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Morton J. Horwitz
Harvard University

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BOOK REVIEW

THE AGES OF AMERICAN LAW. BY GRANT GILMORE. New Haven and London: Yale University Press 1977. X + 154 pp. \$10.00.

MORTON J. HORWITZ*

We seem to be in the midst of another of those major paradigm shifts in American legal theory of which we have had but three during the past two hundred years. During such periods, as Thomas Kuhn has allowed us to see, it is usually difficult for the fathers and sons to engage in serious intergenerational dialogue.¹ The fathers continue to fight the last war; the sons, while dreaming Freudian dreams, see their fathers' system of thought as outmoded.

Professor Gilmore's elegant set of lectures is primarily meant to describe what has by now become a standard periodization of American legal history. The first period, roughly between the Revolution and the Civil War, he calls the Age of Discovery. The second period, the Age of Faith, existed until around World War I. And for the past half century we have been laboring under the burden of the Age of Anxiety.

For the most part this review will focus upon only one small portion of Gilmore's book—his disapproving parental admonitions against what he sees as the emergence of a disturbing "next generation" in American legal scholarship.² But since his critical views of our current situation are intimately related to his conception of certain "lessons" to be learned from the three prior ages of American law, I will want to say something more in a moment about Professor Gilmore's version of legal history during the last two periods in his scheme.

Gilmore calls the disturbing new turn in legal scholarship the New Conceptualism. Just as the old conceptualism during the Age of Faith was displaced by "the pluralism of such scholars as Corbin, Llewellyn, and Kessler, the New Conceptualists . . . have returned to the elaboration of unitary theories, to the reduction of all principles of liability to Holmes's 'philosophically continuous series.'"³

* Professor of Law, Harvard University; A.B., C.C.N.Y., 1959; Ph.D., 1964, LL.B., 1967, Harvard University.

1. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).
2. G. GILMORE, *THE AGES OF AMERICAN LAW* 108 (1977).
3. *Id.* at 107-08.

Gilmore clearly takes his stand against the emergence of "well articulated theory" in law.⁴ Theory, it appears, is synonymous with "conceptualism" and conceptualism with "formalism." "The vice of the formalistic approach to law, on the level of serious scholarship," he warns us,

is that it leads to a disastrous overstatement of the necessary limits of law. In our own history, both in the late nineteenth century and in our own time, the components of the formalistic approach have included the search for theoretical formulas assumed to be of universal validity and the insistence that all particular instances should be analyzed and dealt with in the light of the overall theoretical structure. Solutions to problems are "right" if they conform to, "wrong" if they deviate from, that structure. The theoretical model itself quickly becomes frozen, so that what was "right" or "wrong" in 1870 must be equally "right" or "wrong" in 1920; what is "right" or "wrong" in 1970 will be equally so in the no doubt magical year of double twenty. The adept of formalism, once he has perfected his model (or borrowed one ready-made from an economist or sociologist), becomes an advocate of stability and an enemy of further change. This process takes place quite as inexorably with respect to theories or models which were in their origins radical or revolutionary as it does with respect to those which in their origins were conservative or traditionalist.⁵

And he concludes by articulating the "lesson" his generation has been teaching *sub silentio* for almost fifty years.

[T]he lesson of the past two hundred years is that we will do well to be on our guard against all-purpose theoretical solutions to our problems. As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved. The function of law, in a society like our own, is altogether more modest and less apocalyptic. It is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.⁶

Most of Gilmore's attack on the New Conceptualism is reserved for "the extreme right wing (speaking both politically and jurisprudentially) but by no means all of it."⁷ He is clearly delighted to quote University of Chicago Professor Richard Posner's simplistic attempt

4. *Id.* at 107.

5. *Id.* at 108-09.

6. *Id.* at 109.

7. *Id.* at 146 n.11.

"to encourage the application of scientific methods to the study of the legal system."⁸ "As biology is to living organisms, astronomy to the stars, or economics to the price system," Gilmore has Posner say, "so should legal studies be to the legal system."⁹ But, Gilmore confesses that his effort to "[link] . . . the New Conceptualism with the 'conservative reaction' . . . [of the 1950's] may not be altogether accurate. . . . Certainly, a fondness for unitary theory and universal abstraction has never been the exclusive possession of conservative thinkers."¹⁰ Indeed, he accounts for the increasing prominence of legal history since the 1960's by noting that "[d]uring periods of apparent social dissolution the traditionalists, the true believers, the defenders of the status quo, turn to the past with an interest quite as obsessive as that of the radicals, the reformers, and the revolutionaries."¹¹ During this "crisis of Western thought," he tells us, we must prepare ourselves for "both left-wing revisionists and right-wing traditionalists."¹²

Here then is a jeremiad delivered by (of all things) a self-confessed "skeptical relativis[t]" who warns us that we are about to repeat the errors of our grandfathers and turn our backs on the hard-won wisdom of our fathers. The fathers learned after considerable struggle that the grand illusion of the Age of Faith was Faith itself; that the great "vice" of theory was that any "theoretical model itself quickly becomes frozen . . . [and] . . . [t]he adept of formalism, once he has perfected his model . . . becomes an advocate of stability and an enemy of further change."¹³

While Gilmore identifies "The End of Ideology" as one of "[t]he cheerfully meaningless slogans of the 1950s" that "ha[s] not survived the national and international chaos of the 1960s and 1970s,"¹⁴ he does suggest that "the conservative reaction which inspired [those] political slogans may, on a much more sophisticated level, still be with us."¹⁵ But what else can possibly lie behind his "skeptical relativism" than precisely that system of thought that produced the End of Ideology literature during the 1950's?

It is not surprising that one who has so little respect for "theory" can so unselfconsciously return to that complacent *deus ex machina*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 102.

12. *Id.* at 104.

13. *Id.* at 108.

14. *Id.* at 106.

15. *Id.* at 107.

of the political theory of the 1950's—"broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us."¹⁶ Consensus theory was, after all, the articulated ideological foundation of the End of Ideology literature, which Gilmore correctly identifies as part of the post-war "conservative reaction." So why doesn't he see that "skeptical relativism," consensus theory and the End of Ideology literature are all part of the same bag?

The answer to this question takes us back to the ways in which the legal (and political) consciousness of Gilmore's generation was formed. It is, in fact, the story of how members of the legal elite during Gilmore's own age—the Age of Anxiety—confronted and overthrew the legal consciousness of the prior Age of Faith. Gilmore's version of legal history is not, therefore, "mere" legal history. Instead, it is intended to teach lessons and convey warnings about the disastrous consequences of any return to an Age of Faith.

Notwithstanding a whole series of necessary qualifications and complexities, the stark fact about the Legal Realists of Gilmore's generation is that they chose to attack legal formalism not on the basis of its reactionary *political* premises but on its conceptualism. They launched a process-oriented methodological attack on the possibilities of elaborating any coherent legal theory, not on the political values that underlay the particular legal theory they sought to overthrow.¹⁷ For seventy years every progressive proponent of judicial activism has been challenged to justify why he wasn't simply returning to *Lochner v. New York*,¹⁸ that bête noir of the Age of Faith.

This is not the place to document carefully the ways in which Legal Realism undermined the Old Order. But it is clear that its major strategy was to attack the "absolutism" of the Age of Faith and to insist that the possibilities of objective reasoning about law and values was inevitably illusory. Skeptical relativism brought us incrementalism, "line drawing," balancing tests, an exclusively process-oriented jurisprudence, and finally, a conservative appeal to "consensus" as the only remaining arbiter of values.

Why the attack on the Age of Faith had to wrap itself in the robes of positivism and relativism is an important and complex ques-

16. *Id.* at 109.

17. I am indebted to my colleague Duncan Kennedy for originally suggesting this theme and some others developed in this review. They are elaborated in Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1731-32, 1748-49, 1756-60 (1976).

18. 198 U.S. 45 (1905).

tion. We need to understand why it was necessary to destroy Faith itself and not the particular corrupt values to which orthodox legal theory had attached itself. The usual explanation is that the prestige of the natural sciences was so captivating and irresistible that legal theorists could hardly avoid emulating the methodological debates then going on in the natural and social sciences.¹⁹ But, standing alone, this explanation strikes me as superficial. There was nothing preordained about the identification of legal with scientific methodology. Indeed, with his slogan of "law as science," Langdell had already made any such equation an easy object of scorn and ridicule.

The answer seems to lie in the two-front war that liberal reformers were forced to fight beginning in the 1890's. Again, if we put to one side a whole series of necessary qualifications and complexities, the leading *theoretical* alternative to the reactionary political theory of the 1890's was Socialism. Both Left and Right confronted the reformist Center with relatively internally coherent visions of the political and legal order, which required one to choose between basic and irreconcilable visions of social, economic, and political life. For reasons deeply rooted in their connections to the Established Order, the reformers were thoroughly unprepared to choose between such stark alternatives. And the superficial—and hypocritical—institutional tinkering that Progressivism made possible reinforced their yearning to believe that no such irreconcilable choice was in fact necessary. It was coherent theory itself, they came to insist, that was the enemy because it sharply exaggerated social conflict and made ultimate value choice necessary. Common sense, skeptical relativism, a dash of modest and incremental institutional adjustment and, finally, a vision of a deeply consensual society that would save them from the agony of ultimate political choice permitted them to conceive of themselves as heroically walking a tight-rope between "ideological extremes."

The 1960's exploded that vision and, as hard as we try, it will never be the same again. We confront a political and moral bankruptcy that only time will bring into clearer focus. And despite his dark and foreboding talk about "the crisis of Western thought"²⁰ and "the polarized society which we seem to have arrived at" which makes "consensus . . . unlikely,"²¹ Professor Gilmore seems stuck with his

19. For a very fine discussion of this subject, see E. PURGELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

20. G. GILMORE, *supra* note 2, at 104.

21. *Id.* at 108.

generation's faith in the incapacity of thought to illuminate our predicament. "Man's fate," he tells us,

will forever elude the attempt of his intellect to understand it. The accidental variables which hedge us about effectively screen the future from our view. The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse. So far we have been able to learn, there are no recurrent patterns in the course of human events; it is not possible to make scientific statements about history, sociology, economics—or law.²²

To the extent that Gilmore is attacking a particular simplistic (and value neutral) version of behavioral "social science" that has long dominated American academic thought, he is clearly correct. But his message is meant to be much wider and deeper than that. It stands for a corrosive skepticism which rails at the possibilities of all systematic thought and condemns all efforts at large theoretical undertakings as "absolutist" illusions. It has been responsible for the low state of the entire post World War II generation of legal scholarship.

We have had only one major American legal theorist—Holmes. And for all the silly mythologizing of Holmes that Gilmore correctly scorns, he is a figure to be emulated and admired—not for his personal vision of things which Gilmore accurately describes as "savage, harsh, and cruel,"²³ but for his faith in the capacity of the human mind to rise to the highest flights of theory and synthesis.

Yet even Holmes ultimately flunks Gilmore's test. "He talks to us from on high, laying down principles of unrestricted universality, reducing the bases of liability to what he called . . . a 'philosophically continuous series.'"²⁴ And though his "thought was subtle [and] sophisticated," "Holmes's accomplishment was to make Langdellianism intellectually respectable."²⁵

But Holmes is usually remembered for his attack on Langdell's legal "theology." No, says Professor Gilmore. "Langdellian jurisprudence and Holmesian jurisprudence were like the parallel lines which have arrived at infinity and have met."²⁶ The parallelism lies in Holmes's effort "to reduce all principles of liability to a single, philosophically continuous series and to construct a unitary theory which

22. *Id.* at 100.

23. *Id.* at 49.

24. *Id.* at 53.

25. *Id.* at 56.

26. *Id.*

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."²⁷

Gilmore's generation is thus forever locked in to the particular dogmas of the way it has chosen to define the vices of formalism. Theory, abstraction and generalization came to be understood as inevitable efforts to obscure "what [is] actually going on." The remaining legacy of disintegrated realism is a vision of social life as consisting of "accidental variables," an insistence that "there are no recurrent patterns in the course of human events," and an Olympian disbelief in the capacity of man's intellect to understand. Their own particular "theory" of the nature of the Age of Faith precludes them from even trying to understand what *is* actually going on in the real world.

There is theory and there is theory. Gilmore's generation was right, I think, in believing that abstraction was used by the Old Order to obscure the realities of social life. And from that insight they generated their own theory of theory, their own universal abstraction about the inherently obscurantist and inevitably reactionary functions of theory. They had, in short, their own social version of "recurrent patterns in the course of human events." They arrived at this point, in part, because they were unwilling to delve too deeply into less respectable alternative theories which, though providing the possibility of illuminating the actual conditions of social life, would have left them politically exposed.

The great cop-out of Gilmore's generation is precisely its own Faith; its skepticism has enabled it to have contempt for systematic thought about what is actually going on. No less than during the Age of Faith itself, the reigning skepticism of current legal scholarship is now the official faith that keeps us from really understanding what is happening. It is time for the sons to stop listening to the war stories of their fathers.

27. *Id.*

