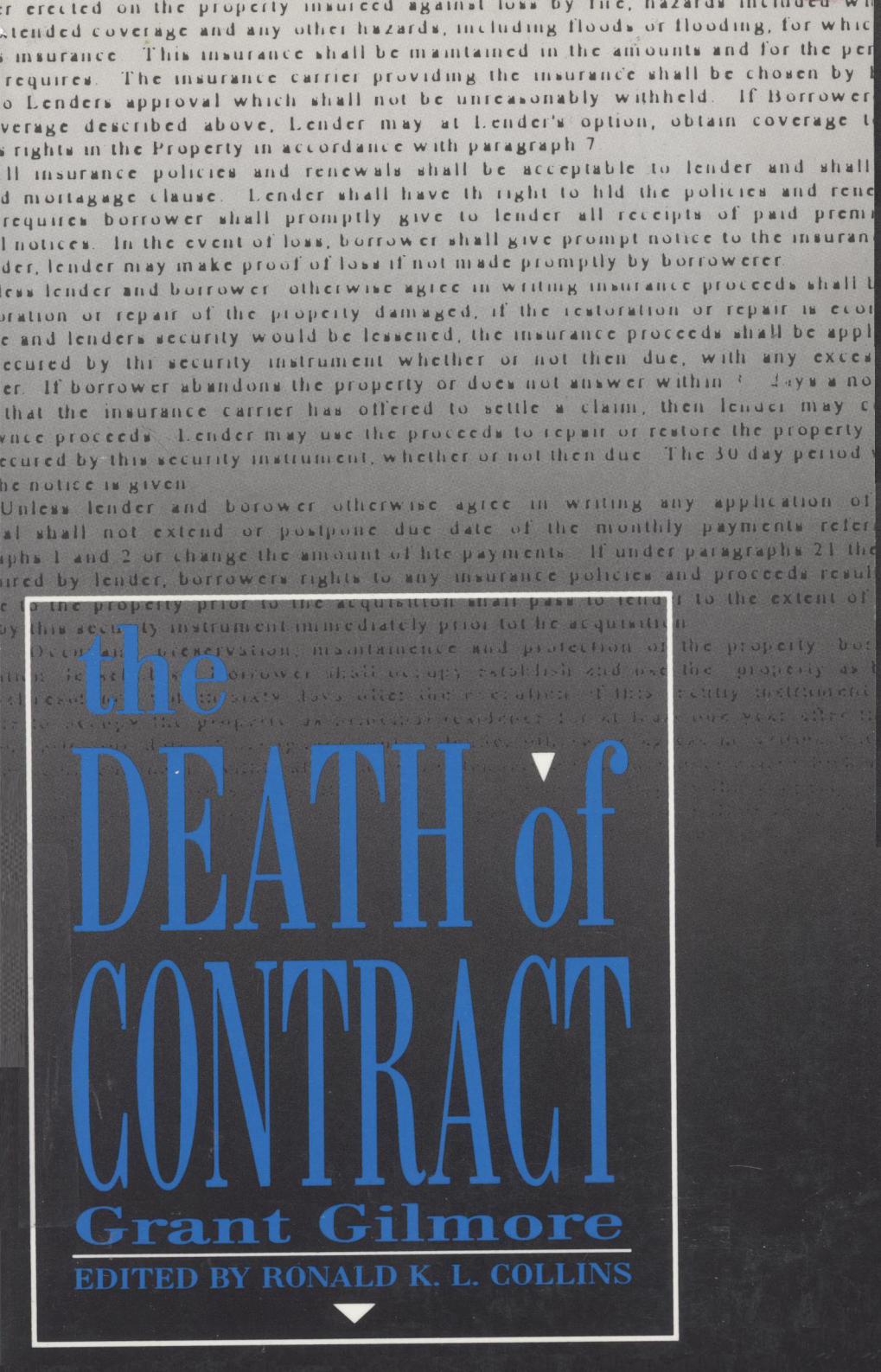
the
DEATH of
CONTRACT
Grant Gilmore
EDITED BY RONALD K. L. COLLINS

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Grant Gilmore

Edited and with a Foreword by
Ronald K. L. Collins

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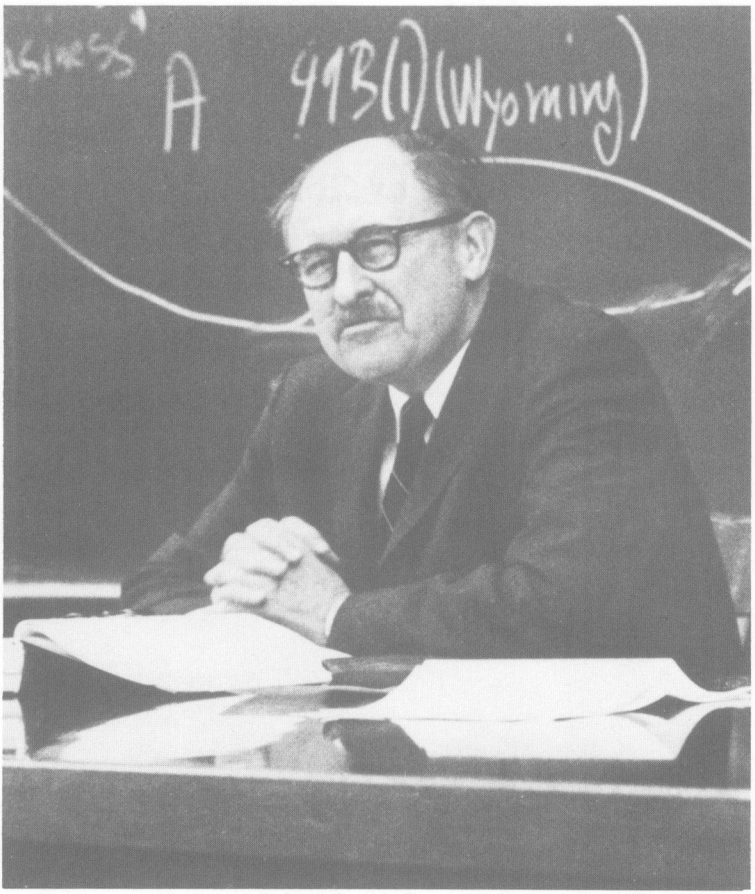

Grant Gilmore, 1969. Photo courtesy of the University of Chicago Law School.

FOREWORD

Every original book has the
seeds of its own death in it . . . .
—*Oliver Wendell Holmes, Jr.*
(Feb. 1, 1919)

WITHIN THIRTY years of the publication of *The Common Law* (1881), Oliver Wendell Holmes, Jr., feared that his great achievement was "dead."[1] Once an original, it had become a classic. Like Blackstone's *Commentaries* and Kent's *Commentaries* after that, it now belonged to law's history. The magnificent Holmes no longer moved the law—he had already settled his share of it.

In a few but notable ways, something of the same is true of Grant Gilmore and *The Death of Contract*. It too was an original, as much as can be. It too drew considerable attention and provoked investigation, reconsideration, and controversy. It too affected our conceptions of law—the law of

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To Lloyd James Tevis (1920–90), my contracts teacher.—R.K.L.C.

Contract. But it attempted to move our conceptions far from Holmesian shores. Hence, unlike *The Common Law,* it was *un*settling.

The Death of Contract was a book for an "age of anxiety."[2] Gilmore's tract[3] seemed rather like the anti-paragon of Contracts. It took a lot of religious-like doctrine out of the law.[4] In fact, that was a real part of its appeal. In this sense, Gilmore's little work is akin to a *Common Law* for postmodern times.

Now, some twenty years after its original publication, *The Death of Contract* may itself appear dead. After all, it is becoming or has become a classic, and there are no classics among the living. So why read such a book? Here are a few (often related) reasons.

The Death of Contract contains some splendid discussions and assessments of contract doctrines, contract restatements of the law, and of course, contract cases. Such considerations point, we are told, to the collapse of the law of contract into the law of torts. All of this is laid out in Gilmore's compact tract, a work that opens with a declaration of death and closes with a reflection on resurrection.

Bear in mind that some of these are *bold* claims. Clearly, there is truth in this telling, but it is nevertheless a story that must be examined. Whether one agrees or disagrees with Gilmore's particular claims is nowhere as important as engaging in the process of critical inquiry. If law is to prove itself, it must be cross-examined. This little book helps to teach its readers, in a variety of ways, something very important about the art of such critical cross-examination.

Part and parcel of the art of legal analysis is the ability to understand how the law is conceptualized and reconceptualized by those who direct its course. Law, like life, is struggle. And Gilmore struggled—as many from Emperor Justinian to Judge Richard Posner have—to influence our notion of law. Each generation of lawyers has its builders and its levelers, its conceptualists and its contextualists, its formalists and its anti-formalists, its Langdells and its Llewellyns, and so on. Witness within the book the spirited tug-and-pull of this struggle; witness as well the battle for your mind. When the final line is past, will you stand conceptually alongside Holmes or Gilmore,[5] or somewhere in between, or somewhere far away?

If indeed "law is the calling of thinkers,"[6] then there is much to be gained by reading (and rereading with care) *The Death of Contract*. For Gilmore projected case and doctrine through his own analytical lens onto the wide screen of jurisprudence for all to examine. It was a lesson in legal *thinking* more than a mere summary of contract law. This lesson is offered, among other places, in the "Origins" chapter of Gilmore's book. For example, how and why is a given legal argument made? What does that argument presuppose? Are there other ways of looking at the same argument? What follows from starting with a given line of argument? To ask these questions is to embark on that analytical process heralded in *The Death of Contract*. It is how one comes to know or doubt the logic of the law.

Furthermore, this slim volume shows that what is grand in the law transcends the law—call it philosophy

or philosophy of law. The notion is as old as Plato's *Laws*, though for our modern purposes the point may be more readily grasped by reference (again) to Holmes's *Common Law*. For Holmes, as for Gilmore, the primary task at hand was not legal history or case-law analysis, however important such matters are. The two scholars engaged in more speculative endeavors linked to juristic principles.

In a variety of thought-provoking ways, Gilmore's *Death* may be a philosophical counter to Holmes's *Common Law*, at least as portrayed by Gilmore. Holmes organized history and classified cases; his jurisprudence concerned that "inevitable process of legal development" (p. 46) from one point to another. Gilmore moved in the opposite direction. He questioned Holmesian history, challenged case classification (pp. 18–19, 29–30, 61), and saw disintegration (pp. 110–11) where Holmes saw development. Holmes was a grand-theory man (p. 63), whereas Gilmore was quick to point out that this or that theory was never as grand as it was held out to be (pp. 66, 75, 84, 103–4). Illustrative of this, Part II offers a rather robust "debate" between Holmes and Gilmore over the issue of the character of the law ("objectivist" vs. "subjectivist") and its role in judging the acts of men and women. While this was a conceptual quarrel (between a dead jurist and a lively scholar) over a celebrated contracts case, *Raffles v. Wichelhaus* (1864), it all too readily turned elsewhere—to those larger questions of the kind battled over by the great minds of the ages. Thus, speaking from a "higher jurisprudential level," Gilmore was critical of

Holmes's objectivist take on law and life, dismissing it as the "great metaphysical solvent—the critical test for distinguishing between the false and the true" (p. 47). In sum, *The Death of Contract* invites us to consider Holmesian thought as expressed in *The Common Law*, if only thereafter to rebut it.

> Thought is biographical. For
> behind every great work lies the
> person, in all complexity
> and contradiction.

A few words about the man may help to put his novel work and bold words in more human perspective. Grant Gilmore (1910–82) was a Yale man bred in the Boston suburbs. He had all the ivy-league credentials—A.B. (1931), LL. B. (1942), law journal editor-in-chief, all stamped with the Yale seal. He also held a Ph.D. in French studies (1936). His Yale doctoral dissertation, *Stéphane Mallarmé: A Biography and an Interpretation*, examined the life and work of the unorthodox nineteenth-century French symbolist poet. At first, Gilmore taught French at Yale University. Several years later he returned to Yale to begin his illustrious career in the law, counseled by a brilliant psychoanalyst—one Helen, his spouse.

Gilmore (the man who distrusted Harvard)[7] received the James Barr Ames Prize, Harvard Law School's coveted award

for distinguished work in legal scholarship by individuals not on the Harvard faculty. This was the same award bestowed on Judge Benjamin Cardozo and on Professor Arthur Linton Corbin. The work that won Gilmore the prize was his two-volume, 1,500-page treatise, *Security Interests in Personal Property* (1965), a work dedicated to his mentor Arthur Corbin. Equally impressive, the executors of Oliver Wendell Holmes's papers chose Gilmore (a curious selection) to complete the definitive biography of the eminent jurist. Gilmore was also the scholar who, along with his Yale colleague Charles L. Black, coauthored the highly regarded treatise titled *The Law of Admiralty* (1957). By way of an aside: In 1959 Professor Corbin privately recommended Gilmore to serve as an adviser for the drafting of the *Restatement (Second) of Contracts*. True to fate, the nod never came, and Gilmore never became a "restater."

By many measures, his was an eclectic and impressive vita. Except for Gilmore's self-imposed but generously compensated short exile at the University of Chicago (a place he apparently detested),[8] here was a man who met his moment and was steering fast and far into the future. The next stop in that future was Columbus, Ohio.

In April of 1970 then University of Chicago law professor Grant Gilmore pointed his Saab toward Columbus, where he was to deliver the Law Forum Series Lecture. Though the series was not as renowned as the Storrs Lectures—those would come a few years later upon his return to Yale—the Ohio State Law School program had already at-

tracted more than its share of legal luminaries. The notables included the much-heralded Roger Traynor of the California Supreme Court; Joseph T. Sneed, the respected Stanford law professor and former president of the Association of American Law Schools; and Telford Taylor, the distinguished Columbia University law professor who had earlier served as the chief United States prosecutor at the Nuremberg war crimes trials.

We will turn to Gilmore's famous lectures shortly. Before doing so, a few more things ought to be added to the record in order to complete this little biographical sketch of the man and his work.

After *The Death of Contract* there were more articles and more lectures, the Storrs Lectures on Jurisprudence (1974) being the most important. A few years later those lectures would assume book form in another acclaimed compact work, *The Ages of American Law* (1977). And there was also Gilmore's highly regarded scholarly casebook, *Contracts: Cases and Materials* (the 2nd edition, 1970, with Friedrich Kessler; and the posthumous 3rd edition, 1986, with Kessler and Anthony Kronman).

Late in May of 1982 the then Vermont Law School professor (he returned to Yale in 1973 and left in 1978) offered his last lecture, not in New Haven, but in Hartford, at the University of Connecticut School of Law. It was an inspiring commencement address entitled "What Is a Law School?"[9] A few days afterward, on the day of Benjamin Cardozo's birth, Grant Gilmore, the agnostic, died in his sleep on May

24, 1982. He was seventy-two. Later, in the winter of 1982, a memorial service was held at Yale Law School, with addresses by his friends:

> Guido Calabresi: "[Grant's] last works are not of the present."[10]

> Anthony Kronman: "Grant was a magician in an age of bureaucrats."[11]

And a little later Gilmore's senior coauthor and his Yale law colleague added his own remembrance for the *Yale Law Journal:*

> Friedrich Kessler: "[Grant liked to] strike out boldly . . . in his attempt to blaze new trails."[12]

The New Haven farewell notwithstanding, Grant Gilmore left his papers to the Harvard Law School—the same institution that held firmly to the conviction that "inspiration should be distrusted."[13] Incredible. He was as contrary in death as he had been in life. Then again, perhaps "complicated" is a better word.

By the time he died, the complex and cantankerous Gilmore had made his own peculiar mark on the law, and a stark mark at that. Still, no gravestone marked his memory.

His scattered ashes were his final consideration, illusory as that may seem.

> *The Death of Contract* . . . is one of those few books that deserve our most careful thought and attention.
>
> —*Richard Epstein*

Law is inextricably linked to language, typically expressed in the written word. Hence, careful reading is essential to law. Constitutions, cases, statutes, and regulations all demand a certain kind of attentive reading[14] if they are to have any meaning. Gilmore, the Mallarmé-inspired wordsmith and the UCC Article 9 draftsman, knew this lesson far better than most. In fact, a great deal can be learned about this larger issue by stepping back and reflecting on how to read *The Death of Contract.*

Was Gilmore right about the "origins" of Contract? Was he right about his assertion that Justice Holmes was the prime mover in creating the "revolutionary" doctrine of consideration? Or was he right about the historical background of, say, the old contracts chestnut known as the *Peerless* case (pp. 39–45)? What about his take on *Hadley v. Baxendale* (pp. 54–59, 92–93), or his notion of "doctrinal disintegration" (pp. 110–11), or his famous claim that the law of contracts was being absorbed into torts (pp. 95–104)? In important part, how one answers these questions and there-

after evaluates Gilmore's thought depends, I believe, on how one approaches this provocative little work.

In life and law, certain things need to be taken at face value, provided we understand both the "face" and the "value" before us. Gilmore made striking claims; and the bench, bar, and academy have vigorously responded to them, as the bibliography to this book suggests. There is much in that face–value exchange that has enriched, and continues to enrich, our understanding of law generally and contract law specifically. But there is more to Gilmore than such exchanges. There is a more subtle, even sophisticated, side to *The Death of Contract.*

In *The Death of Contract* Gilmore sometimes wrote for the mind's eye of the "attentive reader" (e.g., p. 78); in other works, he wrote heedful of that same reader, or the "astute reader," or the "careful and determined reader." Once, he openly defended the importance of forms of writing directed to "a hierarchy of readers."[15] This, obviously, was natural to a talented writer of Gilmore's stripe, and especially to anyone who, like himself, had studied the peculiar weave of the poetic webs spun by Mallarmé.

Mindful of these suggestive hints, one may justifiably ask: Is it reasonably possible that *The Death of Contract* had a meaning beyond what was "easily comprehensible," a meaning discernible only by "close and careful study"?[16] Just what is that meaning, and how can one (like a lawyerly Columbus) discover it? The answer, of course, depends on the reader.

One *possibility* is that in writing *The Death of Contract*

Gilmore may have replicated (in part or whole) the very phenomenon he was critiquing. There is irony here, but only to those who can detect it. For Gilmore may have sometimes parodied the case summaries of Dean Christopher Columbus Langdell and Professor Samuel Williston, imitated the elegant lecture style and intellectual craft of Holmes, and spoofed the rest of his inattentive readers. In much the same spirit, for those who wanted certainty, he gave them certainty, albeit in the negative. For those who wanted a tidy explanation of how the world of Contract came into being, he gave them a Genesis. For those who wanted a story of the Decline of Contract, he gave them a "survey of the brief, happy life of the general theory of contract" (p. 93). For those who wanted the bottom line, he gave them Death. For those who wanted hope, he held out Resurrection (p. 112). And so on. It was almost as if Gilmore were warning: "If you take what I say as Gospel, may Fate have mercy on you."

Then again, it is possible that Gilmore was simply wrong and wrongheaded in places, that he took unwarranted liberties with case law and case history. But if Professor Richard Epstein and others are even partially correct in their claim that *The Death of Contract* "is one of those few books that deserve our most careful thought and attention,"[17] then we owe it to this great legal mind to at least consider the possibility that he was doing something other than making obvious mistakes, if any mistakes there were. "Despite the book's many shortcomings," said Gilmore, "I have not been persuaded by my critics that my *reconstruction* was fundamentally in error."[18] What are we to make of this?

> Theory is important. Theory helps us understand our world, stimulates additional hypotheses, and offers a framework for less theoretical thinking.
>
> —*Robert A. Hillman*

Indeed, theory *is* important. Grant Gilmore surely knew that. Precisely because he did, he may have felt the need to warn of the dangers of theory, or of grand theories of the kind that had been, and continue to be, so important in steering life and law. Theory can help us understand our world *up to a point*. Theory offers a framework for thinking provided it is never too certain or rigid, and never too "scientific." Speculated Gilmore: "Man's fate will forever elude the attempts of his intellect to understand it. . . . The quest for the laws which will explain the riddle of human behavior leads us not toward the truth but toward the illusion of certainty, which is our curse."[19] Think more, theorize less might have been his maxim.

Was *The Death of Contract*, then, a clarion call for what would become the critical legal studies (CLS) movement? Yes and no. Like the legal realists and the CLS adherents who followed them, Gilmore was quite skeptical of the way in which the law could be manipulated. He railed against "ritual incantation[s]" (p. 49) in the law, those sacred rules which have little or no connection to reality. Put irreverently: Courts avoid practicing on weekdays what they so eloquently preach on Sundays (p. 52). So yes, there was surely a "critical" component in Gilmore's thought.

Gilmore's critical edge did not, however, lead to suicidal