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## Foreword

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# SYMPOSIUM

## FOREWORD

*Ellen A. Peters\**

This Symposium on *The Death of Contract* would have astonished and delighted Grant Gilmore. Although he might not have agreed with all of the points of view expressed by the various participants, he would indubitably have been an enthusiastic supporter of the enterprise. His perspective on legal scholarship was unvarying: any idea is worth pursuing, if the author is willing to commit to its serious pursuit. Indeed his teaching style was that of an agent provocateur, of an interrogator asking often unanswerable questions in order to stimulate an interesting inquiry.

Grant Gilmore's scholarly career was inextricably tied to the Yale Law School. He left Yale, for a number of years, only because he felt that the governing board (the senior faculty) was countenancing a departure from the school's mission of unconditional scholarly independence. The nature of the dispute has become obscure over time, but there was nothing obscure about the depth of Gilmore's feelings. When the issue first surfaced, several of us who were then still untenured (including, as I recall, Robert H. Bork) mounted what came to be called the Children's Crusade, in an effort to persuade Gilmore that his fears were groundless and that we valued his critical presence. He postponed his departure (and, with his help, I was voted tenure that spring), but ultimately he was not then able to be reassured by us or by his other friends and admirers on the faculty.

Wherever he was geographically located, however, Grant Gilmore's intellectual outlook reflected the Yale Law School's pervasive commitment to legal realism from the 1930s onward. Jerome Frank was a visible and audible presence at Yale. All the faculty were expert at demonstrating the fragility of legal doctrine and the ambiguity of legal language. In the absence of fixed constellations in the legal firmament, attention necessarily focused on alternatives, on the critical dissection of inherently imperfect solutions to particular policy disputes framed by factual contexts. Lacking confidence in jurisprudential outcomes, the faculty valued a wide angle of vision that took

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\* Chief Justice, Supreme Court of the State of Connecticut. Chief Justice Peters was a member of the faculty of the Yale Law School from 1956 to 1978.

account of traditional as well as nontraditional learning about the law. In such a legal climate, any intriguing idea was worth exploring, whether or not its hypothesis proved ultimately to be persuasive. *The Death of Contract* was one such intriguing idea.

For me, reading the articles in this Symposium is an exercise in nostalgia. It is a reminder of my deep and abiding affection for Grant Gilmore, who, for thirty years, was my beloved teacher, mentor, colleague, and friend. It is also, alas, a reminder of how far removed I have become from the heady intellectual climate of the Yale Law School that so enriched my life for twenty-two years and of how little time I have had to explore contemporary scholarship since I left Yale to join the bench in the spring of 1978.

With these caveats on the record, I take it that my role in writing this foreword is to try my hand at commenting, from my personal vantage point, on this Symposium's wide-ranging panoply of reflections on *The Death of Contract*. I will briefly address each author's contribution in alphabetical order.

Professor Braucher is correct in her observation that although entitled *The Death of Contract*, the work was intended to convey Grant Gilmore's underlying optimism about the ability of the law to adapt to the changing needs of society.<sup>1</sup> Gilmore was skeptical about the role of law and economics, because he thought that its teachings were far removed from the vast array of factual distinctions that mark the circumstances of contracting parties. *The Death of Contract* reflects his commitment to a jurisprudence in which lawyers and courts aspire to respond affirmatively to newly emerging needs and controversies. Thus defined, freedom of contract has not become outdated.

Professor Collins accurately identifies the underlying theme of *The Death of Contract* as law's unremitting, but ultimately unsuccessful, search for a way to impose order on chaos.<sup>2</sup> Indeed, Gilmore viewed with equanimity his own conclusion that certainty in the law is an unattainable goal. In the speech that he gave at the University of Connecticut School of Law, just one day before his unexpected death, he opined: "If it were possible for judges and legislators to achieve absolute clarity in their opinions and statutes, the process of adjusting our rules to reflect changing circumstance would be even more difficult than it is now. . . . The great periods of the law may be those that reflect times not of order and peace but of trouble and disorder."<sup>3</sup>

Professor Farber is right to emphasize that Grant Gilmore's criticism of Holmes and Langdell was grounded in his profound skepti-

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<sup>1</sup> Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995).

<sup>2</sup> Ronald K.L. Collins, *Gilmore's Grant (Or the Life & Afterlife of Grant Gilmore & His Death)*, 90 NW. U. L. REV. 7 (1995).

<sup>3</sup> Grant Gilmore, *What is a Law School?*, 15 CONN. L. REV. 1, 2, 4 (1982).

cism about the viability of formalism.<sup>4</sup> At times, that skepticism led various observers to an overly romantic view of the flexibility of the common law. That view was balanced, however, by a recognition of the desirability of codification of the law, at least with respect to recurrent commercial transactions, so as to impose some order and predictability upon the proliferation of inconsistencies in common-law outcomes. Even codification, of course, can be more or less formalistic in style; Gilmore elsewhere expressed his preference for the open texture of the drafting of Article 2 of the Uniform Commercial Code to the tighter drafting of Article 9.

Professor Hillman accurately characterizes Grant Gilmore's main criticism as an attack on the rigidity of the formalist bargain theory of contract.<sup>5</sup> Much of the argument about the competing roles of bargain and promissory estoppel has centered on whether these two views of contractual obligation had domains that were separate or overlapping. Should promissory estoppel be confined to family cases and gift transactions, or should it also play a role in commercial engagements, where presumably the parties have an opportunity to bargain? Gilmore noted as well that formalism about contract formation had a carry-over into formalism about contract performance, with seemingly opposite results: the former limited contract liability, while the latter enhanced it. Professor Hillman rightly observes that the essential clue to resolve this apparent anomaly is to focus on juridical risk, on the greater uncertainty associated with jury fact-finding than with judicial application of rules of law.

Professor Hyland recognizes the important historical role that legal realism played in the assault on formal legal doctrine that is at the core of *The Death of Contract*.<sup>6</sup> Legal history furnishes numerous examples of the long-standing tension between doctrinal and fact-bound jurisprudence, sometimes manifested in the distinctions between law and equity and sometimes manifested in the distinctions between bargain theory and promissory estoppel. Notably, despite recurrent critical assaults on doctrinal solutions, doctrine in one form or another continues, hydra-headed, to re-emerge. Perhaps this history counsels us to search for mid-level generalizations and doctrines that are sufficiently open-textured in their articulation to encourage variation and flexibility in their implementation.

Professor Kastely locates *The Death of Contract* within various historical and modern jurisprudential perspectives about contractual

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<sup>4</sup> Daniel Farber, *The Ages of American Formalism*, 90 Nw. U. L. REV. 89 (1995).

<sup>5</sup> Robert A. Hillman, *The Triumph of Gilmore's The Death of Contract*, 90 Nw. U. L. REV. 32 (1995).

<sup>6</sup> Richard Hyland, *Life, Death, and Contract*, 90 Nw. U. L. REV. 204 (1995).

ideology and contractual thinking.<sup>7</sup> She traces the capacity of contract law to be used for ends that are socially desirable as well as for ends that are socially objectionable. She concludes that only a purposefully flexible view of contract obligation will enable contract law to serve important values of human dignity, interpersonal connectiveness and, ultimately, justice. The nineteenth-century view of contract law that Gilmore deplored in *The Death of Contract* would not readily have afforded recognition to the values of social justice that Professor Kastely rightly emphasizes.

Professor Linzer reminds us that *The Death of Contract* did not purport to be the gospel on the entire law of contracts.<sup>8</sup> Grant Gilmore started out as a commercial law scholar and approached the law of contracts with considerable humility about its unfathomable complexity. He recognized that he knew even less about the law of torts. In emphasizing that there was a role for reliance or unjust enrichment in the imposition of contract liability, even when formal consent was lacking, Gilmore did not intend to denigrate the central place of promise and autonomy in the great bulk of contractual relationships.

Like Professor Hyland, Professor Patterson demonstrates that *The Death of Contract*, while eminently successful in exposing the flaws of Langdellian formalism, was not equally successful in dealing a death-blow to other versions of formalism.<sup>9</sup> In *The Ages of American Law*, Grant Gilmore saw, lamented, and recognized as inevitable the recurrence of a search for theoretical solutions to real-life problems. Perhaps what is at play is the deep-seated concern that, without some guiding principles, the law would vest essentially unreviewable discretion in judge or jury.

Professor Rubin places his review of *The Death of Contract* within the larger arena of contractual behavior.<sup>10</sup> Grant Gilmore would surely have agreed that judicial doctrine casts a lesser shadow on alternative methods of dispute resolution than on judicial proceedings themselves. Professor Rubin's extensive discussion of the costs and benefits of nonjudicial enforcement of contractual engagements explains why ADR plays such an important role in the resolution of contract disputes. I would add that, particularly in contract cases, the array of possible nonjudicial solutions is often more capacious and more attractive than is the choice among standardized remedies to which the judgments of a court of law are necessarily confined.

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<sup>7</sup> Amy Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 Nw. U. L. Rev. 132 (1995).

<sup>8</sup> Peter Linzer, *Law's Unity—An Essay for the Master Contortionist*, 90 Nw. U. L. Rev. 183 (1995).

<sup>9</sup> Dennis Patterson, *Langdell's Legacy*, 90 Nw. U. L. Rev. 196 (1995).

<sup>10</sup> Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 Nw. U. L. Rev. 107 (1995).

Although *The Death of Contract* speaks more to principles of liability than to principles of remedy, Gilmore's articulated preference for flexibility clearly extended to all aspects of the law of contract.

Professor Testy reviews *The Death of Contract* from a postmodern perspective.<sup>11</sup> Rejecting the view of critical scholars who dismiss contract law as inherently oppressive, she notes that contract law has a dual mission as a vehicle for social control as well as an opportunity for individual empowerment and freedom. That dual mission is entirely consistent with Gilmore's own emphasis on a developing and ever-changing role for contract, a role that cannot be constrained within the classical doctrine of bargain theory.

Professor Yablon proffers psychological insights about a possible relationship between Oliver Wendell Holmes and Grant Gilmore on which I am not competent to comment.<sup>12</sup> I have never heard why Gilmore undertook to do the Holmes biography. Although Gilmore's earlier decision to write the admiralty treatise was, at least in part, financially motivated (to supplement his teaching salary), it seems unlikely that financial considerations still played a significant role at the time of the Holmes project. Perhaps Gilmore hoped to discover cohesiveness and found, once again, only disparate elements of an disunified whole. To turn that adversity into an elegant lecture series is a model to be emulated and admired.

My own view of *The Death of Contract* is more impressionistic. It is fanciful to think that contract law is dead. The historical interplay between contracts and torts has broadened, rather than diminished, contract liability. Contract law, in turn, has broadened liability for property transactions. The interplay of these various sources of the law of private obligations illuminates the boundaries of each of them. Boundaries do not, however, determine the core. We must continue to focus on the strengths and weaknesses of the law of contracts *per se* to assure its continued adaptability to the challenges of the world around us. Beyond peradventure, that is the view of the law of contracts to which Grant Gilmore subscribed.

Grant Gilmore cannot have intended his title to be taken literally. *The Death of Contract* must, therefore, have had a different agenda. I attach significance to Gilmore's admiring references to Cardozo opinions on the law of contracts. On other occasions, Gilmore was adept at demonstrating the factual weaknesses, the inherent contradictions, and the doubtful historical allusions that lie concealed just beneath the glittering surface of many Cardozo opinions. *The Death of Contract* is a scholarly allegory on the role of formalism in the law of con-

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<sup>11</sup> Kellye Y. Testy, *An Unlikely Resurrection*, 90 Nw. U. L. REV. 219 (1995).

<sup>12</sup> Charles M. Yablon, *Grant Gilmore, Holmes, and the Anxiety of Influence*, 90 Nw. U. L. REV. 236 (1995).

tracts written in the style of a Cardozo opinion. It is always worth reading and rereading, because it is stimulating, suggestive, elegant, epigrammatic, enigmatic, and hence utterly fascinating. Also like so many Cardozo opinions, on the merits, *The Death of Contract* is ultimately unpersuasive.