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Book Note

RECONSTRUCTING CONTRACTS, by Douglas G. Baird [1]

DANIEL HAMSON

"WE HAVE WITNESSED THE DISMANTLING of the formal system of the classical theorists. … Contract is dead."[2] Grant Gilmore offered this stark assessment of the state of contract law forty years ago in his seminal text, *The Death of Contract*. Gilmore's work was the culmination of a wave of growing discontent with the nineteenth-century view of contract law as a conceptually discrete field bound together by a limited collection of core principles—a perspective proffered most famously by American jurist Oliver Wendell Holmes. Challenging the classical notion of contracts, Gilmore asserted that this relatively young enterprise is a "failed experiment;"[3] that is, contract law is nothing more than a species of civil obligation and, as the coherence of its organizing principles continues to erode, the law of contracts will slowly become "'reabsorbed' into the mainstream of 'tort.'"[4] Ultimately, with their sustained critiques of Holmes's doctrinal position, Gilmore and his fellow exponents succeeded in influencing the ideological tenor of subsequent Anglo-American contract scholarship.

Reflecting on the general tone of contract law in the immediate wake of *The Death of Contract*, Douglas G. Baird recalls the conventional belief that the classical view of contracts was simply a "pipe dream."[5] Yet, Baird wonders in the opening lines of his book, is there not some wisdom in the fundamental principles of contract law explicated by Holmes and his followers? Drawing inspiration from these nineteenth-century legal theorists, Baird confronts Gilmore's famous eulogy of contract law with a frank rejoinder: Contracts can be organized around

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1. (Cambridge: Harvard University Press, 2013) 184 pages.
2. Grant Gilmore, *The Death of Contract*, (Columbus: Ohio State University Press, 1974) at 103.
3. *Ibid* at 102.
4. *Ibid* at 87.
5. *Supra* note 1 at ix.

a handful of straightforward ideas and these ideas exist outside of the shadow of civil obligation.

In forwarding his thesis, Baird divides his argument into two parts. The first part, comprising chapters one through four, reviews the traditional foundational concepts of contract law, as conceived by Holmes, and then proceeds to examine how these principles are regarded in the present-day. In chapter one, Baird questions the practicality of relying on the notion of *consensus ad idem*, cautioning that a "mystical subjective meeting of the minds is too ethereal."[6] Drawing on the eminent case of *Raffles v Wichelhaus*,[7] Baird contends that we should use an objective standard to determine whether two parties have come to an agreement. Chapter two investigates the classic postulate that a contract is formed only when there has been a bargained-for exchange. Primarily concentrating on *Hamer v Sidway*,[8] Baird evaluates this contractual principle while conscientiously acknowledging the difficulty of attempting to perfectly map contract rules onto complex social relationships. Baird then moves on to consider the Holmesian supposition that legal outcomes of contractual disputes can be accurately explained by defining a promisor's obligation as being simply the duty to pay money damages in the event of non-performance. The author explores this idea in chapter three through frequent reference to the battle of letters between Holmes and his contemporary critic, Edward Avery Harriman. In chapter four, Baird reviews the expectation damages principle and calls attention to the limitations of Holmes's unique conception of a promisor's duty, expounded in the preceding chapter.

In the second part of his argument, chapters five through eight, Baird considers the traditional rules of contract formation and modification. In chapter five, he examines the backdrop of expectations the law imparts upon parties dealing in a commercial setting—specifically that of good faith and disclosure—and observes the practical importance of having clear and definitive rules for bargaining in such a context. Baird then goes on to discuss the contractual concepts of excuse and mistake in chapter six. In chapter seven, he explores the doctrine of duress and discusses the tension between mutually beneficial renegotiations and the potential this holds for the exploitation of vulnerable parties. Finally, in chapter eight, Baird contemplates the place of contract law in the context of contemporary bargaining, where standardized terms have

6. *Ibid* at 23.
7. (1864) 2 H & C 906.
8. 27 NE 256 (NY 1891).

come to replace the traditional person-to-person dealing so frequently portrayed in classic contracts dilemmas.

Cogitating on his project, Baird is careful to note that he is not wholly endorsing Holmes' views on the law of contracts. Instead, in a balanced and thoughtful manner, he endeavours to remind his audience of the enduring utility of classic Anglo-American contract law, despite its inherent shortcomings. In doing so, Baird helps to shepherd a more temperate and fluid brand of Holmesian contract theory into the spotlight.

After famously proclaiming the death of contracts in the final lines of his text, Gilmore feigned away from the finality of his statement by openly wondering "what unlikely resurrection the Easter-tide may bring"[9] for the law of contracts. *Reconstructing Contracts* is Baird's response.

9. *Supra* note 2 at 103.