

The Ages of American Law

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THE AGES OF AMERICAN LAW by Grant Gilmore. New Haven: Yale University Press. Footnotes, index. 1977. Pp. x + 154. \$ 10.00 cloth.

*David M. Webster**

In *The Ages of American Law* Grant Gilmore has written a brief legal history, analyzed the role of law in late twentieth century America, and painted biographical vignettes of some of the great names and events of both English and American jurisprudence. While none of these has been done with all possible fullness, his book is thought provoking, well written, and in places compelling. It will probably become a standard work in what he calls "the legal history game" and should be read by practitioners of law as well as students of history.

Gilmore denies any intention of producing conventional history in which evidence is marshalled to prove certain preannounced hypotheses. To the contrary, he frequently speaks in the most general of terms and deals in what he acknowledges to be "speculations" as to why American law developed as it did. In speculating, for example, as to how the American Law Institute's Restatements influenced or were influenced by the era in which they appeared, he also clearly and concisely presents ideas as to what the Restatements are, why the Institute produced them, and who took the lead in drawing them up. Without being particularly historical his work presents the meat of history—namely, a sound selection of the events which comprise our legal past.

Gilmore's central speculation and thesis are that American law since 1800 is a three part drama in which the legal system alternately eschews and embraces what he designates "the formalistic approach" to law. Formalism assumes that there are certain principles of fundamental truth (to be derived from sources such as English common law) upon which all laws and legal decision-making should be based. The facts and circumstances of various cases should be measured against established fundamental legal theories, and verdicts or decisions should be reached through the matching of the legal "truth" to the facts. The closer a legal decision comes to adopting the fundamental theories, the more "correct" or "right" that decision is.

Gilmore contends that American law has progressed when an innovative or exploring approach to legal problems is utilized rather than legal formalism. He has divided American legal history in this

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and the last century into three "Ages" as a means of delineating the swings to and from legal formalism. He calls these periods The Ages of Discovery, Faith, and Anxiety.

The initial Age of Discovery, lasting from the early nineteenth century to the Civil War, is said to have been a golden age, likened—perhaps somewhat excessively—to the period of late sixteenth century English theater or late eighteenth century Viennese music. It was an age when a society's best minds (for no particular reason) naturally gravitated towards a particular endeavor: the creation of an American legal system. To Gilmore it was a time of great judges (epitomized by Joseph Story) "[d]eciding great cases greatly, . . . striking a sensitive balance between the conflicting claims of local autonomy and national uniformity in an immense, diverse, and rapidly growing country, creating a new law for a new land."¹

Had those early legal figures instead adopted a formalistic approach to the problem of creating a new law for America, they would have sought to adopt the far more static and fixed principles of English common law and the English legal system. To an extent, of course, this happened. But for reasons relating, in part, to political and social hostility towards the utilization of an English system, English common law and, more importantly, the English approach to law were not simply imported to these shores without question. Because those early lawyers were not formalists, an innovative, creative and uniquely American system arose.

As is often the case, golden ages flourish briefly and then disappear as new political, social, and economic realities overtake them. Such was the case with American law at about the time of the Civil War. The fluidity, innovation and imagination which had created the new system of American law were replaced by a far more formalistic system emphasizing stability, certainty, and predictability. Dean Langdell of Harvard is taken as the symbol of this Age of Faith. His teachings focused on the need for stability and predicatability in the law, and he and his disciples felt above all else that law was a science—capable of being synthesized or reduced to basic truths or principles which, like laws of physics or chemistry, could be used as the criteria for legal decision-making.

Gilmore's most penetrating criticism of such formalism is that it is a static system which molds events and social change to fit "the law" rather than the other way around. It is somehow altogether too comfortable, too easy for one to postulate—as in Gilbert & Sullivan's *Iolanthe*—"The Law is the true embodiment/of everything that's ex-

1. G. GILMORE, THE AGES OF AMERICAN LAW 41 (1977).

cellent/It has no kind of fault or flaw,/ And I, my Lords, embody the Law." To Gilmore the Age of Faith is sheer regressive reaction to the dynamism of the Age of Discovery, significant for the lengths to which its chief figures went to avoid being anything other than mechanists in their approach to legal and social problems. He is not surprised that this was so and thinks it may well have been inevitable. Indeed, he fears that it may come again.

In detailing the Age of Faith the author presents an extremely able portrait of Oliver Wendell Holmes. He begins by warning the reader to disabuse himself of the mythical view of Holmes as "Yankee from Olympus," a myth which he suggests was concocted by Harold Lasky and Felix Frankfurter in the second decade of the twentieth century. "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."² Through his *The Common Law*, Holmes—in keeping with his time—made what Gilmore calls essentially "prescriptive statements about what the law ought to be—at all times and in all places."³ Holmes saw fit 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."⁴ To Gilmore, this thought symbolizes the Age of Faith and clearly shows why such an age can never lead to innovation and social progress.

Upon the heels of this stolid, tranquil time came our own post World War I Age of Anxiety. Gilmore relates a remark made by Benjamin Cardozo in 1920 to the effect that the judicial process is one of great uncertainty and at root one not so much of discovering fixed legal truths but rather of creation.⁵ The furor this caused was immense and signaled both the formalistic antecedents of the Age of Anxiety and a key feature of its nature—the recognition that judges should create law as may be necessary to move with the times. Nothing could be less formalistic, and nothing quite so alien to the legal mind of the earlier Age of Faith.

The Age of Anxiety also saw the birth of American "legal realism." Gilmore chooses to highlight it with a discussion of Karl Llewellyn and the Uniform Commercial Code—that venerable document which was created to reflect actuality in the business world in a way that

2. *Id.* at 49.

3. *Id.* at 53.

4. *Id.* at 56.

5. *Id.* at 76-77.

more formalistic pronouncements (such as Williston's Uniform Sales Act) did not. He points out how legal realism utilizes the social sciences in an effort to find out not just what the law was but what it should be. Once again, it would seem that legal thought in our own era—at least as represented by the legal realists—is fluid, innovative and flexible.

At this point, Gilmore makes an interesting observation. Although legal realism seems to have swept the field, in actuality the legal realists criticized and discarded the belief that "law is a science" only to replace it with "law is a *social* science."⁶ Such at heart is not a total abandonment of the Age of Faith, which leads to the conclusion that our own era—or at least in its legal realism period—is a combination of fluidity and formalism. Gilmore seems to be acknowledging this in his attempt to point out where we now stand, but just short of doing so he backs away.

If he does back away from a firm characterization of our own time, he does not hesitate from telling us what lawyers should be seeking:

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. If the assumption is wrong, if there is no consensus, then we are headed for war, civil strife, and revolution, and the orderly administration of justice will become an irrelevant, nostalgic whimsey until the social fabric has been stitched together again and a new consensus has emerged.⁷

Fair enough. Gilmore is urging lawyers to be realistic about law, neither expecting too much nor too little from it. It can never be the universal solution to the problems of our society, and we run the risk of entering an age of new formalism if we try to make it one. If we are able to make our law respond to the constantly changing human situation, and if we are careful not to let ourselves think that law furnishes total truth, then the next age of American law will be exciting and workable.

Gilmore's book is clean and bright. It touches lightly but carefully on literally dozens of names, events and ideas, including Blackstone, Mansfield, Acton, Story, *Swift v. Tyson*, Bentham, Field, Langdell, Holmes, Pierce, Corbin, Cardozo and Brandeis. The footnotes alone

6. *Id.* at 87.

7. *Id.* at 109-10.

are a small masterpiece of legal personalities, events, lore and the like. Gilmore provides one of the few comprehensible explanations of some of the movements and schools of thought he discusses. His book runs the risk of being criticized for affixing catchwords to time periods for which other and perhaps better names have already been given—liberalism, activism, and progressivism are just a few. Similarly, there is nothing new or profound in saying that the law changes as the time change and that the law in some ages is more responsive than the law in other ages. What makes *The Ages of American Law* successful is the care with which its points are crafted, and the restraint and taste with which it was written. In places it cries out for detail and elaboration, but one suspects that further detail might well have spoiled the effect Gilmore has achieved. His effort is distinguished and worthwhile.

