulay themselves describe their approach as "behavioral". Friedman & Macaulay, *supra* note 21, at 808.

is not their empiricism, as Gilmore (and in some moods the Behaviorists themselves) would have it, for the ordinary Case Lawyer's job of looking for regular patterns of rule-application is also empirical research. Nor is it that Behaviorism is necessarily more systematic—to find out what people thought about legal liability for charges on lost credit cards, for instance, Macaulay once stood at gas pumps asking motorists questions as their tanks were filled.³⁵ The difference is simply that Behaviorists refuse to limit their universe of investigation to cases. Llewellyn's description of the enterprise of over 40 years ago still fits:

[T]he focus of study . . . should now be consciously shifted to the area of contact, of interaction, between official regulatory behavior and the behavior of those affecting or affected by official regulatory behavior; and that the rules and precepts and principles which have hitherto tended to keep the limelight should be displaced and treated with severe reference to their bearing upon that area of contact—in order that paper rules may be revealed for what they are, and rules with real behavior correspondences come into due importance.³⁶

Case Lawyers follow this program to the extent that they are willing to study one group of officials (judges) engaged in one sort of behavior (making and applying rules in deciding appeals) in order to find out which paper rules have certain limited kinds of behavior correspondences (i.e., which are actually employed as rules of decision in cases). They are also interested in the impact of these rules on contracting parties' out-of-court behavior, but believe this to be a subject more appropriate for guesswork than for study. Behaviorists, on the other hand, ask not only what social functions are performed by courts but also who else in society, official agencies or private parties, performs those same functions. Once the focus of study is thus shifted, they assert, the work of courts is seen to shrink to near insignificance.

35. Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, The Law of Contracts, and Credit Cards*, 19 VAND. L. REV. 1051, 1099 (1966). This is not meant as criticism. Indeed I fear sometimes that legal Behaviorists will prove overly susceptible to the attractions of the technology of fact-finding and will follow where many other social scientists have gone—into narrowing the range of their study to data that suit the rigors of the technique. But this has not happened, and the often quite casual methods of this school have yielded rich harvests of insights.

36. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 464 (1930). But in the very next paragraph Llewellyn went on perversely, though apologetically, to declare himself a crypto-Case Lawyer:

At the very heart, I suspect, is the behavior of judges, peculiarly, that part of their behavior that marks them as judges—those practices which establish the continuity of their office with their predecessors and successors, and which make their official contacts with other persons; but that suspicion on my part may be a relic of the case law tradition in which we American lawyers have been raised.

Id.

To illustrate their grounds for this assertion—which naturally vastly irritates the Case Lawyers—we might start by cataloging the social functions that the law of contract is generally thought to perform. From the principal law review literature on the subject³⁷ one could extract something like the following list, on most of whose items both Case Law and Behavioral Realists could probably agree. Contract law is both a system of rules and a process for orderly settling of disputes. (a) As a *system of rules* it provides a framework for market activity by assisting businessmen in planning their contractual relationships. Rules affecting contract formation and modification, formal requirements such as the Statute of Frauds, and rules of interpretation such as the Parol Evidence Rule inform businessmen in advance what they must do to make their agreements enforceable and construed, if there is trouble, as they would wish. This encourages them to deliberate carefully over entering agreements, trains them to think about possible contingencies, and encourages them in careful and unambiguous spelling out of their performance obligations. (b) The system supports market activity by providing sanctions to deter breach. (c) The rules also perform various regulatory functions, such as promoting fair dealing in the market (through such devices as requirements of conspicuousness or proscription of “unconscionable” sales practices) or serving ends extrinsic to the market (such as protecting infant industry or redistributing wealth). (d) As a *dispute-settlement process* contract law supports the market by reconstructing the contractual intentions of the litigants and awarding money to compensate for the disappointed hopes of at least one of them; and simultaneously (and often inconsistently) (e) tries to reach a settlement equitable not in the light of the parties’ expectations, but in view of their present situation by resolving ambiguities in favor of or by excusing weaker parties, avoiding imposing crushing liabilities, etc.

Such preliminary research as the Behaviorists have done³⁸ points

37. See J.W. HURST, *LAW AND ECONOMIC GROWTH* 285-342 (1964); 2 R. v. JHERING, *GEIST DES RÖMISCHEN RECHTS* 478-504 (9te. Aufl. 1968); MAX WEBER ON *LAW IN SOCIETY AND ECONOMY*, 29-40 (M. Rheinstein ed. 1954); Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U.L. REV. 751, 774-779 (1965); F. KESSLER & G. GILMORE, *supra* note 1. at 1-14. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Macaulay, *supra* note 35; Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961).

38. See S. MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* (1966); Friedman & Macaulay, *supra* note 21; Friedman, *On Legalistic Reasoning—A Footnote to Weber*, 1966 WIS. L. REV. 148; Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963). There is also a small but growing number of short studies of specific business practices. To those who are familiar with this literature, my reiteration of its findings in this paragraph can only be tedious. But if someone like Grant Gilmore is capable of completely misun-

towards the following conclusions. Many businessmen pay little or no attention to the rules of contract law in planning their relationships. Some are accustomed to and prefer casual, informal dealings. Some use standard forms without reading them or relying on their terms for protection. Others use standard forms which they both read and rely on, but the forms are drawn with a view not to legal consequences but to bureaucratic convenience. Still others carefully plan and structure their relationships on paper but without regard for what might happen in litigation (e.g., some major manufacturer-supplier contracts are probably unenforceable in court; the parties know this but don't care). The sanctions provided by contract would in most instances be too weak to deter a really determined contract-breacher; but weak or strong, the damage sanctions are usually irrelevant because in very few situations does it make any sense to litigate. Where there is a mutually productive continuing relationship, there is a strong incentive to peaceful resolution of disputes; where expected mutual benefit fails, fear of bad publicity or adverse credit ratings will often succeed in settling arguments; even when a relationship breaks down completely it is cheaper for aggrieved parties to quit the relationship than to go to court; and where there is a resort to more formal processes it is most likely to be to some form of arbitration.

Moreover, the regulatory aspects of contract law have marginal impact on most business relationships (except as rules for standard forms to draft around) because when significant interests conflict, regulation of them is almost never permitted to be handled by common law but becomes the subject of specialized statutory and administrative attention (e.g., labor law or insurance).

What then is left to the common law of contract? The common kinds of appellate cases are:

atypical or freak business transactions; economically marginal deals both in terms of the type of transaction and amounts involved; high-stake, zero-sum speculations; deals where there is an outsider interest that does not allow compromise; and family economic transactions.³⁹

If all this is true, or even partly true, the emphasis placed on cases by contracts scholars and teachers does seem a bit misplaced. This is especially so since some of the Behaviorists' conclusions may be reached without even looking outside the cases. It has, for example, been obvious to Case Lawyers for some time that the conventional "contract and market" measure of expectation damages is not a sanction that packs much punch:⁴⁰ Holmes' famous

derstanding the Friedman-Macaulay thesis, it obviously could bear some repetition.

39. Friedman & Macaulay, *supra* note 21 at 817.

40. [T]here has long been evident in the literature, both judicial and aca-

"bad man"⁴¹ would take one look at our contract remedies, diluted by *Hadley v. Baxendale* limitations, the mitigation principle, and our system's failure to award the winner attorney's fees, and laugh evilly. Does anyone suppose this situation could conceivably have lasted for as long as it has if significant economic interests had wished it otherwise? This alone should tell us that our appellate cases will be curious ones. Moreover, as Gilmore's book shows, classical contract law has deteriorated into a highly particularistic mode of judicial decision-making tailored to the unique facts of individual disputes; it carries out chiefly the "dispute-settlement" functions described above.⁴² There is surely no doctrine more pliable than contract doctrine; consideration has been made to serve so many purposes that there is no resilience left in it.

In this state of affairs, contract will not provide many rules of general application sufficiently predictable for private parties to use in planning relationships. Even if the parties do try to provide for litigation, they cannot know what would happen if they litigate, what behavior of theirs the court would or would not take into account, what policies of equity or fairness it would try to serve, and whether it would understand their relationship well enough to see what they wanted and what went wrong. Parties who really do have occasion to litigate may attempt to draft clauses "excluding or controlling the 'irrational factor' in litigation" in their contracts,⁴³ as by merger, liquidated damages, or disclaimer clauses rebuffing attempts at individualized, equitable adjudication. But this use of legal form for planning purposes is also the least likely to survive serious challenge in appellate litigation, for these clauses are the most likely to be struck or limited in the interests of promoting fair dealing or protecting underdogs.⁴⁴ Thus even investigation within the traditional confines of Case Law seems to support, albeit on different grounds, the Friedman-Macauley thesis of the marginality of case law in the economic system.

The Case Lawyers might respond to the Behavioralist criticism

demarcated, an uneasy feeling that there is something wrong with a damages rule [the "contract and market" rule], which, over a range of factual situations, produces no damages and thus, so far as legal sanctions go, allows contracts to be breached with impunity.

F. KESSLER, & G. GILMORE, *supra* note 1, at 1042. The style points to Gilmore as the author.

41. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 171-173 (1920).

42. See text following note 37, *supra*.

43. Kessler, *Contracts of Adhesion*, 43 COLUM. L. REV. 629, 632 (1943).

44. I am far from suggesting that these clauses do not serve their purpose. But they are not often challenged in appellate litigation, and they therefore take their form less from rules developed in the case law than from requirements of mass-produced litigation in trial courts (e.g., debt collection).

in several ways. First, they might say that it is untrue, that the Behaviorist findings only apply to certain sorts of transactions, that important cases are indeed litigated, and that businessmen in fact do use certain rules derived from case law in planning their relationships. But anyone who has begun to argue this way has himself become a Behavioral Realist, since this kind of assertion assumes the relevance of a universe of experience outside the case law.

Second, they might admit everything, but say the cases are valuable tools for training lawyers. But most lawyers who have anything to do with contracts will not be litigating them or planning in anticipation of litigation; moreover, if it is conceded that the cases represent freak situations, the study of their facts will not yield much relevant vicarious experience. It may be said that the cases are always good for teaching analytic method, but this is obviously not a serious response. It explains the casebooks but not the treatises and articles.

A third and more interesting response is one that concedes a large part of the Behaviorist case but maintains that Contract is undergoing a resurrection. The clearest sign that the common law has not lost its genius for change and adaptation is the new body of case law promoting procedural standards of fair dealing between unequals and protecting underdogs (notably consumer buyers) against overreaching sellers.⁴⁵ A Behaviorist would have to reply that this is where the case law of contract has shown itself to be most ineffectual. The underdogs, if poor consumers, are not inclined to litigate. Those who are so inclined must find free counsel with time to pursue claims to appeal. The delay and expense of litigation is often exacerbated by opposing counsel's tactics of abuse of discovery process and delay. Trial courts are often hostile. When, years later, a favorable judgment has been wrung out of the appellate court, it has served one client. If the seller pays any attention to the holding at all it is to draft around it.⁴⁶

Still another response is to concede that the courts have lost most of their power to support or regulate important market dealings, but to maintain that they could attract businessmen back to reliance on their rules as planning guides by crafting better rules. The hope here is to achieve a new synthesis of contract law founded on the realities of business practice.⁴⁷ Several comments

45. The two cases most often cited in this connection are *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) and *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

46. See D. CAPLOVITZ, *THE POOR PAY MORE*, ch. 12 (2d ed. 1967); Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U.L. REV. 115 (1969); Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970).

47. This is the program of Professor Speidel, *supra* note 31, at 828.

might be made on this program. First, such a synthesis could not, assuming the validity of the Friedman-Macaulay view, be built out of existing case law materials. The cases are unpromising material for the extraction of general rules—even rules for how to mop up transactions gone sour and litigated—because of the atypicality of their facts, the particularized methods used to decide them, and above all the marginal relationship of the parties to the economic system.

Suppose, however, that Case Lawyers were willing to go outside the case law to study business practices for the purpose of developing a literature to educate judges in how to decide cases. It would presumably not be worth doing if the courts continued to decide the same kinds of cases they do now.⁴⁸ Yet the program of attracting important businesses back to the courts as litigants assumes that they stay away only because results are unpredictable, or made in ignorance of their business needs. The much more plausible explanations for their staying away are the expense and delays of litigation and the existence of effective private sanctions. Finally, one may well question the prospects for success of a program whose chief targets rarely possess the time to read long briefs or the intellectual power and flexibility of a Learned Hand or Roger Traynor.

Finally one must confront the conviction of at least some Case Lawyers that the process of contract case law adjudication is worth the closest attention because it is a microcosm of fundamental social principles. In this view appellate courts are given the heroic role of expressing the inarticulate purposes of the community, and, by tiny stages, developing the norms that will harmonize the combat of social purposes to the end of the greatest good.

Oddly enough it is to this most ambitious of Case Lawyers' claims that Behaviorists concede a limited degree of validity. The concession is limited because the Behaviorists point out that so much is excluded from the field of vision of the general case law of contract: conflict between important interest groups (regulated by specialized statutory and administrative law), disputes between parties to continuing relationships (usually settled by private sanctions), and so on. Contract litigation, left with such tag-ends of problems nobody cares enough to regulate in some other way, is perhaps therefore not the place to look for clues to settling conflicts about which people care deeply.⁴⁹ Nevertheless, at a very general

48. Macaulay, *supra* note 35, at 1118-1120 is a careful discussion of this point. He concludes that as a general matter, given the enormous investigative effort required to give an adequate empirical basis to a sound rule of general policy, it is probably more efficient for courts to particularize their decisions to the parties, circumstances, and transaction immediately before them. He concedes the relevancy of criteria other than efficiency.

49. Professor Clyde Summers reaches the same conclusion by a slightly different route. After demonstrating that rules of contract law are useless

level contract law may contain some principles and characteristic methods of operation dealing with "interpretation, fairness, and appropriateness of remedy" that at least "provide a starting place for analysis" in the effort to design rules and processes for the regulation of important aspects of commercial life.⁵⁰ Still, while this concession suggests a means partially to recoup the enormous investment of intellectual resources in the study of contract law, it does not contribute to the argument for continuing the investment.

Professor Gilmore has not chosen to meet the challenge of the Behaviorists with any of these five responses, or with any other argument that genuinely comes to terms with the Behavioral thesis. He asserts simply that his kind of historical study is a more interesting (and, implicitly, more valuable) enterprise than theirs. It will be useful, then, to consider to what extent *The Death of Contract* validates this claim.

III.

I mentioned earlier⁵¹ a Behaviorist counterpart to Gilmore's historical account of the "death of contract"—Friedman's "decline of the court". (It is, of course, entirely in character that Gilmore should tell a story of doctrinal, Friedman of institutional, deterioration.) Friedman attributes this decline to the displacement of case law by Progressive regulatory legislation and the growing disinclination of businessmen to bring their disputes to court because: (a) business was increasingly conducted in long-term continuing relationships; (b) judges' insight into business affairs declined as these became more complex and specialized; and (c) costs and delays of court action increased.⁵²

or harmful when applied to problems arising out of special sorts of contracts (collective agreements), he says:

The law of contracts as presently conceived . . . cannot be expected to provide framework for integrating the rules and principles applicable to contractual transactions. Its generalizations are built largely upon selected cases considered to be "contract" cases by legal scholars, restatement writers, annotators, and indexers. This tends to exclude cases involving "special" transactions which can be treated more easily under other headings. The legal rules thus developed are not rules of general applicability; they are at the most general rules adequate for regulating those transactions not adequate enough or numerous enough to have stimulated the development of separate bodies of rules.

Summers, *Collective Agreements and the Law of Contracts*, 78 *YALE L.J.* 525, 566-567 (1969).

50. S. MACAULAY, *supra* note 38, at 199. See to the same effect, Summers, *supra* note 49, at 567-575 (recasting contract law as the "comparative law of commercial transactions" might reveal some broad principles or problems that cut across the various "families" of commercial transactions—collective agreements, leases, partnership agreements, insurance, etc.); MacNeil, *supra* note 22, at 807-813 (there exist identifiable general contractual norms or principles growing out of the "primal roots" of contract).

51. See text accompanying note 23 *supra*.

52. L. FRIEDMAN, *supra* note 25, 198-202. The proposition that as indus-

Viewed in this spacious perspective, the collapse of order and system in contract case law is the result simply of that law's increasing insignificance:

[T]he judges were abandoning their habit of abstraction The character of their cases gave them liberty to particularize. The scope of their cases was narrow. They decided small personal disputes—like the support contract cases—and cases arising out of marginal business transactions After all, insofar as the cases were trivial, . . . the judges bore no crushing responsibility to serve values of wide scope, and could safely pay heed to the particular merits of situations before them.⁵³

Moreover, this decline in the court's role and consequent particularizing habit was *well advanced by 1905*, that is, 15 years before the publication of *Williston on Contracts*.

Friedman shows how Wisconsin courts, however tough and abstract the language they sometimes talked, in fact to an extraordinary degree individualized their decisions by making liberal use of excuses like fraud, mistake and duress, by freely implying warranties for the benefit of buyers, and by frequently affecting "objective" interpretation and construction of written instruments only to find, in the end, that other facts in the case suggested what the parties had actually intended.⁵⁴ If Friedman is right about this, then not Corbin and Cardozo but very ordinary judges killed off "Contract" in the sense of a formal, consistently applied body of general rules (to the debatable extent that such a thing ever existed). All Corbin, Cardozo and the Realists did was to point out to the courts that this is what they had been doing.

Gilmore's deathbed scenes seem therefore to occupy only an odd corner of the legal history of contract. They make up a curious episode in the history of the relations between judicial style and academic doctrine. The construct put together by Langdell, Holmes and Williston, though it suited the formalistic style of the 1880's and 90's, was substantively obsolete before they had finished building it. The Realists helped to expose the conflict between style and substance and to promote in some judges (though by no means all or perhaps even most) a rhetoric and method more suited to the actualities of contract cases—fact-centered, policy-oriented, and concerned with reasonableness, fairness and good faith.

One could wish, consequently, that Gilmore had located his story within the framework of the history of business activity and legal

trialization proceeds, commercial litigation first rises somewhat, then sharply declines, is well on its way to being established as a regular pattern in at least Western societies. See the careful statistical demonstration (for Spain) of J. Toharia Cortes, *Cambio Social y Vida Juridica en España, 1900-1970* (unpublished dissertation Univ. Complutense of Madrid, 1971).

53. L. FRIEDMAN, *supra* note 23, at 213.

54. *Id.* at 97-98, 101-107.

institutions. But his not doing so does not make his subject trivial. On the contrary, it is amazingly interesting because we are still living in the circling ripples of the classical theory of contract, still using its conceptual apparatus in our courts, still teaching our first-year students how to take it apart. If it has not significantly affected what lawyers do, it has had an enormous impact on how they talk about what they do. But why? Why did classical theory take the form it did? Why did the courts take over its jargon and concepts? Why is it still around? What bothers me most about Gilmore's book is that he only hints at some possible answers. Some of the hints are promising and some not, but in neither case does he ever elaborate, and his failure to do so means his book is conspicuously lacking in conclusions. This happens, I am persuaded, because the answers lie outside the field of vision of the Case-Law Realist tradition out of which he writes. Not, mind you, that I know the answers. But I would like to suggest some places we might look for them.

A. Architects of the Classical Theory

The first puzzle to confront the reader of *The Death of Contract* is the attribution of the theory to the firm of Langdell, Holmes & Williston, an unlikely trio of partners. Langdell and Williston both built systems of logical, internally consistent doctrine. Holmes was impatient with system-building. He said of Langdell's *Casebook* and *Summary* that he had never read "a more misspent piece of marvellous ingenuity" and that Langdell "represents the powers of darkness. He is all for logic and hates any reference to anything outside of it . . ."⁵⁵ The Realists were to claim Holmes as inspiration and authority for their attacks on treatises like Williston's. Yet Williston was able to draw on Holmes' insights to further Langdellian ambitions for *elegantia juris*, and some of those insights lent themselves readily to that use of them.

Holmes' treatment of contract in *The Common Law*, especially in comparison to his treatment of tort, is especially unsystematic. He is not building a theory of contract but only using some aspects of contract law to illustrate points of a thesis argued at greater length in other lectures. Many of these illustrations would have been of little interest to Williston (e.g., Holmes' refutation of the notion that "consideration" came from Roman *causa* via Chancery practice), but he clearly absorbed Holmes' insistence that the law was moving toward concern with objective, external conduct and away from subjective states of mind.⁵⁶ As Gilmore says, this has a tendency to simplify factual inquiry: if you are not

55. 1 HOLMES-POLLOCK LETTERS (M. Howe ed. 1941) [letter of April 10, 1881]; and see M. HOWE, JUSTICE OLIVER WENDELL HOLMES, THE PROVING YEARS 155-159 (1963) for further comments of Holmes on Langdell.

56. See GILMORE 43 and the illustrations from Williston there cited.

concerned with what the parties really wanted, you can limit scrutiny of their behavior to certain external forms, and "in time [the factual inquiry] can be dispensed with altogether as the courts accumulate precedents about recurring types of permissible and impermissible 'conduct'. By this process questions, originally perceived as questions of fact, will resolve themselves into questions of law."⁵⁷ Surely Williston would probably have been just as happy with "subjective" theory, so long as it came with rules of evidence excluding as unreliable all but certain manifestations of intent. The virtue of the objective theory was that it lent itself beautifully to the abstraction that makes possible doctrinal coherence.

B. Content and Purposes of the Theory

Gilmore was earlier quoted as saying that the Holmes-Williston theory of contract was one of liability made absolute, but severely restricted both in scope and extent.⁵⁸ Why? At one point Gilmore vaguely speculates that "the Puritan ethic was somehow involved" in the idea of absolute liability;⁵⁹ at another he suggests that the theory responded to the same "felt needs" that produced 19th century liberal political economy, and that both "implicitly assumed" a "narrow scope of social duty."⁶⁰ This rings true in some ways. Holmes and Williston were 19th century individualists, skeptical about the ability of governmental regulation to produce social improvement.⁶¹ Yet both tolerated and acknowledged the inevitability of such regulation to a significantly greater degree than other wellplaced lawyers of the early 20th century; neither was a doctrinaire believer in "liberty of contract."⁶² Moreover, Holmes thought that the law set objective standards for liability (independent of subjective intent or any degree of moral blameworthiness) precisely in order to make social regulation possible: "When men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare."⁶³ This view is of course not at odds

57. *Id.* at 42.

58. See text accompanying note 9 *supra*.

59. GILMORE 47. It is hard to guess what "Puritan ethic" in this context means. Perhaps Gilmore is thinking of an undiluted Calvinism in which neither good intentions nor good works can make the slightest difference to a sinner's prospects for election or damnation.

60. *Id.* at 95-96.

61. Holmes' disdain for progressive social movements is too well known to require documentation. As for Williston, see his autobiography, S. WILLISTON, *LIFE AND LAW* 335 (1953): "One who has believed in the theories of Emerson and Franklin cannot fail to be troubled by confirmed deficit spending and centralized bureaucratic, paternalistic regimentation."

62. See Holmes' famous dissents in the "economic due process" cases and Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921).

63. O.W. HOLMES, *supra* note 6, at 86. Though Holmes says that individualism in the sense of giving wide scope to the assertion of individual peculiarities must be sacrificed to the general welfare, the basic thrust of his

with one aspect of liberal political economy in practice: its Darwinian callousness towards a party who has made a bad bargain in the marketplace and now seeks to be excused on the grounds of fraud, mistake, duress and the like. But I believe that on the whole the notion of an absolute contract liability (which, Gilmore points out, was not invented by Holmes but had been floating around American common law since 1827⁶⁴) is not an end result that Holmes' theory aims at, but merely a by-product of the central thesis that contract law is formal and external.

Gilmore's point, however, that the objective theory sought to transform questions of fact into questions of law is very well taken. But again, what was the purpose of this? I have mentioned its utility for Williston's impulses towards construction of doctrinal cathedrals insulated against the penetration of social fact. Gilmore believes avoidance of fact questions is linked to a distrust of the civil jury and a desire to bring as many questions as possible within the scope of appellate review.⁶⁵ For reasons spelled out below,⁶⁶ I agree with him. But surely the main purpose both Holmes and Williston hoped the objective theory would serve was to increase certainty in the application of legal rules.⁶⁷ In planning their affairs private parties could guess more accurately at the results of litigation if standards for their conduct were no longer left to juries but were synthesized into rules announced in case law from the many jury verdicts on standardized sets of facts.⁶⁸ Holmes developed this idea in the context of negligence.

Unlike Gilmore, who does not tell us in this book (though he may in his next⁶⁹), I do not know how Holmes as a judge sought to promote predictability in contract litigation, but it is safe to say that if this was Holmes' and Williston's chief aim, it was also their

argument is libertarian in another sense. As social life forces us into greater interdependence, the more we shall need regulation; but the more regulation we have the more important is it that it be cast in forms that make it predictable. The free man is the man who can make choices knowing what consequences the state will make follow from his acts.

64. GILMORE 44-45, 125 n.103.

65. *Id.* at 99.

66. See text following note 84 *infra*.

67. M. Howe, *supra* note 55, at 198-200; S. WILLISTON, *supra* note 61, at 209:

Langdell's followers have recognized the necessity that rules of law should produce satisfactory economic and social effects, and that there must be a variety of rules to govern the affairs of men; but there is a difference in emphasis. This group has attached greater value to the simplicity and certainty that can best be attained by a limited number of recognized principles carried logically to their conclusion than their critics seem to have done.

See also note 63 *supra*.

68. O.W. HOLMES, *supra* note 6, at 98.

69. Gilmore is completing the biography of Holmes begun by the late Mark deWolfe Howe; whose narrative had reached the point of Holmes' appointment to the Massachusetts Supreme Judicial Court.

chief delusion. Their rules met the convenience of the treatise writers but not of the businessmen whose security of expectations they were designed to promote. Some of the rules seemed purposely designed to promote uncertainty—such as the doctrine that even offers reciting their irrevocability on their face could be revoked before acceptance. Other rules, such as those dealing with mutuality and illusory promises, refused enforceability to common kinds of business deals like the long-term requirements contract. The main problem, however, went deeper. Businessmen will not find the rules of courts useful in planning their conduct unless they make a practice of use or threatened use of courts, and the less they use the courts the less will the rules conform to business expectations. In contrast to Holmes' negligence cases, there will be nothing out of which to synthesize objective standards of conduct. Lacking the data (and doubtless also the temperament) to derive rules from regularities of business practice as revealed in litigated cases, Williston was constrained to deduce them from other rules.

C. *The Theory's Acceptance in the Courts*

Gilmore wonders why Langdell's idea of a general theory of contract "had the fabulous success it did instead of going down the drain into oblivion as a hundred better ideas than Langdell's do every week."⁷⁰ Its "success" in the courts was of a peculiar kind. Judges borrowed the terminology and categories of the theory but not its results. They appropriated the "bargain" theory of consideration but in fact enforced unbargained-for reliance.

Nonetheless, one may well ask how it came about that a scheme smelling so strongly of the lamp, as the Holmes-Williston theory, had such an appeal for common law judges. Gilmore thinks it helped satisfy a hunger for some national uniformity of commercial law.⁷¹ I guess I would just want more evidence on this point. National uniformity is the sort of rallying cry that rouses the august members of the American Law Institute, but how did the local commercial bench and bar feel about it? Friedman's hypothesis is that the bench and bar welcomed the technical, erudite, scientific look of the new treatises as did the schools, and for the same reasons. The idea that law was very difficult and required formal training was useful in the early years of the cooperative efforts of law schools and bar associations to erect barriers of educational requirements and bar examinations so as to raise the standards of practice and to keep out the riffraff.⁷²

70. GILMORE 14.

71. *Id.* at 96-97.

72. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 536 (1973). See also Stevens, *Two Cheers for 1870: The American Law School*, 5 *PERSPECTIVES IN AM. HISTORY* 403, 453-64 (1971).

Williston's treatise and the Restatements also suited the formal style of judicial decisionmaking (though that style was on its way out when the *Restatement of Contracts* appeared in 1932) by supplying formal structure on a scale never before dreamed of. But what was the impulse that produced the need and the means to fill it?

In the early 19th century judges had thrust upon them a large discretionary role in administering the society and economy of the American states. This role was new to American judges, seemed incongruous in a democracy, and had to be legitimated.⁷³ Originally, this was accomplished by explaining in their decisions how they helped to promote important social purposes, notably economic growth.⁷⁴ But in the late 19th century they sought legitimacy through formalism. Perhaps this was to justify their kamikaze exercises of power in invalidating progressive welfare legislation and enjoining unions. Professor William Nelson has recently suggested another explanation. He says formalistic reasoning arose in the 1880's after pre-Civil War legal "instrumentalism" had become disgraced through being associated with proslavery decisions. In particular the Supreme Court of the United States took generations to recover from the taint of *Scott v. Sandford*.⁷⁵ Nelson says that formalism was not only a technique for separating law from politics but was also the style of a revival of a natural law jurisprudence of "principle" rather than of "expediency" founded on the moral absolutism of the anti-slavery movement.⁷⁶ A tendency to believe that legal rules could be drawn deductively from self-evident moral principles was happily reinforced by the quest for the scientific ideal in law by academics like Langdell.⁷⁷ Friedman adds the suggestion that formalism of style and the embrace of the opportunity offered by Langdell and Williston to turn it into superformalism may also have been a way for the judges to obtain the compensations of prestige for the decline in their power—relegated

73. For a recent theoretical analysis of the relationship of legal formality to the legitimacy of court decisions, see Kennedy, *Legal Formality*, 2 J. LEGAL STUDIES 351 (1973), a dazzling article that in its statement of the problem alone illuminates whole areas of law.

74. See Horwitz, *The Emergence of An Instrumental Conception of Law*, 5 PERSPECTIVES IN AM. HISTORY 287 (1971).

75. 61 U.S. (19 How.) 393 (1856).

76. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 549-51 (1974). Nelson's thesis calls to mind the attacks made on the Legal Realists, accusing them of amoral positivism, in the light of the Nazi rise to power in Germany. There is considerable irony in the fact that whatever the Realists owed to Holmes was also formed in the Civil War, which killed off antislavery idealism in Holmes the soldier and bred in him the profound skepticism about absolute moral claims that forms the emotional basis for his jurisprudence.

77. *Id.* at 562-63.

to a marginal societal role in contract disputes, they took on the mantles of oracles.⁷⁸

Yet with all these interesting things going on around him, Gilmore chooses to focus on the *least* distinctive aspect of 20th century contract law: the decay in integrity of a doctrinal system.⁷⁹ Doctrinal disintegration is not a very remarkable phenomenon studied for its own sake, rather than to understand the social and intellectual forces that produce it. The courts are always groping for generalizing formulae, the formulae always breaking down, and the courts finding reformulations. Contract law is unusually susceptible to doctrinal instability because of the diversity of incompatible purposes it has been made to serve and the rapid underlying changes in patterns of doing business. Since the beginning of the 19th century courts and commentators have talked about the need to establish commercial rules that will promote security of business expectations, have announced tough new rules, and have spent the next two generations riddling them with qualifications and exceptions.⁸⁰ Gilmore, out of his vast knowledge of 19th century commercial law, realizes this better than anyone, and indeed he gives several examples of mid-19th century breakdown of doctrine in this book.⁸¹

What, then, was so special about the construction and collapse of classical theory in the 20th century? What was special was the self-consciousness of the processes of creation and destruction. The common law never saw anything in its history like the huge systematizing treatises of the early 20th century, and the people who tore them apart produced a remarkable legal literature. Judges left to themselves weave unconscious of the pattern. In this century a brand new profession of spectators—law teachers and law review editors—watched and criticized their every move. Furthermore, questions about the wisdom of this holding or that rapidly turned into questions about what was worth studying in law, which in turn became impossible to disentangle from questions about what was important to teach law students; debates over doctrine were magnified (or reduced) to quarrels over curriculum. The rise and fall of academic doctrinal systems must

78. L. FRIEDMAN, *supra* note 23, at 213-14.

79. Gilmore does not even elaborate on an interesting earlier thesis of his that 19th century "conceptualism" broke down because of the sheer volume of reports—there were too many cases for the judges to ensure the integrity of conceptual systems. He ascribes the growth of legal realism as an intellectual movement to this process as well, though it is never made entirely clear (at least to me) what the connection is. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

80. See Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974).

81. GILMORE 77-81. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965) is crammed with instances from 19th century doctrine on chattel mortgages.

therefore have some, probably close, connection with changes taking place in legal education.⁸² Gilmore does not on this occasion explore such a connection. Whoever does might find in it some hints toward the solution of one of the problems posed at the beginning of this section: Why is the classical theory still around.

D. *The Survival of Contract*

As Gilmore himself implies, there probably should never have been a general theory of contract at all. Contract was fused out of old specialties like bailments, suretyship, and sales. But by the time Williston published his treatise, it was in the process of breaking up again in the decisions of courts as patterns of practice in different contexts informed judicial decision making: offer and acceptance law became real estate brokers' law, subcontractors' bid law, insurance policy law, catalogue sales law, and so forth. The only unity remaining in contract law was that of the classical theory. If Contracts was to continue to be maintained as a course of instruction, as an organizing category, the classical theory *had* to be maintained, if only as the target for Realist attacks. Case-Law Realism as a method of exposition and teaching defined itself, dialectically as it were, as a challenge and alternative to classical contract and as a method of finding better answers to the same questions. The Realists were like 18th century rationalist skeptics obsessed with criticism of a sacred text. Meanwhile the case method had proved a remarkable pedagogical success as a vehicle for imparting analytic skills.

Yet the continued occupation of the center of legal study by case law remains something of a mystery. One could understand it if being a lawyer in America were like being an English barrister, a trial lawyer whose mastery of a manageable body of legal doctrine is an indispensable skill for the work involved. But it isn't. The two hypotheses suggested above to explain the survival of Contract case law through the compromise of Case-Law Realism (the need for constant reenactment of the oedipal destruction of the classical theory and the pedagogic virtues of teaching by the case method) do not seem explanation enough for the extraordinary continuity of the case-law tradition through 103 years of legal education.

Here are some clues. Langdell thought only cases (preferably English cases, which accounted for over 90 per cent of those in his casebook) were the proper materials for legal "science" at a time

82. In fact the fullest account to date of the Legal Realist movement, W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973), treats Realism almost exclusively as an event in the history of legal education (rather than of jurisprudence or social theory of commercial law), with results that are in many ways rewarding.

when he was trying to impart some academic hauteur to legal training. Holmes asked himself:

How can the laborious study of a dry and technical system, the greedy watch for clients and the practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life?⁸³

He answered by saying that law schools must strive to turn out, and lawyers to be, thinkers in their craft. Langdell rather snobbishly evokes a world of English barristers in their wigs and clubs, Holmes a striving for connection to the great world of cosmopolitan learning. But they have in common a fastidiousness about ordinary law practice and a vision of the ideal of the scholar-scientist-practitioner.

In a time when even some of the leaders of the bar felt their possession had become a "business" and the business one of clerking for the corporations, the vision had obvious attractions.⁸⁴ Appellate judging and practice are the least grubby of legal jobs—the most intellectual, the most dependent upon reason. Counsel speak in moderate tones in a quiet room, the judges reason with one another, they explain their decision, it becomes immediately binding on the parties who (usually) comply with it. It is no wonder that law teachers should wish that this tranquil and rational way of doing things represented the norm of a lawyer's work, and if not the usual, at least the ultimate, means of resolving social disputes. This may help to explain the classical theory's drive to reformulate questions of fact as questions of law and in so doing to expand the scope of appellate review. This is the arena where the scholar is most likely to be the successful practitioner. ("Which of us," Goethe somewhere remarks, "is so civilized as to refrain from cruelly stressing, at times, the qualities in which he excels?") Case law is among other things the ideology of mandarins.

Gilmore sees coming a time when criticism of case law doctrine will be displaced from the center of law study. I hope he is right, but he is gloomy about it. Here and there in his book he throws out garlands of superlatives:⁸⁵ *Corbin on Contracts* is "the greatest law book ever written"; the *Restatement of Contracts* is "one of the great legal accomplishments of all time"; the *Restatement* and the U.C.C. are "our two most notable twentieth century legal artifacts"; the "reduction of the basic fields of law to self-contained and logically consistent systems of rule and doctrine [is] the greatest achievement" of late 19th and early 20th century jur-

83. O.W. HOLMES, *The Profession of the Law*, in COLLECTED LEGAL PAPERS 29 (1920).

84. See R. HOFSTADTER, *THE AGE OF REFORM 156-163* (1955).

85. I am indebted to my colleague Marc Galanter for pointing this out to me.

isprudence.⁸⁶ The tone is elegiac—he seems to be saying: “Many ingenious lovely things are gone.”⁸⁷ He sees moving across the distant plain armies of sweating sociologists, clipboards and calipers in hand, to bivouac in plastic tents where pyramids once stood. And in fact we shall do well to worry if the new orthodoxies threaten to constrict our view of the world as narrowly as did the old ones they are replacing.

ROBERT W. GORDON†

86. GILMORE 57, 59, 82, 101-102.

87. W. YEATS, *Nineteen Hundred and Nineteen*, in *COLLECTED POEMS* 232 (1934).

† Associate Professor of Law, State University of New York at Buffalo.