BOOK REVIEW

GILMORE'S NEW BOOK: TURNING AND TURNING IN THE WIDENING GYRE

THE AGES OF AMERICAN LAW. By Grant Gilmore. Yale University Press, New Haven and London, 1977, pp. 154, $10.00.

*Reviewed by Peter R. Teachout**

> The historian. . .operates between. . .fairy tale and data, between an intellectual activity that generalizes (seeks meaning, tells a story) and one that scrutinizes and doubts and says it is not proven, or perhaps rescues a solid fact from the mass of uncertainty. Somehow he must find a way of dealing with these two incompatible processes of thought, these two contradictory languages, he must find a place for himself between them.
>
> James White, *The Legal Imagination*[1]

When Grant Gilmore's *The Death of Contract*[2] was first published two years ago, it created something of a sensation in the legal academic world. Gilmore's slender, witty, provocative account of the rise and fall of classical contract law triggered an explosion of comment and criticism in the periodical literature.[3] The critics were generally agreed that *Death of Contract* was the work of an engaging and original mind, but they were also puzzled by what appeared to be Gilmore's casual disregard for established history. In particular the critics found curious Gilmore's insistence that Langdell was responsible for the emergence of a general theory of contract in the

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1. J. WHITE, THE LEGAL IMAGINATION 884 (1973).

2. G. GILMORE, THE DEATH OF CONTRACT (1974).

3. *See* Milhollin, *More on the Death of Contract*, 24 CATH. U. L. REV. 29 (1974); Mooney, *The Rise and Fall of Classical Contract Law: A Response to Professor Gilmore*, 55 ORE. L. REV. 155 (1976); Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975); Gordley, Book Review, 89 HARV. L. REV. 452 (1975); Gordon, Book Review, 1974 WIS. L. REV. 1216; Horwitz, Book Review, 42 U. CHI. L. REV. 787 (1975); Reitz, Book Review, 123 U. PA. L. REV. 697 (1975).

late nineteenth century[4] and, even more curious, Gilmore's effort to link Holmes to the Langdellian school of thought.[5] These and other problems left the readers of *Death of Contract* genuinely baffled. Had Gilmore simply been careless?[6] Was he putting us on?[7] Was there a hidden pattern in the fabric of his composition which no one had been able to see? Whatever the explanation was, it was not forthcoming. *Death of Contract* was a joy to read, but as history, the critics concluded, it was "a very curious performance."[8]

Now Gilmore has given us a new book which is certain to leave the legal world even more perplexed. *The Ages of American Law*[9] is a boldly original account of the history of American law from roughly 1800 to the present.[10] It is based upon a series of Storrs Lectures given by Professor Gilmore at the Yale Law School in

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4. "To one who has studied pre-Langdellian contract law, Professor Gilmore's emphasis on Langdell's 'almost inadvertent discovery of the general theory of contract' seems strikingly unhistorical." Horwitz, *supra* note 3, at 794. In addition see Mooney, *supra* note 3, at 164-67.

5. "One is quite surprised. . .that Professor Gilmore has not even attempted to explain or justify his strikingly unorthodox creation of a Trinity consisting of Langdell, Holmes and Williston." Horwitz, *supra* note 3, at 796-97. In addition see Mooney, *supra* note 3, at 167-72.

6. Professor Mooney seems to take this view. After proclaiming Professor Gilmore to be "a giant among us," Mooney proceeds—one is tempted to say, like Jack and the Beanstalk—to chop away at Gilmore's history, finding in it numerous misstatements and errors. Mooney, *supra* note 3, at 163. Mooney concludes: "*The Death of Contract* is not quite the first-rate contribution to historical scholarship the legal world has come to expect from Grant Gilmore." *Id.* at 156.

7. Those who know Professor Gilmore do not dismiss this possibility lightly. Professor Speidel speculated that Professor Gilmore would probably "be amused by all the reviewers who take him so seriously." Speidel, *supra* note 3, at 1167.

8. "[W]hen the magic of the speaker's voice has faded, one begins to realize that this has been a very curious performance." Gordon, *supra* note 3, at 1218. Gordon's remark reflects a common tendency among the critics of *The Death of Contract* to want to separate the "voice" of Gilmore's work from the substance—to separate, in Yeat's phrase, "the dancer from the dance." I take, as will become clear below, a contrary approach.

9. G. GILMORE, THE AGES OF AMERICAN LAW (1977) [hereinafter cited as *Ages*].

10. Gilmore makes extremely modest claims for his work:

> I have put forward a number of hypotheses about what seems to have happened in American law since 1800 or thereabouts along with some speculations about why what seems to have happened should have happened. My hypotheses and speculations make a certain amount of sense to me. I shall be pleased if they make any sense to others.

Id. at vii. Whether this work should be taken as simply a bundle of "hypotheses" and "speculations," as history, or as something else is a question to which I give some attention in this review.

October, 1974—lectures which apparently had a powerful impact upon his original audience.[11] This new book is magnificently written; Gilmore gives us passages of historical writing—passages of light and passages of darkness—that compare easily with anything being done in American legal history today. But, as history, *Ages of American Law* presents many of the same problems as *Death of Contract.* For some strange reason, Gilmore makes his work turn upon a number of assertions which, from an historical viewpoint, are highly misleading if not simply and inexplicably wrong. *Ages of American Law* is, in short, another "curious performance"—doubly curious this time, because it would seem that, in the wake of the criticism of his *Death of Contract,* Professor Gilmore might have brought at least a few of his more eccentric contentions into line.[12]

What is even more puzzling about Gilmore's *Ages,* however, is that in spite of its historical problems, it seems to "work." When we come away from the book, we understand what the period of creativity in our legal past was like. We understand the "law's black night" of legal formalism. *Ages of American Law* seems to have a unique power of its own. It is almost as if Gilmore had reached beyond the thin veneer of history and discovered a deeper mythology which, at some fundamental level of our being, hits very close to home. How do we understand this unique piece of legal literature? Is there any explanation that will account for both its historical eccentricities and its curious impact?

The place to begin to look for an answer to this puzzle, it seems to me, is with the "imaginative pattern" which gives structure and

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11. Gilmore's third and final lecture was published in the Yale Law Journal. Gilmore, *The Storrs Lectures: The Age of Anxiety,* 84 YALE L. J. 1022 (1975). The "Editors Introduction" to this contains a moving description of the lectures. The final lecture was given on the last day of October: "As we sat in the auditorium that afternoon, we had a feeling that ironies beyond our comprehension, beyond even our guessing, continually pressed on Professor Gilmore. . . . When the third lecture was over, we rose and clapped and cheered." *Id.* at 1027.

12. There is a problem of timing, however, since Gilmore had already composed and delivered the Storrs Lectures prior to the appearance of the criticism of his *Death of Contract.* Moreover, he could not move back the date of the emergence of a general theory of contract, or sever the link between Holmes and Langdell, without seriously disrupting the basic imaginative pattern of the lectures, as I think will become clear from the discussion below. In any case, Gilmore responds to the criticism of his *Death of Contract* in a footnote in his new book, saying, in substance, "I do not repent." *Ages, supra* note 9, at 146-47 n.11.

meaning to Gilmore's history.[13] All history, as Professor White observes in the passage quoted at the outset of this section, is composed in part of "fairy tale" (or theme, or story) and in part of "data" (or solid fact). The historian must constantly walk the tightrope between "these two incompatible processes of thought, these two contradictory languages."[14] When the historian ventures toward the "data" end of the spectrum, his history gains in accuracy, but loses its "meaning" (an example might be an unedited tape recording). When he strays too far toward the "fairy tale" end, his history loses credibility as history and becomes something else —something we want to call "fictional." Good history, of course, involves both elements: the imaginative (which gives it meaning) and the factual (which gives it credibility). This tightrope act is particularly difficult to manage when the historian attempts, as Gilmore does here, to take an exceptionally broad view of history. With this type of history, the historian is less concerned with data, with what actually happened, than he is with the large patterns and dominant impulses[15]—what Wallace Stevens would call, those "supreme fictions"[16]—that give history "meaning." The imaginative pattern tends to become dominant, and the pressures are then great to make the data fit the pattern, to leave out what perhaps ought not to be

13. The idea that a history is given "meaning" by its underlying imaginative pattern is treated brilliantly in Professor James White's *The Legal Imagination* in a section on "The Narrative Imagination and the Claim of Meaning." White, *supra* note 1, at 858-925 (1973). I use White's concept of a tension between imaginative pattern and historical fact in only the most amateur way in this review.

14. *Id.* at 884.

15. Gilmore announces early in the book that his purpose is to give expression to the dominant impulse of the respective ages of American law: "When we reconstruct the past, we think we see that in one period the innovative impulse was dominant and that in another period the formalistic impulse was dominant." *Ages, supra* note 9, at 16. The difficulty with his history, as I attempt to show below, is that he is not entirely consistent on this score; he is constantly crossing back and forth across the border into descriptive history, leaving the reader confused about whether Gilmore is talking about the "dominant impulse" or a "true picture" of history. The problem of drawing meaningful lines between "dominant impulse" history and descriptive history is discussed in White, *supra* note 1, at 888. White has this to say about the type of history Gilmore attempts here: "It makes sense to say that [the type of history that concerns itself with the] inspired representation of 'the soul of an age'. . .has a value less as history than as something else. . . ." *Id.* at 888.

16. "[W]hat makes the poet the potent figure that he is. . .is that he creates the world to which we turn incessantly. . .and that he gives to life the supreme fictions without which we are unable to conceive of it." W. STEVENS, *The Noble Rider and the Sound of Words*, in THE NECESSARY ANGEL 3, 31 (1942), *quoted in* White, *supra* note 1, at 889.

left out. This sort of dynamic is at work, one suspects, in Gilmore's *Ages of American Law*. It may help to explain, at least in part, our uneasiness with the relationship Gilmore establishes in this work to historical "facts."

This leads to a second preliminary observation about Gilmore's work. If it is a mistake to take *Ages of American Law* as a faithful representation of what actually happened, it is equally a mistake to take it simply as a body of historical ideas. The content of some histories can be fairly summarized by stating the central argument in the abstract, but that is not the case here. Gilmore's *Ages* can no more be reduced to an abstract statement of his "thought" or "thesis" than a good judicial opinion can be reduced to a series of headnotes. The real power of Gilmore's book lies elsewhere, in the way the basic imaginative pattern is given content, in the striking images, the recurring metaphors, the shifting tones—in short, in the writing. *Ages of American Law* is not a conceptual history; it is, as the historian J. T. Boulton said of Burke's *Reflections*, "a complete literary achievement, a mode of writing effectively designed to convey a particular manner of thinking."[17] Boulton goes on to describe Burke's work in a way that provides an important clue as to how Gilmore's history should be taken:

> [I]t is surprising to find critics who examine his political thought without recognizing that literary criticism is essential to their purposes. . .[W]hat Burke "has to say is not a matter just of 'content' or narrow paraphrasable meaning, but is transfused by the whole texture of his writing as it constitutes an experience for the reader." Burke was not only a great thinker, he was also an imaginative writer who requires a response from the reader as a whole man and not simply as a creature of intellect.[18]

The problem with much of the criticism of Gilmore's *Death of Contract* is not that it was wrong, but that it responded only to the paraphrasable content of Gilmore's book and failed to recognize how much of what Gilmore had to say was conveyed "by the whole texture of his writing."[19] In this review, I do not make a systematic

17. J. BOULTON, THE LANGUAGE OF POLITICS IN THE AGE OF WILKES AND BURKE 97-98 (1963).
18. *Id.*
19. Both Mooney and Horwitz seem to have dimly recognized that *The Death of*

effort to bring the techniques and insights of literary criticism to bear on Gilmore's *Ages*, but I do attempt to understand the book not simply as a history but as a more complex literary achievement.

I. The Basic Imaginative Pattern of Ages

Perhaps the most striking thing about Gilmore's *Ages* is the theme of radical despair which lies at its center. If Gilmore's history has a "meaning," it is that the eighteenth century idea of the progressive advance of civilization is dead.[20] The notion that our constant striving to improve the law will somehow result in a system of laws under which people will live happily is, we are told, an "illusion."[21] This dark theme is foreshadowed in the opening pages of the book:

> The eighteenth century, with good reason, thought well of itself. It was an Age of Enlightenment. It was also an age of enthusiasm and of a generally shared belief in the inevitability of progress—a belief which sustained itself throughout the nineteenth century and into our own. This pervasively optimistic intellectual ambience guaranteed that the laws which the prototypical social scientists might discovery would be laws we could be proud of and live with happily, not laws which would bring us crashing down in a hopeless despair at the human condition.[22]

The central movement in American legal history, as Gilmore paints it here, is from the "enthusiasm" and "shared belief" of Story's age to the uncertainty, anxiety, and disorder of our own; it is from unity to disintegration, from optimism to despair. Gilmore's *Ages of*

Contract should be taken as literature—Mooney wondering if it should be "read like an historical novel," and Horwitz referring to it as a "morality play"—but neither critic was able to find a fruitful way to pursue the idea. Mooney, *supra* note 3, at 163; Horwitz, *supra* note 3, at 787.

20. This theme had a powerful impact upon Gilmore's original audience. Editors of the Yale Law Journal describe how unprepared the audience was for the "savage nihilism" of the third and final lecture. Gilmore, *The Storrs Lectures: The Age of Anxiety*, *supra* note 11, at 1027 (Editors' Introduction).

21. *See Ages*, *supra* note 9, at 99-107.

22. *Id.* at 4.

American Law is, in a very real sense, an historical *voyage au bout de la nuit.*[23]

This central movement is worked out in the context of the three basic ages of American law. Gilmore adopts the tripartite division of American legal history initially developed by Karl Llewellyn in his *The Common Law Tradition.*[24] The first major age, Gilmore's Age of Discovery, runs from roughly 1800 until the Civil War. This was our "Golden Age,"[25] a time during which courts made decisions in what Llewellyn called "the Grand Style."[26] It was a period of enormous creativity and untroubled harmony in our legal past, a sort of Garden of Eden, never again to be recovered. The next major period, Gilmore's Age of Faith, extends from the Civil War until World War I. "After the Civil War all the gold, by a sort of reverse alchemy, was transmuted into lead. The pre-Civil War Grand Style lost out to a Formal Style, which was as bad a way of deciding cases as the previous way had been good."[27] Gilmore's Age of Faith is the "law's black night,"[28] a time of repressive order dominated by legal formalism, a world in which the lifeblood has been sucked out of the law. The third age is our own, the Age of Anxiety:

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23. It is possible to disagree about where the real "bottom" of Gilmore's historical night lies. Some might place it at the turn of the century when the Langdellian order was at its peak; others might locate it in the present, since Gilmore describes our own age as one of continued disintegration and mounting despair. Perhaps both views are right. At times Gilmore—at least the Gilmore reflected in *Ages*—seems to fit perfectly Perry Miller's description of Story: "[H]e lived in a cloud of augmenting gloom . . . , a darkness which he enjoyed and which never dampened his spirits." The full passage from which this line is taken is quoted in text accompanying note 66, *infra*.

24. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960). *See Ages, supra* note 9, at 11-13.

25. I argue below that we should pay close attention to the mythical patterns of Gilmore's work because of the influence these patterns exert on his historical material. In this respect, the following quotation from Henry Reynolds' *Mythomystes* (1632) is relevant:

> What could they meane by their *Golden-age*,. . .but the state of Man before his Sin? and consequently, by their Iron Age, but the worlds infelicity and miseries that succeeded his fall?. . . Lastly. . .what can *Adonis horti* among the Poets meane other than *Moses* his *Eden*, or terresiall Paradise?

1 CRITICAL ESSAYS OF THE SEVENTEENTH CENTURY 156 (J. Springarn ed. 1908-1909). Gilmore's Age of Discovery may be taken, in one sense, as an imaginative reconstruction of "the state of [legal] Man before his Sin," and Gilmore's Age of Faith, as a representation of the "infelicity and miseries" which succeeded the Fall of legal Man into formalism.

26. *Ages, supra* note 9, at 12.

27. *Id.*

28. *Id.* at 41.

> After World War I the formalistic approach which had been dominant in American legal thought for fifty years, went into a protracted period of breakdown and dissolution. . . . [A] principle feature of the new approach, which became manifest during the 1920s, was a root-and-branch rejection of the formalism or. . .the conceptualism of the preceding period.[29]

It is with respect to this third period that Gilmore most radicallly departs from the historical convention. Llewellyn, for example, believed that in the post-World War I period American law was once again emerging from the Dark Ages of legal formalism, that society was witnessing the reappearance of the pre-Civil War Grand Style. But Gilmore has another view. To Gilmore, the formalistic period in American legal history was a time when the leading legal figures maintained an illusion of certainty and predictability, while, beneath the surface, the reality continued to crumble and slip away. Our own period is distinguished from the formalistic one, not because the process of disintegration has been halted and health restored, but rather because the best and wisest in the profession have faced up honestly to the disintegration of the legal order.

If the central movement in Gilmore's history is from unity towards disintegration, the central tension in each age is between the forces of chaos and the forces of order. The struggle between these competing forces is played out in terms of the large figures in American legal history—Story, Langdell, Holmes, Cardozo, Corbin, and Llewellyn. In Gilmore's world, these legal giants take on powerful symbolic as well as historical significance.[30] What distinguishes the

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29. *Id.* at 12.

30. One of the things that sets Gilmore's work apart from the current fashion in legal historiography is the way individual historical figures loom large against the horizon in *Ages*. The modern tendency in writing about American legal history has been to portray the past as comprised solely of abstract concepts (ideas, forces) pushing anonymously back and forth across the historical stage. It is as if our past consisted not of concrete experience but of highly conceptual "isms:" instrumentalism, utilitarianism, objectivism, "high classical formalism," and so on. In the same way, the activity of legal history itself seems to have devolved into something of a labeling game: the burning question, we are told, is whether particular historical figure X was primarily an "objectivist" or a "formalist." While Gilmore does not escape the current fashion entirely, he comes close to doing so. In *Ages*, individual figures play a central role in the unfolding of events, and they are given the full range of human attributes. Thus, when Gilmore looks at Holmes he sees, among other things, "cruelty" and "despair," and not simply an intellectual problem.

good from the bad, the wise from the foolish, is the relative sensitivity each brings to the task of striking the balance between the enduring tensions in the law:[31] between unity and diversity, nationalism and localism, the legal order and the variety of experience, and so on. Some, like Story, manage—through sheer power of imagination—to strike a wise and sensitive balance, and thus set society off on a constructive course. Others, like Langdell, "stupidly" attempt to impose a scientific order on the law, to reduce the entire universe of legal thought and activity to a unitary set of principles, which have little relationship to real people in the real world. The picture becomes more complex in the present age, with waves of chaos followed by waves of order, followed in turn by waves of creative anarchy. Essentially, those who succeed, like Cardozo, Corbin, and Llewellyn, do so because they find a way to come to honest terms with a fragmented and pluralistic world. The "fools" in the modern period are the systematizers, the conceptualists, those who attempt to impose their own "unitary views" on a rich and contradictory reality, to reduce it all to the restrictive terms of science, or economics, or political theory.

The fundamental opposition in American legal history, as Gilmore sees it, is not between the left and the right. Rather it is between the "unitary view" people (the Langdellians and their various resurrections in our own period: the Realists of the thirties and forties, and the "New Conceptualists" of the sixties and seventies) and the "partial view" people, those who have come to realize that life is rich, and truth is tentative, and the most one can hope for in the modern world is, what Robert Frost would call, a "momentary stay against confusion."[32]

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31. White's *The Legal Imagination* is, among other things, a wonderful catalogue of such tensions. White, *supra* note 1.

32. A poem, says Frost, "begins in delight, it inclines to the impulse, it assumes direction with the first line laid down, it runs a course of lucky events, and ends in a clarification of life—not necessarily a great clarification, such as sects and cults are founded on, but in a momentary stay against confusion." R. FROST, *The Figure A Poem Makes*, in SELECTED PROSE OF ROBERT FROST (Cox and Latham ed. 1967). Gilmore's conception of the activity of law, it seems to me, bears a certain correspondence to Frost's conception of the activity of poetry.

II. Common Law Antecedents: The Blackstonian Impulse and the Mansfieldian Impulse

To describe Gilmore's *Ages* thusly is to describe merely its skeletal structure; the real richness of the book lies elsewhere, in the way Gilmore fleshes out this basic imaginative structure with the stuff of history. Gilmore begins his history offstage, in the England of the sixteenth, seventeenth, and eighteenth centuries. English law during most of this period, he tells us, consisted of an unruly chaos of common law rules and decisions, which were accepted as law not so much because they made sense as because they were "there." Although abridgments and digests began to appear in the seventeenth century, these were considered no more than "plumbers' manuals."[33] This situation changed dramatically during the second half of the eighteenth century when the legal world polarized into two opposing forces. On the one side was Blackstone, "an obscure lecturer at Oxford"[34] whose famous *Commentaries* represented at once an unprecedented effort to bring order to the chaos of the common law and at the same time "a conservative reaction to the fundamental changes which the English judges were making in the apparently settled rules of English law."[35] On the other side were Lord Mansfield and his fellow judges who were "quite consciously . . .making law, new law, with a sort of joyous frenzy"[36] in response to rapidly changing social and economic conditions in England. Thus, in the late eighteenth century, there emerged a legal world in which the "Blackstonian thesis (which represented what the conservative establishment wanted the law to be) was confronted with its Mansfieldian antithesis (which represented what the courts were actually doing with the law during a period of extraordinary change)."[37] The resulting nineteenth-century synthesis was different in England and in America. In England, the Blackstonian elements tended to be dominant; but in America, Gilmore tells us, "a pure Mansfieldianism flourished."[38]

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33. *Ages, supra* note 9, at 3.
34. *Id.* at 5.
35. *Id.*
36. *Id.* at 6-7.
37. *Id.* at 7.
38. *Id.* at 24.

The division of the legal world into these two diametrically opposed impulses—the Blackstonian impulse and the Mansfieldian impulse—serves two important functions in Gilmore's composition. First, it serves to describe a rudimentary moral order: judicial lawmaking is "joyous," creative, and good; the academic effort to reduce the diversity of the law to a single (conservative) order is repressive and bad. Gilmore has given these contrary impulses a name and an historical habitation, and thereafter uses them as a convenient shorthand for opposed sets of values in his history. Second, the pattern of this introductory section is repeated in amplified form in Gilmore's subsequent development of the first two ages of American law: Gilmore's Age of Discovery *is* the Mansfieldian impulse, and his Age of Faith *is* the Blackstonian one. This, of course, is not accidental, and it underscores the importance of seeing *Ages of American Law* as a carefully orchestrated literary composition.

III. The Age of Discovery

Gilmore's Age of Discovery is quite literally a Golden Age, a Garden of Eden, a pastoral world of impossible harmony and happiness. Joseph Story, the symbol of the age, is portrayed as a man overflowing with creativity, wisdom, and good. It is a world in which the Mansfieldian impulse is clearly dominant; the legal endeavor of the period is characterized by the creative disregard for the past. At a subsequent point Gilmore looks back on his treatment of this period, describing it thusly:

> My description of American law before the Civil War sounded like a romp through the Garden of Eden. Wherever we went we paused to admire the happy sight of great judges deciding great cases greatly, aware of the lessons of the past but conscious of the needs of the future, striking a sensitive balance between the conflicting claims of local automony [sic] and national uniformity in an immense, diverse, and rapidly growing country, creating a new law for a new land.[39]

Clearly this does not purport to describe historical reality. What

39. *Id.* at 41.

Gilmore gives us in his Age of Discovery is not history then, but the imaginative reconstruction of the dominant impulse of the age.[40]

The American experience was defined from the outset, Gilmore tells us, by the idea that we had been given an opportunity to make a "fresh start"[41] with the law; we did not have to deal, as did England, with a "compost heap"[42] of accumulated and discarded rules and decisions carrying back through the centuries. Gilmore dates "the professionalization of American law"[43]—by which he means the emergence of a relatively coherent and distinctly American body of law—from about 1820.[44] The generation of lawyers that came of age during this period, he asserts, were Mansfieldians to the core. "[N]ot only were [Mansfield's] cases regularly cited but his lighthearted disregard for precedent, his joyous acceptance of the idea that judges are supposed to make law—the more law the better—became a notable feature of our early jurisprudence."[45]

The major challenge confronting this new generation of American lawyers was the combined one of making sense out of a growing accumulation of case reports and of bringing a certain amount of uniformity to the diverse rules and opinions emanating from the several states. In meeting this challenge, the figure of Joseph Story looms above all others. Story's creative influence was reflected in every major accomplishment of the day: the codification effort, the writing of treatises, and the nationalization of the common law. In each of these arenas, Story acted as a powerful unifying force. What is critical, however, is that he did so with a kind of sensitivity to his materials and respect for the diversity of experience that others—Blackstone before him, and Langdell after—did not have.

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40. *See* note 15 *supra*.

41. *Ages, supra* note 9, at 19.

42. *Id.* at 11.

43. *Id.* at 23.

44. By 1820, Gilmore asserts, a number of strands in our development had come together making the creation of a uniquely American body of law possible: first, the period of fundamental constitution-framing was over and a settlement had been worked out between the forces of nationalism and the forces of localism; second, a substantial body of American legal materials had accumulated by this time, thus eliminating our earlier dependency on English law; and third, the shift from an essentially agrarian society to an essentially industrial one was already well underway. This third factor was important because it meant that, unlike England, America did not have to tear down an existing legal order in order to establish a new one. *Id.* at 23-25.

45. *Id.* at 24.

A good example is Story's role in the codification movement. Gilmore contrasts Story's approach to codification with that of Jeremy Bentham. Bentham wanted to codify the entire common law, to purge it of its superstitions and antiquities, to make it functional and efficient, and to do so, moreover, at a national level. Story's conception of codification and its possibilities was much more modest:

> For Story and others, codification seemed to be the most promising way—perhaps the only way—of dealing with the problem posed by the mounting flood of case reports. . . . [I]n Story's peculiarly American version of the codfication idea, what was needed was not a universal codification—such a project, Story once commented, would be "positively mischievous, or inefficacious, or futile"—but a limited one, restricted to fields of law which had achieved maturity, stability, and a general acceptance. . . .[46]

If Story was a unifier, he was a discriminating one. In contrast to Bentham, he did not adopt a unitary approach to the law; he did not attempt to reduce all legal experience to a single set of operative or critical terms.

When the codification effort fell through, Story and others turned their attention to treatise writing. "If the law could not be unified by the enactment of uniform statutes—or codes—throughout the country, perhaps it could be unified through an authoritative formulation in learned treatises."[47] Story's nine treatises, according to Gilmore, "were works of impressive scholarship and of great originality. Nothing like them, in English, had ever been seen before; for the better part of a hundred years no books of comparable excellence were produced in any English-speaking country."[48]

During this period the Supreme Court demonstrated extraordinary inventiveness in bringing uniformity to the discordant decisions of the various states. The Court did so through two primary vehicles: (1) a series of decisions which expanded the admiralty

46. *Id.* at 26.
47. *Id.* at 27-28.
48. *Id.* at 28.

jurisdiction of the federal courts,[49] and (2) the famous *Swift v. Tyson*[50] decision, which authorized the federal courts to disregard local state rules in questions of general commercial law.[51] As Gilmore describes it, the Supreme Court approached these decisions with Mansfieldian relish, with a wonderful inventiveness and complete irreverence both for the past and for proper form. Not surprisingly, in both of these Supreme Court developments, Story played a significant role. The result of this creative effort was the development of a relatively uniform and harmonious body of national law:

> For the next half century the Supreme Court of the United States became a great commercial law court. As novel issues generated controversy and conflict, the court's function was to propose a generally acceptable synthesis. . . . [I]n a surprising number of instances [the Court was] able to produce solutions which promptly became the law of the land. . . .[52]

One dark shadow, however, cast itself across this harmonious

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49. Gilmore describes the Court's approach to these admiralty decisions in Mansfieldian terms: "[B]y the simple expedient of paying no attention whatever to the known meaning of the words chosen by the constitutional draftsmen, the Court effectively federalized—nationalized—the law relating to all waterborne transportation." *Id.* at 30.

50. 41 U.S. (16 Pet.) 1 (1842).

51. Story's opinion in *Swift v. Tyson* provides a model, Gilmore suggests, of how courts should approach the law:

> Courts, said Story, should not take a narrow view of precedent. They should look to the entire range of available literature, scholarly as well as judicial, English and European as well as American. They should take into account the social and economic consequences of their decisions. . . . That approach accurately reflected the creative and innovative spirit which was a noteworthy feature of American law during the pre-Civil War period.

Ages, supra note 9, at 34-35. This description of the legal literature of Story's day is perfectly balanced by its negative counterpart in the literature of the Langdellian period. *See* note 79 *infra*. One cannot help but ask whether Gilmore's "description" is inspired, at least in part, by a sense of symmetry.

John Chipman Gray views the result in *Swift v. Tyson* and the quality of Story's contribution to legal literature in that case in a somewhat different light:

> Among the causes which led to the decision in Swift v. Tyson, the chief seems to have been the character and position of Judge Story. He was . . . a man of great learning, and of reputation for learning greater than the learning itself; he was occupied at the time in writing a book on bills of exchange, which would, of itself, lead him to dogmatize on the subject; . . . he was fond of glittering generalities; and he was possessed by a restless vanity. All these things conspired to produce the result.

J. GRAY, THE NATURE AND SOURCES OF THE LAW 253 (2d ed. 1921).

52. *Ages, supra* note 9, at 34.

setting: slavery. It was the institution of slavery, Gilmore argues, that ultimately drove American law from its period of great creativity into the darkness of legal formalism.[53] Slavery laws posed an impossible dilemma for the antislavery judge:

> What is a judge to do when, in his judicial capacity, he is required to enforce a law which, as a private person, he regards as profoundly immoral? Many judges, in the South as well as in the North, confronted that dilemma. For Southern antislavery judges the problem was the institution of slavery itself, in all its ramifications. For Northern antislavery judges the problem came up mostly in proceedings under the Fugitive Slave Act to force the return of escaped slaves (or alleged slaves) to their owners.
>
> A judge so situated has several options. He can resign his judgeship. Or he can offer himself as a candidate for impeachment by saying: I regard this law as immoral and refuse to enforce it in my court. Or he can evade the issue by seizing on minor technical lapses (usually procedural) and dismissing the case. Or he can enforce the law, with death in his heart—because it is the law, duly established by the constituted authorities, and because, as a judge, he has no other choice.[54]

"[M]ost judges," Gilmore goes on, "follow either the route of technical evasion (which exalts procedural detail over substance) or the route of blind obedience (which exalts a sort of Platonic idea of the law over reality)."[55] In either case, the judge and the legal system are driven into "a formalistic conception of law in which the purpose for which a rule of law exists is lost from sight; in which the law, which must always be looked on as a means, becomes its own end; in which the letter lives while the spirit dies."[56]

Gilmore proceeds to describe as prime examples of this slavery-formalism syndrome, Justice Story and Chief Justice Shaw of the Massachusetts Supreme Court. Both were convinced antislavery

53. The idea that antislavery judges were driven to formalism by the moral pressures presented by slavery cases is developed in R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

54. *Ages, supra* note 9, at 37-38.

55. *Id.* at 38.

56. *Id.*

men, he asserts, who, when faced with decisions in slavery cases, were "driven into a formalism which was entirely foreign to the ideas they had expressed and the principles they had stood for during their long careers."[57] Gilmore concludes: "The intolerable pressures to which even Story and Shaw succumbed may have been responsible for the first appearance of the techniques of formalism in our case law. Those techniques, however, had a long and brilliant future ahead of them."[58]

The lengthening shadow of slavery brought an end to the last great age in American law. The counterpart to this period in our own history was the great classical period of Roman Law in the third century:[59]

> [I]n Rome in the third century, . . . a stable, wealthy, and powerful society found both the need and the opportunity to create a rational system of law. We know little enough about what happened in Rome during the third century and nothing at all about why, after half a century, the explosion of creative energy should have spent itself, never to be repeated, as the Roman world stumbled toward its doom.
>
> In our history, as in the history of Rome, the period of glorious achievement came, almost overnight, to its end.[60]

If we stand back for a moment and view Gilmore's chapter on the Age of Discovery as a literary composition, a number of observations may be made. One of the things that puzzled readers of *Death of Contract* was Gilmore's apparent failure to support his historical assertions with conventional explanation or argument.[61] But that is

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57. *Id.* at 39.

58. *Id.*

59. Gilmore follows Llewellyn with this analogy. *See* Llewellyn, *supra* note 24, at 45 n.40.

60. *Ages, supra* note 9, at 39-40.

61. A good example of this puzzlement and frustration is Mooney's response to Gilmore's portrait of Holmes:

> It is possible. . .that the conventional wisdom about Holmes's jurisprudence, and his relation to Langdell, is mistaken. It is also possible that Holmes's writing on contract law is simply inconsistent with his general jurisprudential views. A third possibility is that Holmes's contribution to the birth of Contract was largely unintended. . . . Gilmore could have persuaded most of his readers with any one of these explanations, or with almost any other explanation. . . . By not discussing it at all, however, Gilmore leaves at least certain of his readers with the nagging feeling that they, . . . missed something important.

Mooney, *supra* note 3, at 168-69.

to mistake entirely the way Gilmore's history "works." Gilmore does not *argue* his history so much as insist upon it "poetically" through resourceful use of imaginative pattern, image and metaphor,[62] and through creative editing and arrangement of historical material. We are made to *feel* the Age of Discovery as a type of Garden of Eden not simply because he refers to it (jokingly) that way at a later point,[63] but because that is the way the world of this period is presented and that is the way his chapter is structured.

Gilmore quite consciously has presented his Age of Discovery as a world of fresh beginnings, untroubled creativity, and wonderful harmony. In the same way, he has cast slavery quite clearly as the "wicked" serpent in the garden, and formalism as the "tempting" apple.[64] The dominant images in Gilmore's description of slavery

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62. This can be illustrated by looking at the way Gilmore treats the idea that the Age of Discovery was the last great age in American law. Gilmore does not stop simply with the metaphor of the expulsion from the Garden, or with the analogy to the collapse of Rome. In a concluding passage, he brings the idea home in a remarkably effective way:

> No golden age endures forever—even if the barbarians do not invade, even if all the slaves are freed. In the history of literature and the arts we are familiar with the phenomenon of a great creative period which vanishes as suddenly and as unexpectedly as it came—the Elizabethan theater at the end of the sixteenth century and the Viennese school of music at the end of the eighteenth are two obvious examples among many. It may be that, for reasons which escape our grasp, the best and most creative minds of a generation are drawn to a particular field. . . . After a generation or two of intense activity the job is done; the best and most creative minds of the next generation follow their genius into new fields. But it will be a long time before anyone realizes that the last great play has already been written, the last great symphony composed.

Ages, *supra* note 9, at 40. The thing to note about this passage (and the immediately preceding one about the collapse of Rome) is that there is not much here that can properly be called "explanation" or "argument." But that is not to say these passages do not do important work. Through the use of recurring images of finality, and the adoption of what might be called a romantic tone, Gilmore impresses us with an understanding of this moment in our own history (i.e., the end of the age of Story) in a way that an appeal to our rational facilities could not. Consider, for example, the impact of Gilmore's line (in the passage on the collapse of Rome) that ends: "never to be repeated, as the Roman world stumbled toward its doom." *Id.* at 39. This line stops us in our tracks; we respond at a level of our being that could not be reached by rational argumentation. The important thing to see is that Gilmore's use of image and tone and metaphor allow us to see *more* about this moment in our own legal history, to understand it more completely, than could be achieved by a simple appeal to rationality. One of the powerful virtues of Gilmore's writing is that he constantly requires his reader to respond, not simply as a creature of intellect, but as a complete person.

63. *See* quotation in text accompanying note 39 *supra*.

64. "The great and *wicked* compromise . . .was the recognition of *slavery* (a word which

and formalism are those of moral wickedness, temptation, and compromise. Even the great innocent Story at last "succumbs" to the temptation of formalism. The Garden of Eden and expulsion metaphors are important, moreover, not only because they somehow describe the dominant impulse and pattern of *this* age; they are also important to the larger movement of Gilmore's history. Gilmore's central theme of despair depends to a certain extent upon the existence of an earlier world of innocence and harmony to which we can never return. Casting this period as a sunlit garden also provides a dramatic and useful contrast to Gilmore's *pièce de résistance*—the dark night of legal formalism which immediately follows.

That leaves, however, the troubling question of what this all has to do with history in the narrow sense, with what actually happened. The problem is a real one because, although he has announced at the outset of his work that he is primarily concerned with giving expression to the dominant impulse of the age, Gilmore often writes as if he were describing the reality. He seems to be trying to have it both ways, which creates an enormous tension in the reader. We know the real Story was not as Gilmore portrays him here. We know that formalism had been an element in our case law long before this period, and that its ascendancy during this period had causes much more complex than Gilmore would give us to believe. And we know that the issue of slavery (and Story's and Shaw's response to it) was much more complex than Gilmore describes. In short, if we take what Gilmore is doing as literal history, then we dismiss straight away his whole history of the Age of Discovery as hopelessly sentimental. Even if we do not, it is important to recognize the distance between the world Gilmore describes and the reality of this particular period in our history.

Take, for example, Gilmore's treatment of Story. The real Story is almost entirely subsumed, in Gilmore's chapter on this period, by Story, the symbol of his age. The real Story, for all his wonderful

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is never used in the Constitution) as an arrangement entitled to constitutional protection." *Ages, supra* note 9, at 37 (emphasis added). "And once the tools of *formalism* have been used, even in a good cause, they are there, ready to hand, *tempting*." *Id.* at 38 (emphasis added). I may be making too much of words here, but I do not think so. The words fairly express the dominant impression Gilmore wants to leave us with, and the connections are too perfect to be merely coincidental.

talents and genuine contributions to American law, in fact never felt really at home in his own age. He was ever looking to the past for sustenance, or to England; he sided with the wealthy established class against the common man and the poor; he lived in constant dread of Jacksonian democracy, and went into a fit of despond when Taney took over the bench. Story once declared that the most important problem in government was "how the property-holding part of the community may be sustained against the inroads of poverty and vice."[65] The historian Perry Miller describes Story this way:

> In his private talk, Story lived in a cloud of augmenting gloom about the national future, a darkness which he enjoyed and which never dampened his spirits. A year before his end, in 1844, he asserted that Americans were "too corrupt, imbecile and slavish," in their dependence upon demagogues, and predicted that "we shall sink lower and lower in National degredation." . . .[H]e did not fear violations of the Bill of Rights but only assaults upon the rich.[66]

The real Story, in other words, was a much more contradictory and interesting figure than the Story Gilmore paints here. We are given only those parts of Story that serve Gilmore's symbolic purposes and nothing more.

Similar problems exist with Gilmore's treatment of the causes of legal formalism. If Gilmore had argued that the slavery dilemma sometimes forced great judges into a destructive formalism, one would be foolish to disagree.[67] But Gilmore asserts that legal formalism was foreign to our case law before slavery became an acute problem, and implies formalism would not have crept into our jurisprudence but for slavery. This is simply claiming too much for slavery and leaving out too much about formalism. Legal formalism in one form or another has been an element of Anglo-American law since the beginning. If it came into ascendancy during the nineteenth century, it probably did so because of the rise of the self-regulating market, and the market's needs for predictability and

65. *Quoted in* P. MILLER, THE LIFE OF THE MIND IN AMERICA 225 (1965).

66. *Id.* at 226-27.

67. A good example is Judge Ruffin's opinion in State v. Mann, 13 N.C. 263 (1828). An extremely illuminating treatment of the slavery dilemma and the law can be found in White, *supra* note 1, at 432-88.

certainty.[68] We can understand why Gilmore links formalism with slavery the way he does—because it is such a marvelous way of realizing the demands of the Garden of Eden metaphor around which he structures his chapter on the Age of Discovery. But, by focusing on slavery and ignoring the other forces at work, Gilmore gives us a highly distorted account of the rise of legal formalism during this period in our history.

Much the same point can be made about Gilmore's assertion that Story and Shaw were driven by slavery decisions into a formalism which was "entirely foreign" to the ideas and principles they stood for. The problem with this assertion is that it paints an entirely too simple and, I would argue, erroneous picture of the relationship that existed between the views these two judges held as men and the positions they expressed from the bench. Let me illustrate by taking the example of Chief Justice Shaw. To be sure, Shaw was a convinced antislavery man, but he also *supported*—politically and personally—the compromise that was reflected in the Fugitive Slave Law. He did so because he cared deeply about the preservation of the union and feared its dissolution.[69] The important point here is that Shaw's judicial decisions in the slavery area essentially comported with—rather than contradicted—the views he held off the bench. The argument that he was driven into legal formalism by slavery decisions is tempting, but in the end not very convincing. To the extent the evidence cuts one way or another, it would probably show that Shaw was not above *abusing* the form where it would

68. *See* Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975). At a much later point in his book, Gilmore recognizes the interconnections between "laissez-faire economics and late-nineteenth century legal theories," but goes out of his way, it seems, to avoid casting the emerging private market as a primary *cause* of the rise of legal formalism. *Ages*, *supra* note 9, at 67. Explanations of the rise of formalism in American law have become, in recent years, a dime a dozen. Legal academics have become so preoccupied with explaining classical legal formalism they have not stopped to ask whether, at the level of judicial practice, "it" ever really existed at all. One day an empiricist will come along and prick the balloon. *See generally* L. FRIEDMAN, CONTRACT LAW IN AMERICA 190 (1965); Mooney, *supra* note 3, at 175. *See also* note 107 *infra*.

69. This clearly is the view taken by Professor Levy in his authoritative legal biography of Shaw, L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 72-108 (1957). "As the 'national calamity' he [Shaw] had always dreaded became ever and ever increasing reality, a man of his conservative temperament and Unionist views could only retreat from the cause of individual freedom in anxious regard for an even greater value, the nation itself." *Id.* at 108.

lead toward a result that was compatible with his underlying political vision of the slavery issue.[70]

IV. The Age of Faith

> When we turn to our next period—roughly from the Civil War to World War I—we find ourselves expelled from our lovely sunlit garden and condemned to wander uncertainly in the law's black night.[71]

Gilmore's Age of Faith is a bleak, dark, terrifying world. In no other part of *Ages* are the images and symbolic figures more striking and ominous. This is one of the most powerfully written sections of Gilmore's book. At the same time, this chapter is perhaps the most problemsome from the standpoint of history. Gilmore seems to be constantly straining the historical reality to make it fit the demands of the imaginative structure of his composition, to be asking his central figures to bear more symbolic weight than they ought to be made to bear. We begin to sense that we have passed entirely out of the realm of history and into a mythological universe.[72]

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70. Levy's account of the confrontation between Richard Henry Dana and Chief Justice Shaw in the Shadrach affair is instructive in this regard. *Id.* at 88. Dana attempted to get Shaw to grant a writ of habeas corpus for the imprisoned Shadrach but Shaw insistently refused. A careful reading of this account reveals that it was Dana who insisted that proper legal form be observed, and Shaw who sought desparately to find a way to avoid doing so because, interestingly, of his "positive disapproval of the antislavery efforts." *Id.* at 88.

71. *Ages, supra* note 9, at 41.

72. One way to explain why Gilmore's work has such strange power—and why we have such difficulty understanding it—is to say that it constantly modulates between history and myth. By "myth" here, I mean something along the lines of Malinowski's definition:

> Myth as it exists in a savage community. . .is not of the nature of fiction, such as we read today in a novel, but it is a living reality, believed to have once happened in primeval times, and continuing ever since to influence the world and human destinies. This myth is to the savage what, to a fully believing Christian, is the Biblical story of Creation, of the Fall, of the Redemption by Christ's Sacrifice on the Cross. . . . Studied alive, myth. . .is not symbolic, but a direct expression of its subject-matter; it is not an explanation in satisfaction of a scientific interest, but a narrative resurrection of a primitive reality, told in satisfaction of deep religious wants.

B. Malinowski, Myth in Primitive Psychology 18-19 (1926). Gilmore's history is to the legal community, it could be said, what myth is to a primitive one. For an excellent discussion of the various connotations of myth, see I. MacCaffrey, Paradise Lost as "Myth" 1-22 (1967).

What Gilmore's Age of Faith is about, in a sense, is not history at all, but a frame of mind. One possible name for that frame of mind is "legal formalism;" another might be "a unitary view of the law." The real strength of this chapter is that Gilmore does not just tell us about these types of legal consciousness, and why they are bad, he *shows* us what it is like to live in a world where legal formalism prevails, a world "in which the letter lives while the spirit dies."[73]

Presiding over "the law's black night" are two powerful princes of darkness: Christopher Columbus Langdell, the first Dean of the Harvard Law School, and Oliver Wendell Holmes, Jr., Supreme Court Justice and American legal folk hero.[74] Langdell is a perfect symbol of the new age, because, according to Gilmore, he was "the first to give a conscious, theoretical expression to the new order of things."[75] The centerpiece of Langdell's contribution to the new legal order was his idea that law was, quite literally, a science:

> Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius. Langdell's idea evidently corresponded to the felt necessities of the time. However absurd, however mischievous, however deeply rooted in error it may have been, Langdell's idea shaped our legal thinking for fifty years.
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> Langdell's idea was that law is a science. He once explained how literally he took that doubtful proposition: "[A]ll the available materials of that science [that is, law] are contained in printed books. . . . [T]he library is. . .to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the

73. *Ages, supra* note 9, at 38.

74. It is not accidental that these two traditionally revered figures in legal history are given this honor. Gilmore clearly wants to create a nexus between the destructive darkness of the Langdellian order and what might be called "law worship." Thus he makes a point of the fact that, during this period, "[n]ever had the idea of law as the ultimate salvation of a free society—a government not of men but of laws—so captured the imagination of any people." *Id.* at 41.

75. *Id.* at 62. I dispute below whether Langdell was in fact the "first" to give "conscious, theoretical expression" either to the idea of law as science or to a general theory of contracts. *See* discussion in text accompanying notes 91-103 *infra*.

> zoologists, all that the botanical garden is to the botanists. . . ."[76] (footnotes omitted).

Several important consequences flowed from "Langdell's idea." For one thing, it led to an ideologically conservative legal order since the law as science idea was based on the premise that the principles and rules of law, like those governing the structure of the atom, were permanent, unchanging, and enduring. "The jurisprudential premise of Langdell and his followers was that there is such a thing as the one true rule of law, which, being discovered, will endure, without change, forever."[77] This, in turn, had profound consequences for legal pedagogy and literature. Once the "one true rule of law" had been appropriately discovered, cases found to be inconsistent with it could be summarily dismissed as "incorrectly decided." In the same way, once the law was conceived as a "closed, logical system,"[78] lawyers and judges need no longer look to what real people were doing in the real world; the sole concern would be with logical consistency. A style of treatise and opinion writing soon emerged which was distinguished by "its quality of bloodless abstraction."[79]

The same impulse led the Langdellians to give expression for the first time, Gilmore asserts, to a general theory of contracts:

> [I]n the pre-Langdellian era, no one thought of developing a theory of contract any more than any one had ever thought of developing a theory of assumpsit. . . . In a pluralistic age, no one saw any reason why all these types of contracts should be subjected to a unitary set of rules. . . . What counted was

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76. *Ages, supra* note 9, at 42.

77. *Id.* at 43.

78. *Id.* at 62.

79. *Id.* at 60. Gilmore describes the literature of this period as follows:

> This became the age of the string citation—quite as much in the judicial opinions as in the learned treatises. And the judges, like the professors, rarely, if ever, bothered with the facts of the cases they cited or with the reasons why the cases had been decided as they had been.Nor did the judges make any attempt to explain the reasons for their decisions. It was enough to say: The rule which we apply has long been settled in this state (citing cases). Indeed, it was improper, unfitting, unjudicial to say more. The juice of life had been squeezed out; the case reports became so many dry husks. Stare decisis reigned supreme.

Id. at 62-63. Gilmore's description of the legal literature of this period is in deliberate contrast to his description of the literature of the Age of Discovery, *see* note 51 *supra*.

> what real people were doing in the real world. With the Langdellians all that changed. The key to the general theory of contract which quickly emerged was that a unitary set of rules was now to cover all possible situations. . . . The law, under the new dispensation, no longer recognized factors or brokers, farmers or workers, merchants or manufacturers, shipowners or railroads, husbands or wives, parents or children—only faceless characters named A and B, whoever they might be and whatever it might be they were trying to accomplish.[80]

Gilmore's point here is an important one. A unitary theory of contract (or of the law) necessarily reduces the rich diversity of experience to the terms of a single, abstract vocabulary. Persons and events lose their independent existence and are transformed into mere functions of a theoretical construct; "real people. . .in the real world," "husbands or wives, parents or children," are transformed into "faceless characters named A and B."

But how does Holmes relate to this Langdellian world? "If Langdell gave the new jurisprudence its methodology," Gilmore goes on, "Holmes, more than anyone else, gave it its content."[81] What follows is an extraordinary moment in legal literature:

> Put out of your mind the picture of the tolerant aristocrat, the great liberal, the eloquent defender of our liberties, the Yankee from Olympus. All that was a myth. . . . The real Holmes was savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak. Holmes had no use for the gentle optimism of Karl Marx who seems to have believed that after one more revolution the world would be a better place. According to Holmes: "[T]he *ultima ratio*. . .is force, and. . .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. When the state finds itself in a similar position, it does the same thing."
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> In this bleak and terrifying universe, the function of law, as Holmes saw it, is simply to channel private aggressions in

80. *Id.* at 45-46.
81. *Id.* at 48.

> an orderly, perhaps in a dignified, fashion. He reduced all of jurisprudence to a single, frightening statement: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." That is, if the dominant majority . . . desires to persecute blacks or Jews or communists or atheists, the law, if it is to be "sound," must arrange for the persecution to be carried out with, as we might say, due process.[82]

This savage portrait of Holmes's dark nature utterly reverses the conventional image of the man; it is as if before our eyes the print of a photograph had been transformed into its negative. Suddenly, the "law's black night" is flooded with blackness.

Gilmore is not through, however, because he has not established the link between the Holmesian blackness and the Langdellian "unitary view." Gilmore does this, with typical resourcefulness, by going to Holmes's elaboration of the notion of law as a "philosophically continuous series" in his relatively early *The Common Law*.[83] Holmes's lectures on the common law, Gilmore contends, reflect "unresolved tensions in Holmes's thought."[84] At one point in the lectures, "Holmes seems to have looked on the aggregate of legal doctrine at any given time and place as an unstable mass characterized by internal inconsistency."[85] This, of course, is "good" in the universe that Gilmore has created for us since it runs directly counter to the Langdellian "unitary view." "The trouble is," Gilmore goes on, "Holmes failed to keep in mind his own profound insight. . . ."[86] In fact, Holmes spends a good part of *The Common Law* proving that the law, and more particularly all theories of liability, can be reduced to a "'philosophically continuous series.'"[87] This is the link Gilmore has been looking for. Holmes's

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82. *Id.* at 48-50.

83. O. HOLMES, THE COMMON LAW (Howe ed. 1963).

84. *Ages, supra* note 9, at 52.

85. *Id.* at 52. Gilmore here quotes Holmes's famous passage on the instability and inconsistency of the law, which ends:

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

Id. at 53.

86. *Id.*

87. *Id.*

"'philosophically continuous series,'" he then goes on to show,[88] is simply a highly sophisticated version of the Langdellian "unitary view:"

> Langdell's thought was crude and simplistic. Holmes's thought was subtle, sophisticated, and, in the last analysis, highly ambiguous. Holmes's accomplishment was to make Langdellianism intellectually respectable. He provided an apparently convincing demonstration that it was possible, on a high level of intellectual discourse, to reduce all principles of liability to a single, philosophically continuous series and to construct a unitary theory which would explain all conceivable single instances and thus make it unnecessary to look with any particularity at what was actually going on in the real world. Langdellian jurisprudence and Holmesian jurisprudence were like the parallel lines which have arrived at infinity and have met.[89]

Gilmore's Age of Faith is a powerful imaginative reconstruction of a world dominated by legal formalism. Whatever its relationship to history, this chapter is an extraordinary literary achievement. Gilmore has edited his material and made the connecting links in a way that is brilliant and extremely effective. His central perception that there is an inherent nexus between the impulse to the "unitary view," the tendency to abstraction, and the denial of life itself is a profound and important one. And Gilmore's Holmes, in my view, is one of the great creations of "historical" literature.[90]

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88. Gilmore discusses at this point the idea advanced by Holmes in *The Common Law* that the progress of the law was always toward an ideal state, and that the nature of the progress was from a subjective and moral conception of the law to an objective and amoral one. *Id.* at 53-54. Gilmore also discusses Holmes's assertion (which was essentially borrowed from Shaw) that "[t]he general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune." *Quoted in Ages, supra* note 9, at 55. Gilmore concludes with the statement that the link in Holmes's mind between his theory that the law was constantly progressing toward externality and objectivity and his restrictive view of liability is "by no means clear." *Ages, supra* note 9, at 56.

89. *Ages, supra* note 9, at 56.

90. Professor Gilmore, who is now Holmes's official biographer, seems to be searching in *Ages of American Law* for a fresh conception of Holmes. Although the dominant image of Holmes which emerges from these pages is that of a pessimistic, brutal figure preoccupied with discovering a logical fix for the law, Gilmore at times also seems to recognize the immense complexity of the man. "It is surely true," Gilmore says in a footnote, "that my Holmes has little in common with the Holmes of popular myth and legend. Holmes, to the

Yet what Gilmore has achieved in this respect, it seems to me, he has achieved at the expense of playing fair with history. Once again we are torn betwen Gilmore's compelling creation and what we know about the historical reality. Essentially, Gilmore's Age of Faith is constructed upon four basic assertions, each of which is highly questionable from an historial point of view: (1) that Langdell was the father of the idea of law as a science; (2) that in the pre-Langdellian world there was no such thing as a general theory of contracts; (3) that Holmes was essentially a proponent of a unitary theory of law; and (4) that Holmes can best be understood as a master theoretician for the Langdellian forces.

First, "Langdell's idea" that law was a science was first advanced almost a hundred years before Langdell took over as Dean of the Harvard Law School in 1880.[91] Blackstone is generally recog-

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extent that I can follow the dark outlines of his thought, seems to me to have been both a greater man and a more profound thinker than the mythical Holmes ever was." *Id.* at 126-27 n.13. At another point Gilmore comments that "[t]he stalwarts of the post-Holmesian orthodoxy took from the master only what suited them; the disturbing and heretical aspects of his thought were ignored." *Id.* at 67.

While Gilmore probably overstates the sway held over the legal and popular mind by the "mythical Holmes," he is onto something important, it seems to me, in his insistence that we deal openly with—rather than explain away—the darker strands of Holmes's character and thought. The fact is, Holmes *was* quite capable of arrogance and cruelty. To be convinced of that we need go no further than his statement in *Buck v. Bell* that "three generations of imbeciles is enough," 274 U.S. 200, 207 (1927), or his needless reference to the five young alien protesters in *Abrams v. United States* as "puny anonymities," 250 U.S. 616, 629 (1919) (Holmes, J., dissenting). On the other hand, as Gilmore notes, Holmes was also capable of eloquent dissent. *See Ages, supra* note 9, at 131-32, n.36. The tendency in writing about Holmes, with the exception of Mark DeWolfe Howe's excellent study, has been either to praise the man indiscriminately or to engage in a kind of sterile debunking. What Gilmore seems to be moving toward is a much more complex—I would say, Elizabethan—conception of Holmes, one that pulls into sharp focus the powerful contradictions in his character and thought, and explores searchingly the paradoxical connections between his darker and nobler natures. I say "Elizabethan" because the Elizabethan conception of man was based on "the troubled, even despairing, sense of man's inescapable duality, of his being pulled at once toward the bestial and the angelic." D. BUSH, PREFACES TO RENAISSANCE LITERATURE 89 (1966). "[T]his conception of man," Professor Bush notes, in a way that seems to apply to Gilmore's conception of Holmes, ". . . . embraced lower depths and loftier heights and richer tensions than are comprehended in the naturalistic view." *Id.*

91. *See* Miller, *supra* note 61, at 158. *See generally* at 156-85. Miller begins his chapter on "The Science of the Law" with the following quotation from an article by James Gould on "The Law School at Litchfield" which was published in *The United States Law Journal* in 1822:

> The object in some measure peculiar to my plan of instruction, is to teach the law—the *common* law, especially—not as a collection of *insulated positive*

nized as the first to have given the idea effective expression.[92] In this country, as early as 1817, David Hoffman was "solidly propounding the large conception of American law as a science rather than a mere accretion."[93] Gilmore's pastoral hero, Story himself, warmly embraced the idea; indeed he once praised—irony of ironies—*Mansfield's* opinions for the extent to which they approached the scientific ideal.[94] Nor can Langdell's conception of law as a science be distinguished on the grounds that it was deductive rather than inductive. In 1851, a full thirty years before Langdell took over as Dean, *The United States Monthly Law Magazine* described the law as essentially a deductive science:

> Like other sciences, it is supposed to be pervaded by general rules, shaping its structure, solving its intricacies, explaining its apparent contradictions. Like other sciences, it is supposed to have first or fundamental principles, never modified, and the immmovable basis on which the whole structure reposes; and also a series of dependent principles and rules, modified and subordinated by reason and circumstances, extending outward in unbroken connection to the remotest applications of law.[95]

In 1858, Timothy Dwight of Columbia announced "no science known among men is more strictly deductive than the science of a true Jurisprudence."[96] In sum, Langdell may have embraced the

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rules, as from the exhibition of it, in most of our books, it would appear to be; but as a *system of connected, rational principles:* for, such the common law unquestionably is, not only in its fundamental and more comprehensive doctrines; but also, generally speaking, in its subordinate, and more artificial provisions. In this view of the common law, I regard our books, in general, as extremely defective. They treat it, rather as a code of arbitrary, but authoritative rules and dogmas, than as a *science.* They are conversant, too exclusively, about *doctrines,* to the neglect of *principles.* They deal much in *rules,* and little in *reasons.* In other words, they teach us *what* the rule is; but seldom, *why* it is.

Quoted in, Miller, *supra* note 61, at 156.

92. *Id.* at 158.

93. *Id.* at 159.

94. "Mansfield's judgments on trusts, last will, contingent remainders, said Story, 'are reduced to a very high degree of exactness and consistency, and followed out into their regular results with a *truly logical conformity to principles. . . .*'" *Id.* at 158 (emphasis added).

95. *Quoted in id.* at 161. Miller adds: "The article further contended that such was now the attested method at Harvard Law School." *Id.*

96. *Id.*

idea of law as science (although it is doubtful that he took it as literally as Gilmore insists),[97] but in doing so he was not giving expression to anything new.[98] If anything, by the time he got around to giving his famous "law as science" address, the idea was already on the decline.

Second, Gilmore's assertion that "in the pre-Langdellian era, no one thought of developing a theory of contract"[99] is equally without historical foundation. This contention was a major tenet of Gilmore's thesis in *The Death of Contract,* and it has been so thoroughly demolished by the critics of that book that it needs little elaboration here.[100] The first contracts treatise ever written, John Joseph Powell's *Essay Upon the Law of Contracts Not Under Seal,* published in 1796, reflects an effort to develop a general theory of contracts.[101] And the same holds true of the other early contract writers: Chitty, Metcalf, W.W. Story, and Parsons.[102] Parsons, in particular, quite consciously advanced a unitary view of contracts in his *The Law of Contracts,* first published in 1853.[103]

Third, Gilmore's suggestion that Holmes can best be understood as a proponent of the unitary view is misleading. Gilmore is right to suggest there is an unresolved tension in Holmes's thought

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97. Professor Sutherland suggests he did not. A. SUTHERLAND, THE LAW AT HARVARD 177-78 (1967).

98. Langdell's one genuine contribution was his use of the idea of law as science to revolutionize law school pedagogy. Professor Sutherland describes Langdell's contribution this way: "Langdell insisted that the student examine any text critically, using his own evaluation . . . that the student judge all material for himself, scrutinize instances closely, accept no other man's judgment until he had judged its logic for himself, judged its soundness, its wholesomeness." *Id.* at 178. This method carried with it, it would seem, the seeds of destruction of a unitary view of law. If there is one thing a unitary conception of law cannot tolerate, it is the presence of a critical and independent mind, in the class, say nothing of a classroom full of them.

99. *Ages, supra* note 9, at 45.

100. *See* Mooney, *supra* note 3, at 164-67. Mooney's review contains an excellent analysis of the early contracts treatises. These treatises, Mooney concludes, reflected a general, or unitary, theory of contracts.

101. *Id.* at 164-65.

102. *Id.* at 165.

103. *Id.* at 166-67. Mooney concludes: "In sum, there was nothing 'revolutionary' about Langdell's casebook except its pedagogy. If any single person is to be praised or blamed for having 'stumbled across' the notion of contract as a unified subject, it seems that it should be John Joseph Powell or Theophilus Parsons (or John Chitty, or Theron Metcalf, or W. W. Story)." *Id.* at 167.

in *The Common Law;* at points in this work, Holmes does seem to be concerned with the construction of logical systems. But it is important to see this tension in terms of the larger development of Holmes's thought. It is clear that at the time *The Common Law* was written Holmes was *moving away from* an earlier logical, or rationalistic, approach to the law toward a deep skeptical empiricism. As Mark DeWolfe Howe has observed:

> [Holmes's] initial juristic endeavor has been to devise a scientific, or logical classification of the law—a scheme of order having rational symmetry yet practical utility. Time, experience, and the temperament of an empiricist had led him to see that such a rationalistic search for order was leading him towards those treacherous abstractions on which so many legal philosophies had floundered. Early in the 1870's he had come to recognize the sterility of a jurisprudence that disregards the social, psychological, and moral conditions from which the law draws its vivifying juices.[104]

If we are to understand Holmes, Howe tells us we must see his thought as evolving over time. In contrast, Gilmore portrays Holmes's thought as essentially static; he does not allow Holmes to develop as a writer and as a mind. Gilmore's Holmes is locked, as it were, into one moment of history, the moment he wrote *The Common Law.* Holmes the empiricist, the forerunner of the Realists, the anti-Langdellian, is never allowed to surface. This may serve the purposes of Gilmore's artistic construction—his negative world of the Age of Faith—but it does not give fair expression to the "dominant," or essential, Holmes.

Fourth, Gilmore's portrait of Holmes as master theoretician of the Langdellian movement falls under much the same criticism. As a matter of historical record, Holmes had little respect for Langdell or for his ideas about the logical consistency of the law.[105] Langdell, Holmes once wrote, "represents the powers of darkness. He is all for logic and hates any reference to anything outside of it, and his

104. O. HOLMES, THE COMMON LAW xxii (Howe ed. 1963) (Editor's Introduction).

105. Holmes's famous remark, "The life of the law has not been logic; it has been experience" was directed against Langdell and his preoccupation with logic. M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882 at 155 (1963).

explanations and reconciliations of the cases would have astonished the judges who decided them."[106]

These are not the only historical problems with Gilmore's Age of Faith,[107] but they are some of the most important ones. What they represent, it seems to me, is how treacherous it is to take what Gilmore gives us here as history of a conventional sort. Consciously or unconsciously, Gilmore is writing, not history, but something very close to allegory,[108] and it is as allegory that what he has to say must be finally taken.

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106. 1 HOLMES-POLLOCK LETTERS 17 (M. Howe ed. 1941).

107. Another problem with Gilmore's Age of Faith springs not from what he says, but from what he omits to say. He ignores entirely, for example, the extreme judicial activism that was going on in the public law arena during this period. In a few short years during the early nineties, the law was radically transformed to give expression to a conservative political ideology. The best discussion is A. PAUL, THE CONSERVATIVE CRISIS AND THE ROLE OF LAW (1969). Paul concludes that, in the area of public law, the dominant impulse was not formalism at all:

> The. . .constitutional and legal revolution [of the 1890's] was, from the conservative point of view, indeed creative,. . . Due process of law, once primarily procedural, was now solidly substantive as well; the police power, once freely malleable as adjuster of social imbalance, was now encased by freedom of contract; the ancient process of equity, once applicable only to named individuals and as safeguard for physical property, was now an instrument of public, i.e., judicial, policy and applicable to "all persons whomsoever"; the commerce power, once "plenary" under Marshall, was now divided under Fuller; and a hundred years of tax law precedent, thought inviolable by rule of *stare decisis*, was now shattered by the *Pollock* case. Traditional legal conservatism, forced to choose between *traditionalism* and *conservatism*—ironic choice—had chosen the latter. The conservative attachment to the ordered society, demanding as it seemed the firmest judicial interposition in protection of property from social upheaval, *had outranked in value the more formalistic virtues of legal tradition.*

Id. at 235 (emphasis added in final sentence; remaining emphases in original).

108. Allegory is defined in *The Reader's Encyclopedia* as: "an extended *metaphor* in which characters, objects, incidents, and descriptions carry one or more sets of fully developed meanings in addition to the apparent and literal ones." W. BENET, THE READER'S ENCYCLOPEDIA 24 (2d ed. 1965). Harrington's description of allegory seems to me to come closest to describing Gilmore's *Ages:*

> [T]he ancient Poets haue indeed wrapped as it were in their writings diuers and sundry meanings, which they call the senses or mysteries thereof. First of all for the litterall sence (as it were the vtmost barke or ryne) they set downe in manner of an historie the acts and notable exploits of some persons worthy memorie: then in the same fiction, as a second rine and somewhat more fine, as it were nearer to the pith and marrow, they place the Morall sence profitable for the actiue life of man, approuing vertuous actions and condemning the contrarie. Manie times also vnder the selfesame words they comprehend some

V. The Age of Anxiety

If the Age of Discovery was dominated by the impulse of Mansfieldianism and the Age of Faith by that of Blackstonianism, the Age of Anxiety is more complex: it is a world in which the currents and cross-currents intersect in unexpected ways, a world of paradoxical inversions. This is the period of the breakdown of the Langdellian "myth of the law's internal consistency and external stability."[109] Four historical figures dominate the landscape of this period: Cardozo, the "saint," who in one brilliant moment of insight brings the whole Langdellian structure crumbling down; Corbin, the treatise writer, who with his notion of "operative facts" turns the law away from abstraction and back to concrete experience; Wesley Sturges, the law teacher, who saw the law as the kingdom of the absurd and gave up writing forever; and Llewellyn, legal writer and draftsman, who found in the concept of "narrow issue thinking" a way to proceed in a pluralistic and fragmented universe.

Gilmore begins his chapter on the Age of Anxiety with a description of the resurgence of interest in codification during the early part of the twentieth century. This interest took the form of promotion of the Uniform Sales Act and the first Restatements. Paradoxically, these reform efforts were instituted by the conservative establishment as part of a last-ditch attempt "to preserve a threatened status quo" in a period of "violent, rapid and fundamental change."[110] Gilmore compares the Restatements to the *Digest of Justinian,* characterizing both as monumental efforts to preserve the past, then goes on to note the fate of both in the end was the same: "the hurricane continued to howl; the foundations continued to slip away; the wisdom of the past could not save."[111]

The perfect symbol of the Age of Anxiety is Benjamin Cardozo ("By the unanimous testimony of his contemporaries, Cardozo was

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true vunderstanding of naturall Philosophie, or sometimes of politike gouernement, and now and then of deuinitie: and these same sences that comprehend so excellent knowledge we call the Allegorie.

Quoted in A. Hamilton, The Structure of Allegory in The Fairie Queene 15 (1961).

109. *Ages, supra* note 9, at 68.

110. *Id.* at 73.

111. *Id.* at 74.

a saint").[112] Cardozo's Storrs Lectures at the Yale Law School in 1920 are contrasted with Holmes's lectures on the common law forty years earlier at the Harvard Law School. Cardozo clearly rejects a unitary theory of law and exposes the claim to certainty in the law as an illusion. Gilmore quotes the following passage from Cardozo's last lecture:

> I was much troubled in spirit, in my first years on the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach the land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.[113]

In this single passage, Cardozo reverses utterly the entire constellation of truths and values that constituted the Langdellian worldview. Cardozo's assertion that the law was not a hard body of scientific principles but rather a "trackless ocean," his confession that judges made law creatively rather than discovered it, his willing reconciliation with "uncertainty," all were deeply subversive of the illusion of certainty which was necessary to the continued sustenance of the Langdellian order.

A second leading anti-Langdellian was Arthur Corbin. Corbin's treatise on contracts differed radically from that of the Langdellian Williston's in the special emphasis and painstaking analysis Corbin gave to the facts of each case. Corbin counseled we should study cases "not so much for their doctrinal statements as for. . .their 'operative facts.'"[114] By turning away from a preoccupation with

112. *Id.* at 75.

113. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-67 (1921).

114. *Ages, supra* note 9, at 79.

doctrinal consistency and toward a careful understanding of the discrete facts of each case, Corbin helped return the law to reality.

Wesley Sturges, Gilmore's third symbol of the forces of disintegration, is a particularly poignant figure. Sturges, a professor and Dean of the Yale Law School, was revered as a teacher. He apparently touched deeply the lives of those around him. But he was so convinced of the absurdity of the law, and of the futility of attempting to reduce it to some kind of order, that he was left effectively paralyzed as a writer. Early in his career Sturges published a study on the North Carolina law of mortgages to demonstrate it "made no sense and could most charitably be described as a species of collective insanity on the march;"[115] he also published a casebook on Credit Transactions which consisted "of the most absurd cases, along with the most idiotic law review comments, which he had been able to find."[116]

> The law, as Wesley Sturges conceived it, bore a striking resemblance to the more despairing novels of Franz Kafka. Sturges himself had the courage of his bleak convictions. *Ex nihilo nihil.* He wrote almost nothing during the remainder of his long career. . . . I was his student and served on his faculty while he was Dean of the Yale Law School: he was a lonely, great, and tragic figure.[117]

Rejection of the "unitary view" approach to the law did not necessarily lead to paralysis or nihilism, however. Gilmore gives Corbin and Llewellyn as examples of those who found a meaningful way to proceed in a fragmented and pluralistic world. Each in his own way—Corbin, with his "operative facts," and Llewellyn, with his "narrow issue thinking"[118]—found an approach to the law that would permit the legal organization of experience but at the same time do justice to its complexity.

A central parodoxical inversion in this chapter involves Gilmore's assertion that the Realists were essentially Langdellians at heart. The Realists, of course, were the ones who had led the attack

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115. *Id.* at 81.
116. *Id.*
117. *Id.*
118. *Id.* at 82.

on the notion of law as logic and hence saw themselves as archenemies of the Langdellian school. But, as Gilmore very perceptively notes, the Realists (especially those in the McDougal-Laswell camp) never rejected the most fundamental idea of Langdellian jurisprudence, the idea of law as science. This idea was merely transformed into the idea of law as a *policy,* or *social,* science.[119] "[T]he truth of the matter," Gilmore says, "may be that the spirit of Langdellianism survived the apparent rout of the Langdellian forces. . .just as the spirit of Rome may be said to have survived the collapse of empire to reappear in the guise of the Catholic church."[120] The Realists did not abandon the effort to reduce the law to a unitary view, they merely gave it new content.

As we approach the present, Gilmore defines for us a deepening predicament. We are threatened as we have never been before, he claims, with the collapse of the legal system. The flood of case reports continues to grow in geometrical proportions. An "orgy of statute making"[121] during the first half of the century has left us with a mountain of statutes which are rapidly becoming obsolete. The number of outdated Supreme Court decisions in important areas also continues to swell beyond control. A crisis-ridden Congress and an overburdened Supreme Court cannot be counted upon to bail us out. The only possible solution, Gilmore suggests—perhaps not unpredictably—is for the courts to engage in a little Mansfieldianism, a little "joyous" law-making. We should develop the idea that it is as legitimate for a court to reformulate an obsolete statutory provision as it is to reformulate an obsolete common law rule. In the same way, he argues, inferior federal courts "should not follow or consider themselves bound by obsolete Supreme Court cases."[122]

In a concluding section,[123] Gilmore tells us the time has come

119. *Id.* at 86-90.

120. *Id.* at 68.

121. *Id.* at 95.

122. *Id.* at 98.

123. Gilmore's *Ages* has, in effect, two endings. In revising the original lectures for publication in book form, Gilmore radically changed the tone and movement of his concluding section, thus, arguably, changing the "meaning" of his entire history. The original lectures proceeded with ruthless momentum to a radical denial of the possibilities and pretenses of the law. In a powerful closing sequence, Gilmore told his audience to reject "the belief that

to face up to the possibility that the eighteenth-century idea of the predictability and perfectability of society is wrong. "Man's fate will forever elude the attempts of his intellect to understand it. . . . The quest for laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse."[124] In spite of all our efforts, society is no closer today than it ever was to a utopian ideal. The eighteenth-century myth of the inevitability of progress is one which no longer sustains us. In contrast to the optimism which carried us through the earlier periods of our history, "[t]he dominant mood of our own bleak time may well have become a pervasive doubt or malaise, which easily modulates into a black despair at the human condition and its prospects."[125]

In such times, he warns, the Langdellian spirit is likely to be revived. He quotes a passage from his *Death of Contract* which concludes: "It may be that. . .some new Langdell is already waiting in the wings to summon us back to the paths of righteousness, discipline, order and well-articulated theory. Contract is dead—but

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there is one more river to Jordan and that, once we have crossed the river, everything will be tickety-boo;" to give up forever on the idea of achieving World Peace through World Law; and to cast out the notion that ours was a government of laws not men, since in fact ours was a government "not of laws but of men and . . . justice under it was notably unequal." Gilmore, *The Storrs Lectures: The Age of Anxiety*, *supra* note 11, at 1044. Every paragraph radiated a deep disillusionment with the law and its possibilities; every sentence threw back a bold "no" to the claims and hopes that others have advanced for it. This "tickety-boo" sequence flowed quite naturally into Gilmore's memorable closing paragraph, *quoted infra* in text accompanying note 132, giving the original third lecture the tone of "savage nihilism" which had such a powerful impact on Gilmore's audience, *see* note 20 *supra*.

In the book version of *Ages*, however, the tone of "savage nihilism" is strangely gone, and in its stead is a much more ambivalent closing perspective on the law. Gilmore has eliminated the "tickety-boo" progression and replaced it with what one might want to call a little sermonette on how to think about the law. It is an utterly uncharacteristic moment in *Ages*, one of the few places where Gilmore steps outside the role of the artist and proceeds to simply *tell* us how to understand the performance. This jurisprudential interlude is, in my view, the one major flaw in an otherwise remarkable composition. It seriously disrupts the flow to the closing paragraph, leaving that paragraph now curiously awkward and out of context, and supplies little that a discerning reader could not already have supplied on his own. What Gilmore was up to in making these changes is an utter mystery. Perhaps he was embarrassed by the way his original lectures were characterized and attempted something less negative in tone. In that, he has certainly succeeded—but at great expense, it seems, to the integrity of his original composition.

124. *Ages*, *supra* note 9, at 100.

125. *Id.* at 101.

who knows what unlikely resurrection the Easter-tide may bring?"[126] This is not, Gilmore goes on, mere idle speculation. In just the past few years, there has been a resurgence of interest in the essentially-Langdellian effort to reduce the law to a neat conceptual order. There have appeared on the legal horizon a number of "new Conceptualists," who "have returned to the elaboration of unitary theories."[127] These new prophets of the Second Coming do not necessarily belong to the ideological right;[128] they are defined, rather, by the advocacy of "all-purpose theoretical solutions to our problems" and a belief that society can be "purified or saved" if only we can rig (or abolish) the rules in the right way.[129]

Against this impulse to the unitary view, Gilmore sets a very simple wisdom: The law should not be perceived as the be-all and end-all of our existence; at most it serves the very limited role of facilitating incremental change in a society, and it can do this only so long as there is a general consensus in the society about what is important and what is not. When that consensus ceases to exist, then the possibilities for law are reduced to insignificance. Since the values of a dynamic society are constantly shifting and changing, we must learn "to keep our theories open-ended, our assumptions tentative, our reactions flexible."[130] Sounding, paradoxically, very

126. G. GILMORE, THE DEATH OF CONTRACT 103 (1974) (*quoted in Ages, supra* note 9, at 107).

127. *Ages, supra* note 9, at 107-08.

128. "Much of the recent writing which I would lump under [New Conceptualism] does seem to proceed from the extreme right wing . . . but by no means all of it." *Id.* at 147 n. 11. Gilmore identifies Professor Richard Posner of the University of Chicago Law School as a New Conceptualist on the right. See, for example, R. Posner, *Killing or Wounding to Protect a Property Interest*, 14 JOURNAL OF LAW AND ECONOMICS 201 (1971). Gilmore does not identify any New Conceptualists on the left, but an example might be R. UNGER, KNOWLEDGE AND POLITICS (1975). Other examples of New Conceptualism might include G. CALABRESI, THE COSTS OF ACCIDENTS (1970); J. RAWLS, A THEORY OF JUSTICE (1971); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); L. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 7 YALE L. J. 1315 (1974). The problem of how to define a coherent body of principles to which we should commit ourselves and, at the same time, to preserve genuine independence of mind is a central one in the law. In recent years, the pendulum seems to have swung toward emphasizing the former goal, but it will undoubtedly not be long before it begins to swing in the other direction. Perhaps the best example of a work that manages to give expression to both impulses—that insists upon principled and moral decisionmaking yet encourages the exercise of an independent and creative mind—is Professor White's THE LEGAL IMAGINATION. White, *supra* note 1.

129. *Ages, supra* note 9, at 109.

130. *Id.* at 110.

much like Holmes, Gilmore urges us "to preserve a skeptical relativism in a society hell-bent for absolutes."[131] He concludes with a passage as cryptic as it is memorable:

> Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.[132]

For the reader who has come this far, it is clear that by "Heaven" in this passage, Gilmore means *Heaven* and not heaven-on-earth.

Conclusion

> Turning and turning in the widening gyre
> The falcon cannot hear the falconer
> Things fall apart; the center cannot hold
> . . . .
> Surely some revelation is at hand;
> Surely the Second Coming is at hand
> . . . .
> And what rough beast, its hour come round at last,
> Slouches towards Bethlehem to be born?
>
> William Butler Yeats, "The Second Coming"

How do we finally understand *The Ages of American Law*? If we take it simply as history, then it seems impossible not to come away with a deeply ambivalent response. While there are moments of excellent history in this work, moments of unique insight into our legal past, there are also times when what we know to be the historical reality is strained to the breaking point, when events and figures seem to be given deliberately distorted significance. It is as if (to use the terms of the passage from White quoted at the outset of this

131. *Id.*
132. *Id.* at 110-11.

review) Gilmore had failed to manage properly the "two contradictory languages" of the historian: the language of "fairy tale" and the language of "data." We are tempted to conclude that the imaginative theme of Gilmore's history finally assumed too much importance; the "fairy tale" took on a life of its own, and prevented Gilmore from doing justice to the complexity of historical experience with which he was dealing.

To take *Ages of American Law* simply as history, however, is to take a far too narrow view of both what Gilmore is up to in this work and what he has achieved. One important clue as to how *Ages* should be taken can be found in the following passage in which Gilmore discusses the "pseudo-history" of Holmes's *The Common Law:*

> In fact, the historical underpinning [of *The Common Law*] was patently absurd, even when it had not been deliberately distorted. I do not mean to suggest that Holmes was a poor historian or that he did not know what he was doing. He was an excellent historian and knew more about what he was doing than most of us do. He was making a highly original, essentially philosophical statement about the nature of law.[133]

This, or something like it, is in my view what Gilmore has done in *Ages of American Law.* He has given us a work that functions at one level as history but, at another, as something more—as "a highly original, essentially philosophical statement about the nature of law."

One way to see Gilmore's *Ages* is as a "new mythology"[134] of American law. If we do so, then we can begin to understand the dominant influence played by the mythological patterns in the fabric of this work. Gilmore's use, for example, of the Garden of Eden myth gives us a unique way of understanding where we have come from in the law and where we are going. More importantly, we come to realize that the historical figures in Gilmore's *Ages* carry two distinct roles. They are at once actual historical figures and, at the same time, archetypal representatives of the dominant impulse of their respective mythological ages. Thus, Gilmore's Story must

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133. *Id.* at 52.

134. *See* note 72 *supra.*

serve both as the real Joseph Story and as a giant symbol of a period of relative creativity and harmony in our legal past; and Gilmore's Holmes must serve both as the real Holmes and as a symbol of the dark night of legal formalism. When there is a tension between these two literary roles, our credulity is strained; but, at other times, when these two roles converge, the effect is powerful and compelling.

Another way to understand Gilmore's *Ages* is as allegory,[135] as a dark conceit of American law. *Ages* as allegory functions in much the same way as *Ages* as myth. The major figures and events again can be seen to carry two or more roles. The primary difference is that, in allegory, the figures and events are intended, in addition, to instruct us in the basic virtues and vices of, here, a legal existence. Thus Gilmore's Story is not simply both the real Story and the archetypal representative of the dominant impulse of his age; he also symbolizes all that is good and creative in a legal existence. And Gilmore's Holmes is made to carry, in addition to his other roles, the burden of representing all that is destructive and bad.

Whatever we call Gilmore's *Ages,* it is clear that it is a complex literary achievement, one that requires a complex response from the reader. If we take it simply as descriptive history, then a great deal of what is valuable and exciting in this work is lost. In the end, there is no simple way to reduce *Ages* to a "message." Gilmore describes a legal world that is constantly tending toward Yeat's apocalyptic, "Things fall apart; the center cannot hold," and he poses starkly the question of how we are going to respond to this predicament. In this book, Gilmore sets the terms by which we must face the future: on one side lies pluralism and creativity; on the other, formalism, unitary theory, and death. *Ages,* in a sense, is finally a warning: the spirit of Langdell is awake among us; the unitary view of law is once again on the rise; a new "rough beast. . .[s]louches towards Bethlehem to be born."

Gilmore's *Ages of American Law* is a unique and remarkable work.

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135. *See* note 108 *supra.*