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LIFE, DEATH, AND CONTRACT

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for Alessandro Mazzone

Over the past century or so, we have come to think of the law in terms of life and death. Those at least are the terms of what may well be the three most celebrated sentences in the common-law tradition. On the first page of The Common Law, Holmes discussed what is needed, in addition to logic, to provide a general account of the Anglo-American legal system. He suggested that there is a life of the law and that, in his view, it is nourished by societal experience. Maitland, in the opening passage of his book The Forms of Action at Common Law, reflected on the death of the venerable legal institution of the writ system and argued that its forms of action, though they have been buried, continue to rule us from their graves. And then, just a few years shy of the centenary of The Common Law, Gilmore, in The Death of Contract, discussed the passing of an entire field of the law and, again on the first page of the book, assured us that Contract, like God, is dead.

This vision—of legal institutions as entities that are born, live through their appointed span, and then pass away—seems not much to have occurred to jurists in our tradition before Holmes or after Gilmore. Though it continues to intrigue us, it is properly a feature of the century closed by Gilmore’s exquisite book, the passing of which, as much as Gilmore’s text, is the topic upon which we here have been called upon to reflect.

Throughout his life, Holmes was particularly intrigued by questions of life and death. As a young man freshly graduated from Harvard College, he enlisted in the Union Army, was thrice grievously wounded, and each time, after recovering, returned to fight at the front. Thereafter, whenever he found himself behind a podium, his thoughts turned to the meaning of the short life accorded to us and to the attitude necessary when facing death. Perhaps it was that concern that permitted him to notice—in fact, to become one of the first scholars to notice—that, beneath its facade of majestic tranquillity, the common law seems to change. In a statutory regime or a codified

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system, change is often easy to recognize—a law gestates in the legislature and is promulgated, and then, when its time has come, it is abrogated and the number of transactions it governs gradually decreases. In a case law system, however, change is more difficult to identify. Although the facts of each case differ from those of previous cases, and each holding therefore varies somewhat from the precedent, that difference generally signals not a change but an elaboration of preexisting principles.

What Holmes discovered—and portrayed in the first chapter of his book—is that there is a sense in which it is accurate to speak of the coming into existence and the passing away of norms, even in a case law system. A norm may be said to be born when it is fashioned to fit a purpose, to achieve some result in the world outside of the law. At a later point, as society evolves, the rule’s original purpose no longer needs to be served. Yet, because the authority of the rule often remains undiminished, it becomes possible to substitute a new purpose for the old one. The new purpose infuses new life into the norm, yet, in the process, transforms it. Very slowly, under the influence of the new purpose, the old norm passes away and a new one is born.

Maitland was fascinated by Holmes’s discovery, but from a different point of view. There is something undeniably Gothic about Maitland’s oft-cited sentence—and no coincidence that Maitland and Bram Stoker were precisely contemporaries. The Forms of Action shares with Dracula a fascination with how the dead are able to sap our strength, whether by dictating the structure of our legal system or by relentlessly occupying our imagination. While Holmes focused on the progressive, though halting, improvement in the law, Maitland dwelt instead on how the law of the past continually leads us into confusion. “That process by which old principles and old phrases are charged with a new content, is from the lawyer’s point of view an evolution of the true intent and meaning of the old law; from the historian’s point of view it is almost of necessity a process of perversion and misunderstanding.” (Frederic W. Maitland, Why the History of English Law Is Not Written, in 1 The Collected Papers 480, 491 (H.A.L. Fisher ed., 1911).) The lawyer’s habit of examining law merely in terms of its precedential value tends to enshrine historical accident as though it were jural necessity. As a result of that habit, much of the law remains fixed in an archaic form. Maitland believed that only the historian’s perspective can distinguish evolution from elaboration, and therefore only history makes it possible to recognize and smite the vampiric past as it preys on the common law.

Gilmore posed the question as did Holmes and Maitland: Might it legitimately be said that the common law evolves? The difficulty in reading Gilmore is that Holmesian conceptions of change so thoroughly structure our perception that the radicality of Gilmore’s cri-
tique is scarcely capable of expression in our current vocabulary. For Gilmore, the fundamental structure of the common law does not change. Gilmore never recanted his belief that judges, and not rules, decide cases. In the process of case adjudication, common-law judges continue, as they always have, to respond authentically to the dispute at hand. This process of dispute resolution is the root and trunk of the law. The terms of that process change slowly, if at all. Instead, birth and death affect the doctrinal formulations of the rules. Due to their necessarily abstract nature, conceptual frameworks ignore the subtleties of the judicial decisions. When examined from the point of view of the case-law system, much of the doctrine is superfluous speculation, for its rule formulation seldom influences the case results. Kessler and Gilmore, with a pleasure amounting almost to perversity, demonstrate this insight on every page of their contracts casebook. Moreover, codification is born from doctrinal thought and suffers the same process of aging. In his remarkable parting shot, Gilmore drew the lesson from his own attempts to gauge the case law and codify it in the Uniform Commercial Code. “[W]e may take heart in the fact that statutes, even if they are called codes, age even more rapidly than human beings do. The Code dates from the 1940’s; it already qualifies for senior citizen status. Let us treat it with respect—even with a nostalgic affection—but there is no need, and with each passing year there will be less need, for us to be overcome by its quaint, old-fashioned ways.” (Grant Gilmore, The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman, 15 Ga. L. Rev. 605, 629 (1981).)

The Death of Contract is a case study designed to verify Gilmore’s thesis. Common-law case adjudication never clearly distinguished between contract and tort—assumpsit, after all, was a form of action on the case. Classical doctrinal conceptions of contract ruptured into the tranquil interdependence of these two notions and compelled a rigorous separation. The classical conception made converts in the law school classrooms and influenced the doctrinal formulation of the rules, but only rarely determined the outcome of a dispute, and then usually only with unfortunate results. The “death” of contract is the calm that returns to the cases once the irritant of doctrinal abstraction has vanished. “Speaking descriptively, we might say that what is happening is that ‘contract’ is being re-absorbed into the mainstream of ‘tort.’ Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again.” (Grant Gilmore, The Death of Contract 87 (1974).)

The process of change within the common law was of importance to these three writers for the same reason—each sought to convince his readers that the particular change he favored was inevitable. One
of the unfortunate results of this form of argument is that the authors rarely stated their positions clearly and almost never presented arguments in their favor. Instead, they chose to dress quite powerful normative positions in the garb of historical evolution.

Holmes, for example, believed that he had discovered in the evolution of the common law a shift in the basis of liability from subjective culpability to external conduct measured by an objective standard. That evolution, he believed, suggested a more restrictive scope for contractual liability. Irritatingly, Holmes almost never directly stated the noble idea that motivated his historical—and later judicial—enterprise. The process of disengaging that idea from the unhelpful historiographical form of its presentation is so difficult that most of the readers who understand Holmes's argument already understood it before opening the pages of his book. Perhaps that is why so much nonsense has been written about his thought, including the especially idiotic notion that Holmes adhered to a "bad man's" view of the law, according to which our only obligations derive from a calculated prediction of whether, in a particular situation, a court would impose a sanction. Posner, citing Holmes, developed this idea with stubborn narrow-mindedness into the theory of efficient breach. If that, for Holmes, was all there is to the law, it is difficult to understand why he so venerated it, why he believed that, by paying taxes, he was purchasing civilization, and why he left his life savings to the federal government.

In fact, it makes more sense to call Holmes's view the "good person's" view of the law, since his thought is of little use to anyone without a well-developed moral conscience. Duty, for Holmes, was the essence of life. He believed that the role of the law is to guarantee the social institutions within which individuals confront and resolve moral dilemmas and abide by their obligations. Holmes favored whatever legislation is needed to protect the institutional framework—the clear and present danger test may be applied just as easily to the private law—but he was eager to limit judicial intervention so as to provide room for the development of individual subjectivity.

Maitland was the great historian of our legal tradition, and it says much about his age that he thoroughly rejected the history he uncovered. In contrast to historians of most other ages and places, Maitland seems to have had no conception of any wisdom to be derived from the past. Maitland's sole goal was to distinguish the rational, forward-looking aspects of the law from the impasses of history. "Now-a-days we may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. To-day we study the day before yesterday, in order that yesterday may not paralyse to-day, and to-day may not paralyse to-morrow." (Frederic W. Maitland, *A Sur-
vey of the Century: Law, in 3 The Collected Papers 432, 439.) For Maitland, progress necessarily fractures the law into two elements—one that serves as the kernel for future development and one that is condemned to the dustbin. The role of the legal historian is to distinguish between these two aspects of the law, so that the legislator might “clear away the rubbish that collects round every body of law.” (Frederic W. Maitland, English Law and the Renaissance 34 (1901).) Maitland was extraordinarily prescient about the kinds of practical reform that would prove helpful. “Then there is that marvelous monument of legislative futility, the Statute of Uses, the statute through which not mere coaches and four, but whole judicial processions with javelin-men and trumpeters have passed and re-passed in triumph. It has been said of this ambitious statute that its sole effect has been to ‘add three words to a conveyance.’ This may pass as a contemptuous epigram, but it is far from the whole truth. It has caused innumerable unnecessary law-suits. This is not an epigram but a fact. It is not a mere Statute of Uselessness but a Statute of Abuses.” (Frederic W. Maitland, The Law of Real Property, in 1 The Collected Papers 162, 191.) And that is why it is so odd that he generally chose to argue for reform by describing the historical evolution rather than by simply presenting a good argument in its favor.

Gilmore, too, had his goals. He believed that doctrinal categories inevitably crumble as judges fashion decisions that adequately respond to the facts. In this light, he was particularly skeptical about any attempt to stake out a law of contract separate from the complex notions of fault elaborated in tort law or, indeed, divorced from the individual contexts and tensions of the agreements, whether between general and subcontractor, insurer and insured, or merchant and consumer.

As perhaps the most orthodox of Corbin’s students, Gilmore adhered to the lesson Corbin learned from a lifetime devoted to the reading of court opinions—“The leaves of the books like the leaves of the trees!” as Corbin put it—especially those of Cardozo. The lesson is that a contract is not principally a structure of legal rules. It is rather an act of judicial imagination. The courts construct contracts out of the raw materials provided by the parties and the circumstances—statements, acts, trade practice, background understanding, a wink, a nod, a knowing glance. Judges are not far removed from novelists as they gather information and create from it a convincing narrative. In Gilmore’s conception of judicial methodology, the sign of a correct decision is a sharp focus on the unique facts of the case at hand. Rules do nothing but obscure the focus. Rules, when properly understood, are a shorthand for the questions a judge asks when deciding a case.
In this perspective, Gilmore's critique of Holmes far transcends the simple idea that Holmes's proposed law of contract ignored much of the case law. The central error, in Gilmore's view, was the conviction that rules necessarily evolve in a particular direction—that there is an "inevitable process of legal development." (Gilmore, The Death of Contract 41.) The object of Gilmore's book is to demonstrate that, on that point, Holmes was mistaken: there is no nonpartisan conception of change in a case law system. Every time someone identifies one strand of the case law as forward looking and distinguishes it from the remaining decisions, that person has a purpose in mind. Histories of the common law are always illustrations of legal arguments.

These three authors share yet another peculiarity—their accounts are now considered to be more story than history, more fiction than fact. Indeed, the greatness of these three books lies for us today precisely in their creative vision, which is all the more apparent because the tales they tell differ so markedly from what we consider to have been the actual facts of the developments they recount. It is worthwhile to dwell for a moment on the extent of their invention.

The paradox of The Common Law is that it remains the single great book of our tradition, even though it does not accurately state the law as it once was or as it is today or even as it was at the time it was written. (See the masterly analysis in Mark D. Howe, Justice Oliver Wendell Holmes: The Proving Years, 1870-1882, at 160-252 (1963).) There is no longer any need to cite authority for the proposition that Holmes's perception of the universal development of law from subjectivity to objectivity was largely a figment of his very fertile imagination. For example, there is apparently no support at all for Holmes's claim that early civil actions were based on moral culpability. (G. Edward White, Justice Oliver Wendell Holmes: Law and the Inner Self 155-57 (1993).) Moreover, the civil law seems to have developed in precisely the opposite direction—from Roman formalism to modern codifications influenced by Christianity, natural law, and theories of moral agency.

Maitland's explanation of the origins and demise of the writ system has likewise now been demonstrated, to be an invention more lovely than accurate. Maitland believed that the evolution of the common law has largely been the desired result of conscious reform. Thus, in Maitland's view, the Assize of Novel Disseisin was introduced in order to complete the transformation of the common law into a possessory, proprietary legal system, and the writ of assumpsit replaced covenant in order to avoid the limitations of contractual formalism. However, as more recent historiography has demonstrated, the evolution probably resulted partially from jural accident and partially as an unforeseen consequence of urgent political decisions. (See Robert C. Palmer, The Feudal Framework of English Law, 79 Mich. L.
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Similarly, much of Gilmore's history lesson is best considered to be idiosyncratic. For example, Gilmore argued that Holmes was Langdell's successor, brilliantly reformulating Langdell's basic insight into a general theory of contract. Yet the original statement of Holmes's famous dictum about the life of the law was formulated precisely at Langdell's expense. (Oliver W. Holmes [unsigned], Book Review, 14 Am. L. Rev. 233, 234 (1880) (reviewing C.C. Langdell, A Selection of Cases on the Law of Contracts (2d ed. 1879)).) Moreover, others had had ideas similar to Langdell's—he was not the innovator Gilmore made him out to be. (Ralph J. Mooney, The Rise and Fall of Classical Contract Law: A Response to Professor Gilmore, 55 Or. L. Rev. 155 (1976).) Furthermore, if, as Gilmore suggested, the classical conception of contract was historically related to the triumph of laissez-faire ideology, it is difficult to explain why Holmes so desired to restrict the scope of contractual liability. (Morton J. Horwitz, Book Review, 47 U. Chi. L. Rev. 787 (1975).)

If the commentators are right, three of the seminal histories of the common-law tradition are largely works of fiction. Of course, that does not imply that they are untrue. Everyone who has read a novel understands that fiction is not incompatible with truth—though the events are made up, we still see ourselves in the story. The point is simply that each of these histories is an interpretation, each serves as a foundational myth for the elaboration of a particular vision of the law. Holmes, for example, well understood that his vision would survive the limitations of his research. "[John M. Zane] is patronizing to the errors of my Common Law. I don't know whether it has serious ones or how many—but I think the material thing to be that I gathered the flax, made the thread, spun the cloth, and cut the garment—and started all the inquiries that since have gone over many matters therein. Every original book has the seeds of its own death in it... but it remains the original..." (Letter from Oliver W. Holmes to Harold J. Laski (Feb. 1, 1919), in 1 Holmes-Laski Letters 182, 183-84 (Mark D. Howe ed., 1953).) This is epic storytelling at its best—and it is perhaps no coincidence that each of the three books began as a series of lectures delivered orally to an appreciative audience.

It would be easy, of course, to look back at these three authors and criticize them for their unwillingness simply to argue their points of view and be done with it. Upon longer reflection, however, it almost seems that their reluctance in this regard might serve as a criticism of our own somewhat exaggerated mores. At least these three writers respected decorum. They understood that the unmediated expression of one's point of view is of small value in the law. Something
more universal is needed to permit discussion. Doctrinal debate would have pulled them back into the wide embrace of the tradition. Instead, they sought to use historical evolution to provide a new kind of universality for discursive exchange. The danger of the use of historiography for this purpose is, in the end, what Gilmore's book is about. To understand Gilmore's perspective, however, it is important to examine briefly how history acquired an instrumental value in Anglo-American law.

As with much of the common law, the beginning of the story may conveniently be summed up with reference to Blackstone. One might think that, due to the ahistorical perspective of the eighteenth century and its commitment to universal natural law, Blackstone would have been incapable of writing history. Yet, in the Introduction to his Commentaries, Blackstone provided a remarkable summary of the evolution of the Roman and canon laws. In fact, his four volumes are peppered with exquisite historical vignettes of particular legal institutions.

Nevertheless, history played little if any role in Blackstone's introductory overview of the common-law tradition. Instead, Blackstone presented the common law as the immemorial custom of the English people—usages so long in effect that memory ran not to the contrary. Indeed, in Blackstone's view, whenever it is possible to discover the origin of a norm, that norm does not represent custom. Blackstone understood even parliamentary enactments from the same point of view. He considered them generally to be declaratory of long-standing custom—*in perpetuum rei testimonium*. Blackstone admitted that some statutes arise from change of time and circumstance, but he did not dwell on the idea, nor did he furnish his readers with examples. What interested him was rather the fabulous stability of the common law. Blackstone was convinced that he spoke the same language as his great predecessors—Glanvil and Bracton, Britton and Fleta, Littleton and Fitzherbert, and, of course, Edward Coke. He was asking the same questions and further elaborating the same solutions. If Blackstone's work suggests that the law is an organism, it is not one that, within mortal memory, might be said to be born and to pass away. For him, the common law is best understood as a structure that greatly antedates us and that will continue to persevere in its ways.

Blackstone's rejection of the evolutionary vision of the common law was coupled with another firmly held conviction: nothing but mischief is achieved by the inconsiderate alteration of the laws. Blackstone opposed any attempt to improve the law by inexperienced and poorly educated legislators—namely those unconvinced of the genius of the common law. Such tinkering manages only to destroy the law's simplicity, distort its proportion, and insert specious embellishments
and fantastic novelties. For Blackstone, the law consists in the slow accretion of wisdom that results from the elaboration of the system’s basic notions. This development leaves no rough edges, no trace of either a beginning or an end. In other words, the law is suitable to the society that produces it only when it is left to its own devices. Tinkering, even when well-intentioned, can only diminish it. Because each culture possesses an intricate character that never can be wholly understood, only unconscious evolution, and not concerted change, can guarantee liberty. In Blackstone’s estimation, for example, England was the only country to preserve political and civil liberty as the end of its constitution. Those nations ruled by imperial mandate were no longer governed by the laws that were proper to them but instead were compelled to follow the whim of the monarch.

Among the most appreciative students of Blackstone was Joseph Story. “Of a work, which has been so long before the public as Blackstone’s Commentaries, it cannot be necessary for us to utter one word of approbation. For luminous method, for profound research, for purity of diction, for comprehensive brevity, and pregnancy of matter, for richness in classical allusions, and for extent and variety of knowledge of foreign jurisprudence, whether introduced for illustration, or ornament, or instruction, it is not too much to say, that it stands unrivalled in ours, and, perhaps, in every other language.” (Joseph Story, Course of Legal Study, in Miscellaneous Writings 66, 74 (William W. Story ed., 1852).) Story agreed with Blackstone that the genius of the common law is its stability, and that neither judges nor legislators are at liberty to promulgate rules dictated by their own notions of what is fit and proper. Yet, Story acknowledged, Blackstone presented only a summary sketch of the common law’s essential doctrines and distinctions. With each new decision, the principles are more closely investigated, and the sparse and scattered maxims that Blackstone reported are welded into a regular symmetrical system. Story furnished several illustrations of the process. For example, the common law synthesized principles of natural justice and mercantile usage to generate the concept of the negotiable instrument. Assumpsit replaced debt as the action of choice for the recovery of the price of goods sold or the value of work and labor. These new doctrines, Story reflected, constitute not so much innovations as the scientific elaboration of the basic principles of the common law. “[T]he common law is a system of principles, which expands with the exigencies of society.” (Joseph Story, Codification of the Common Law, in Miscellaneous Writings 698, 705.) Thus, in Story’s view, innovation may be compatible with integrity.

From Story’s synthesis, what was necessary to arrive at the evolutionary theories of Holmes and Maitland was to strip away the Blackstonian belief in the natural law foundations of the common law and to install in its place a theory of human progress. The nineteenth cen-
tury did most of the work. As Holmes recollected forty years later, *The Common Law* began as an attempt to refute Blackstone. "You ask me what started my book... I think the movement came from within—from the passionate demand that what sounded so arbitrary in Blackstone, for instance, should give some reasonable meaning—that the law should be proved, if it could be, to be worthy of the interest of an intelligent man—that was the form the question took then.” (Letter from Oliver W. Holmes to Harold J. Laski (June 1, 1922), in 1 *Holmes-Laski Letters* 429, 429-30.) Though Blackstone was Holmes's most noteworthy predecessor in his attempt to provide a general overview of the common law, Blackstone's name appears only about a dozen times in Holmes's book, most frequently as a tag to string citations in the notes.

Both Holmes and Maitland rejected Blackstone's belief that the common law embodies a natural system of justice, and both believed that they understood what was needed to replace it. They recommended shifting the focus from a celebratory discourse about the tradition to a scientific investigation designed to discover norms that would help us achieve our goals. "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics." (Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 474 (1897).) Similarly, Maitland, when reflecting on what study he would recommend to a bright student before taking the plunge into the *ocearus iuris*, suggested history, ethics, and political economy. (Frederic W. Maitland, *Law at the Universities*, in 3 *The Collected Papers* 419, 426.)

In other words, both Holmes and Maitland believed that historical analysis would play a transitional role. Its task was to emancipate common laywers from our enslavement to the tradition and to awaken within us the understanding that we are free to pursue our own goals. Each hoped that, by writing a history of how the tradition had governed us, we would learn, instead, to govern the tradition, to select from it what is useful and to discard the rest. The process of selection itself would be left to social science. Holmes and Maitland led us out of slavery, only to wander for forty or more years over the not terribly hospitable terrain of the Year Books and the plea rolls. Neither was ever privileged to set foot in the promised land of rational discourse about means and ends.

Legal realism is that promised land. In this regard, realism might best be understood to include all of those theories that follow Holmes's suggestion that a legal norm is to be justified not by its role in the tradition or its place in the system, but rather by its usefulness.
in achieving goals in the real world. A legal norm receives a realist justification when we point outside of the law to the beneficial behavior it encourages or to the harmful comportment it prevents. In other words, legal realism, thus understood—admittedly, quite broadly—conceives of the law as an instrument by which the world may be transformed according to our projects and desires. Realism thereby provides a different kind of universality as a basis for discussions in the law, namely a scientific discourse concerning whether our rules are properly designed to achieve our goals.

We know from the first paragraph of Gilmore’s book that he was profoundly uninterested in the sociological vision of the scientifically-oriented legal realists. Moreover, at the time Gilmore wrote, Blackstone’s work offered only an antiquarian interest. Partially because of the personal prestige of Holmes and Maitland, and partially because their work was the midwife of realism, Gilmore may have felt compelled to adopt the historical method—even if his goal, in the end, was to refute the premises upon which that method is based.

At this point it becomes possible to appreciate the exquisitely postmodern quality of Gilmore’s achievement. In order to demonstrate the distance between doctrine and case law, Gilmore theorized that, as part of a modern renaissance in the law of torts, the judicial construction of promissory estoppel was about to overtake the doctrinal notion of consideration. In other words, Gilmore isolated one aspect of the common law, namely the encroachment of tort-like causes of action on the law of contract, and proclaimed that strand to represent the future. Of course, this is precisely what Holmes had done with regard to the evolution he believed he had discovered from the subjective to the objective point of view. Gilmore apparently believed that he could reveal the defects in theories that proclaim an inevitable evolution in the common law only by postulating a different evolution. The sardonic tone of Gilmore’s narrative may owe something to the irony that the only discourse available to criticize Holmes was the very discourse Holmes had created.

The years following Gilmore have not been kind either to realism or to the historical method. The polity has become so evidently fragmented that there is no longer, if there ever was, a consensus about the social goals that social science is to assist us in achieving. Universality based on the social sciences has been replaced by a situatedness that seems to deny the very possibility of a universal justification for legal norms. The historical method has been degraded by the same developments. Histories of the common law have become legal—or, more often, political—argument, with little left of the historical garb. Exemplary in this regard is the work of Morton Horwitz, which tends to be deeply appreciated only by readers who share his political perspective.
With the decline of both realism and the historical method, it is perhaps timely to ask whether we were too quick to abandon Blackstone. One might wonder, for example, what he would say about these developments. As far as realism is concerned, Blackstone almost surely would respond that it would be quite difficult to demonstrate a freedom so expansive as to justify the view that the law is ours to alter in order to achieve our goals. The law, Blackstone would say, is always already there by the time we get to it. It is odd, Blackstone would probably note, to think that the private law, which presents such an intimate reflection of a particular culture’s vision of justice, could provide an unlimited horizon. Modern comparative research has confirmed Blackstone’s intuition. “The legislators may, indeed, with a stroke of the pen modify the actual legal rules, but these other elements and features nonetheless subsist. They cannot be so arbitrarily changed because they are intimately linked to our civilisation and ways of thinking. The legislators can have no more effect on them than upon our language or our reasoning processes.” (René David & John E.C. Brierley, Major Legal Systems in the World Today 19 (3d ed. 1985).)

As to the historical method, Blackstone would surely be impressed by the great mass of the law that has developed since his day, but he would not abandon his belief that the law is best understood in terms of constancy over time. He would of course agree that, on some level, there has always been change and, for those who are interested, history—new statutes are passed and further opinions are penned. The boundaries between law and equity, tort and contract, and public and private law might shift now and again. Blackstone would take due note of all of this, even catalogue it perhaps, but it would not much impress him. What it was possible to see in the eighteenth century—and what has since become much more difficult—is that systems that survive, such as the common law, are able to prosper because they contain within themselves sufficient resources to resolve the problems that are presented to them. Though the principles are continually elaborated and refined, the foundation of the debate remains fixed. Blackstone would have seen in this process the common law working itself clear over time.

It is especially instructive to imagine how Blackstone might have responded to the suggestion that there is history in the law of contract. Gilmore, Atiyah, and others have suggested that our traditional law of contract is moving toward, or returning to, a tort-like conception based on fault, which is designed to protect detrimental reliance. Blackstone, I think, would have been amused. He would have acknowledged, I am certain, that the continuity of the common law does not prevent debate and discussion. In fact, the nature of the continuity is that the fundamental terms of the discussion remain the
same over time. One position in the dispute might temporarily, even for an extended period, overwhelm the others, but none ever triumphs completely and none ever succumbs without day.

Blackstone would have agreed with Gilmore that, like literature and the arts, the law knows alternating rhythms of classicism and romanticism. In the law of contract, classicism seeks a formalist touchstone by which to recognize those promises that should be judicially enforced. In contrast, the romantic visionary enforces promises when injustice would otherwise result. Blackstone would remind us that the tension between these two ways of thinking about promises is a constant feature of the common law. As Holmes and Fuller have noted, consideration functions as a kind of formality—its presence often suggests that the parties are interested in enforcement and that they have given due thought to the matter. The Restatement (Second) perfectly exemplifies the tension that structures this aspect of the common law. It considers a bargained-for consideration to be an essential element of an enforceable promise, yet it also recommends the enforcement of promises in order to prevent injustice—sometimes as a result of detrimental reliance and sometimes as a result of other kinds of injustice, such as the existence of a moral obligation. The courts follow the same method, asking first whether there is a bargain, and then, if not, whether equity should intervene to prevent injustice. Reading the Restatement, the cases, and the treatises, Blackstone would note, one does not get the impression that one or the other of the two theories is about to be run out of town.

Blackstone would also remind us that the same tension was already apparent in his own day. In the 1760s, in the lectures that would become his Commentaries, he emphasized that no promise is enforceable at law without consideration. In the same decade, Lord Mansfield's court decided Pillans v. Van Mierop, in the course of which Justice Wilmot rested his opinion principally on the ground that the writing constituted sufficient formality, while Justice Yates held the promise to be binding largely on the basis of detrimental reliance. (Pillans and Rose v. Van Mierop and Hopkins, 3 Burr. 1663, 1670-75 (K.B. 1765).) The tension played itself out in another way as well, for the courts of equity in the eighteenth century refused to enforce promises when their enforcement would lead to injustice, even promises supported by consideration.

As these examples suggest, the tension between formalism and the avoidance of injustice reflects a division that traverses all of Anglo-American private law, one that was once institutionalized as the distinction between law and equity. Each of these two elements of the common law provides a competing answer to the questions that arise in the law of contract. The division is not limited to the formation phase. For example, Fuller and Perdue were able to demonstrate that
the expectation interest—the principal measure of damages at law—
can be reconceived in terms of the equitable notion of reliance.

In fact, both elements were already present in what, as far as I am
aware, is the first legal document produced by our tradition, namely,
the famous tapestry embroidered in England and now displayed in the
French town of Bayeux. The tapestry can be read as a brief for the
proposition that William the Conqueror was the rightful successor to
the throne of Edward the Confessor. The tapestry, embroidered
shortly after the Conquest, argues both from formalities and from
equitable principles—the two notions that, together, would weave the
texture of the common law. In the artistic center of the work is Har-
old’s solemn oath to support William’s claim to the throne. Preceding
the oath are the equitable arguments: William saved Harold from
brigands, the two fought together as comrades, and Harold accepted
William’s dubbing. In other words, Harold’s promise was made in a
context of gratitude and alliance that justified reliance—and enforce-
ment. The remainder of the tapestry chronicles the remedy—divine,
it is true, and not judicial—for the breach of Harold’s promise. It is
astonishing that so little has changed in the intervening millennium.
A good argument still requires both elements. If, today, the only argu-
ment a party can muster is to point to the wording of the contract,
that party is almost certainly going to lose. Formalism and the preven-
tion of injustice alternately dictate the dominant paradigm, but
neither disappears. They constitute the tension upon which our sys-
tem is constructed, and everything suggests that they will still be
around long after we are gone.

This central structural feature of the common law confirms Gil-
more’s reasons to suspect the system-builders. A structure that pro-
vides contradictory answers to every question need not be overly
concerned with theoretical coherence. An individual author’s concep-
tual theory, of course, does not share that luxury. The dynamic of
conceptualization has always tempted common-law theorists to em-
phasize one or the other of the two fundamental approaches. As a
matter of rigorous theoretical construction, it is probably impossible
to accept both. To those who draw their inspiration from one of the
two perspectives, the other almost necessarily appears to be a foreign
body. A good example of this phenomenon is Gilmore’s treatment of
Holmes. Gilmore saw in Holmes only a theorist of laissez-faire indi-
vidualism. He was never able to state accurately the virtues of the
Holmesian separation between law and morals and the heightened
moral autonomy it permits.

At this point, it is perhaps worthwhile to ask why, in the end, we
are so intrigued by these three sentences that describe the law in
terms of life and death. It may be simply because of the exhilarating
conception of human freedom they convey. They suggest individual
lives that are entirely open to possibility and a world that is totally available for change. If the law is caught in the inevitable cycle of birth and death, then there is nothing about it that need detain us other than its convenience. Once norms are reconceived not as necessary elements of a particular culture but rather as pure contingency, we are free to do with them as we like. In this way, these three celebrated sentences render us the masters of our fate, the authors of our laws.

From this point of view, the most difficult historiographical issue is why a particular legal doctrine or institution does not disappear as soon as it no longer seems to us to be appropriate to the circumstances. We know Blackstone’s answer: the reason the norms do not disappear is because the law is not simply an instrument to respond to our needs. It was there first and will survive us. Any legal history that denies this is simply a bag of tricks. Unfortunately, Blackstone’s view all too unkindly reminds us of our limits. To maintain our sense of freedom, some vanishing is needed—and, in fact, can be manufactured. It is enough if, from time to time, the historians declare that those aspects of the law that no longer appeal to us have passed their prime and are destined for extinction. And each time they do so, we are surprised anew when we discover that the law they have attempted to bury continues to govern from its grave.