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Honor Langdell Commentary

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Paul Carrington's article on the influence of Christopher Columbus Langdell and his work falls into two parts. One is a celebration of what is good and useful and true in the case method of studying law. The other is a history of Langdell's creation of that method of teaching and a criticism of the first Dean of Harvard Law School for allegedly separating law from politics, destroying an older tradition of American law teaching in which the inculcation of public virtue played an important role and hence addling the minds of generations yet to born. Professor Carrington's observations of the effect of the case method are interesting and certainly suggestive. They provide law teachers with important material for thought about what it is we are doing in the classroom. His history, however, is a forensic history, designed, like so much of the history written by lawyers, to prove a point.[1] Carrington's version is different from that generally received; he rescues Langdell's Harvard colleagues James Bradley Thayer, John Chipman Gray, and Oliver Wendell Holmes, Jr., from the obloquy heaped on them, but for him Langdell is still thoroughly, profoundly, and obstinately wrong.

I disagree, and in this brief reply, I suggest that Langdell was far more sophisticated than is often believed. His method of teaching and of studying law was solidly rooted in contemporary Anglo-American legal thought and represented what most of us living in the late 20th century would regard as an important advance on what went before. Finally, I also suggest that the very aspect of Langdell's thought which is so often criticized not only influenced the great American judges of the early and mid-20th century but also contains a deep moral lesson for modern American lawyers and law teachers. Indeed, I, too, hail Langdell, but for different reasons.

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1. Forensic history has been of great importance in American history. John Phillip Reid has described the legal arguments of the Revolutionary generation as a forensic history. See, for example, John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (Madison, Wis., 1986).

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What made Langdell's approach to the study and teaching of law "scientific" was the primacy given to original sources, which for Langdell and his colleagues were the decided cases of the courts. Such an approach was scientific because it refused to deduce the law from the then reigning a priori assumptions about the way the world works. It is true that Langdell seems to have had firm opinions about what the investigation of the sources should reveal about the workings of private law, but he did not believe that those workings were dictated by anything more exalted than the common law's blending of rights and remedies, expressed in the complications of the writ system.[2]

Langdell's scholarship and teaching were also scientific because they were historical. As Thayer wrote, Langdell's great contribution was to bring to legal education what good lawyers always do: study cases to understand the development of principles.[3] Thayer and Gray investigated the historical progression of cases to make their points about the state of the law, Thayer in evidence and Gray in property. For example, while Gray does admit that his dislike of spendthrift trusts is based on his disapproval of what he calls paternalism, his analysis of the invalidity of restraints on alienation is based on close analysis of the important cases to show that this judge-made law is bad law.[4]

Both these aspects of Langdell's thought, which, I believe, are thoroughly characteristic of academic thought of his age, are, in the end, secular. In contrast, what went before, in the period before the Civil War, was profoundly sacral. If one can identify a single problem in our modern understanding of American law in the first half of the 19th century, it is our inability to take seriously the proposition that Protestant Christianity was the strongest cultural force in the nation. Whatever ideas the legal profession had about the sources of public law and the nature of the Constitution, there was widespread agreement that the principles of private law were congruent with and dictated by the absolutely true requirements of Christian morality. Law was principles, and properly decided cases reflected those principles, which themselves, in the end, were God's plan for governing the nation. While the cultural strength of this view began to ebb in the 1850s, the horror of the Civil War and the bungled mess of Reconstruction finally

2. For an excellent explanation of the relationship between common law jurisprudence and the writ system, see Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (Oxford, 1991), esp. ch. 9.

3. William P. LaPiana, *Logic and Experience, The Origin of Modern American Legal Education* 103 (New York, 1994). In the preface to his casebook on constitutional law, Thayer elaborated on the relationship between and science, identifying the case method as one example of "what scientific men call the *genetic* method of study which allows one to see the topic grow and develop under his eye,—a thing always grateful and stimulating to the human faculties, as if they were called home to some native and congenial field." 1 J. B. Thayer, *Cases on Constitutional Law* v–vi (2 vols. Cambridge, Mass., 1895).

4. LaPiana, *Logic and Experience* 127–28.

seem to have ended the reign of religiously based morality in law and politics, at least for people like Holmes, Langdell, and even Thayer and Gray. Langdell did not reject politics; he rejected in the study of law the easy appeal to what was assumed to be right. In its place he put legal science as he understood it. To us that science may look like a naive attempt to substitute professional neutrality for inevitable political choices, but there is evidence that Langdell had strong opinions about what we would call "policy."

The best example is his approach to antitrust questions. At first glance, Langdell's article on the *Northern Securities Case* is the paradigm of Langdellian foolishness.[5] The decree of the Circuit Court breaking up the holding company, he writes, is insupportable because it is unsanctioned by the Sherman Anti-Trust Act. What else would one expect from a scholar who spent untold hours and numerous pages of the *Harvard Law Review* investigating equity jurisdiction as a historical matter. Those expectations, however, are far too timid. Langdell went on to analyze the application of the Sherman Act to the problem of railway competition. Because price competition in rail transportation is inevitably ruinous for the railroads involved, the only cure is government regulation of rates or outright government ownership. Clearly, Langdell had strong opinions on important public issues. He believed, however, that his law school (and perhaps other schools with the same demanding standards) could not teach what was relevant to solving many of those problems without slighting the all important goal of advancing legal science. Langdell's legal education was designed to train lawyers, not administrators or bureaucrats, and especially not "leaders" of the polity.

Such an approach to legal education could turn students into unreflecting defenders of the status quo. I believe, however, that it had the opposite effect. By making the mastery of legal science the hallmark of professional competency and prestige, case method education gave lawyers a claim to social position and power based less on the defense of certain ideas about society and government than on apparently apolitical expertise. This modest approach to legal education may have helped to put the nails in the coffin of substantive due process. All lawyers know is what judges decide, and what judges decide is law because the power of the state enforces it. What lawyers, and judges, are expert in is the intricate system of interrelated rights and remedies known as the common law. They are not expert in the proper organization of society. Langdell could easily imagine government ownership of the railways as the best solution to a problem created by economic facts; such a mind seems unlikely to approve decisions made in the name of "freedom of contract" which appeared nowhere in the Constitution but drew its power from some realm of ultimate right. Thayer's famous views on the limited nature of judicial review may also be related to

5. C. C. Langdell, "The Northern Securities Case and the Sherman Anti-Trust Act," 16 *Harv. L. Rev.* 539 (1903).

this modest view of lawyering and judging. More important, the lesson took with their students. Learned Hand excoriated substantive due process and proudly presented himself as a craftsman, devoted principally to refining and defending legal science.[6]

Langdell's vision of legal education is narrow, perhaps, but its very limitations may have contributed to the birth of what we recognize as modern American legal culture. One of the great themes of that culture (at least until recently) is judicial deference to legislative policy judgment. Langdell and his colleagues helped to create a legal profession which could live with such an arrangement by separating professional status from specific political positions. Such a role may not be as satisfying at the end of the 20th century as it was in its middle. In today's legal culture, Langdell has become the ghost at the banquet, reminding us of how little we really know, and how difficult it is to master the law, let alone law and some other discipline or aspect of policy making. Langdell be praised, for he tells us how difficult is the task of being a lawyer in a democratic society.

6. William P. LaPiana, "Thoughts and Lives," 37 *New York L. School L. Rev.* 607 (1994).