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Langdell Laughs Forum: That Impecunious Introvert from New Hampshire: Re-Imagining Langdell: Comment

William P. LaPiana

Langdell Laughs

WILLIAM P. LAPIANA

The amount of ink spilled in consideration of the life, thought, accomplishments, and legacy of Christopher Columbus Langdell is eloquent testimony to the critical role he plays in the self-image of the American law teaching profession. It is both wonderful and astounding, therefore, to find that critical primary sources remained unread and unused at the very end of the twentieth century. Now that Bruce Kimball has brought them to light, we have a more complete view of the man and his thought, one that, not surprisingly, reveals to us someone quite different from the cruelly and crudely caricatured inventor of those twin devices for stifling young minds, the case and Socratic methods.

Most damaging to the traditional view of Langdell as a rigid dogmatist are the statements in his own notes on partnerships and commercial paper. What constitutes a partnership is a question answered by observing mercantile practice. What the law "ought to be in respect to any feature of negotiable paper" (70) can only be answered by asking what merchants do.[1] This sensitivity to business practice highlights the importance of Langdell's ten years at the New York bar and his resulting familiarity with the "real" world, a familiarity that seems to have been more influential than previously imagined. We now have a Langdell who thinks and teaches, at least when the subject is partnerships and bills and notes, like a legal realist, finding what law should be in what society needs law to do. Perhaps Langdell should be counted among the realists' predecessors, not only because he helped to break the hold of a priori principles on the legal mind, but also because of the approach to the law of business associations and practices revealed in these notebooks.[2]

1. Page references in parentheses are to Bruce A. Kimball, "Warn Students That I Entertain Heretical Opinions," *Law and History Review* 17 (1999): 57–140.

2. William P. LaPiana, "Thoughts and Lives," *New York Law School Law Review* 39 (1994): 630–35.

William P. LaPiana is Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School.

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On the other hand, Langdell did not do much more in these two areas of business law beyond what is recorded in the notebooks. According to Kimball's careful reconstruction of Langdell's teaching, he taught partnership only in his first two years on the Harvard faculty (1869–1871) when he also taught negotiable paper. After 1871 he taught a course in bills of exchange and promissory notes only in 1878–1879 and 1879–1880, both times using James Barr Ames's casebook on bills and notes. Ames built his academic reputation in the areas of partnership and bills and notes.[3] As Langdell's first and most famous student, Ames may have absorbed some of Langdell's approach to these subjects. In 1902 Ames was asked to prepare the first draft of what would become the Uniform Partnership Act and incorporated into his work the "entity" theory of the nature of a partnership. He died before the work was completed and was succeeded by William Draper Lewis who rejected the entity theory in favor of the common law or "aggregate" concept. Lewis noted that advocates of the entity approach called it the "mercantile" approach because they believed, wrongly, in Lewis's view, that business people acted in accord with the entity theory. It is certainly possible that Ames's adherence to the entity theory owes something to Langdell.[4]

The heavily annotated case books upon which most of Kimball's article is based are far more difficult to interpret and incorporate into a story about Langdell as a teacher and scholar. While some will disagree with Kimball's use of the reconstructed classroom dialogues as a way to extract meaning from these notes and glosses, they are only a means, after all. Kimball offers them as the best way to illustrate what he believes this evidence tells us about Langdell—that the Dean was not "dogmatic, rigid, and closeminded" (76). One can certainly concede the point, even without resorting to the reconstructed discussions.

There is, however, another way to look at this new evidence—what does it tell us about what Langdell actually taught and thought? While the notebooks give tantalizing glimpses of Langdell the proto-realist, the annotat-

3. See, e.g., James Barr Ames, "The Negotiable Instruments Law—Necessary Amendments," *Harvard Law Review* 16 (1903): 255–61 and especially footnote 1 detailing the involved controversy over the provisions of the uniform negotiable instruments law in which Ames played an important role.

4. William Draper Lewis, "The Uniform Partnership Act," *Yale Law Journal* 24 (1915): 639. For the controversy surrounding the Act, see Judson A. Crane, "The Uniform Partnership Act—A Criticism," *Harvard Law Review* 28 (1915): 762–89; William Draper Lewis, "The Uniform Partnership Act—A Reply to Mr. Crane's Criticism," *Harvard Law Review* 29 (1915): 158–92 and 29 (1916): 291–313; Judson A. Crane, "The Uniform Partnership Act and Legal Persons," *Harvard Law Review* 29 (1916): 838–50. Much of the discussion in these articles involves analysis of cases to determine on which view of partnership they proceed.

ed casebooks can also be seen as evidence that Langdell's classroom was dominated by the type of instruction that was the target of criticism by his contemporaries. A few months before he took up his teaching duties at Harvard Law School in the fall of 1874, James Bradley Thayer discussed the situation at Cambridge with Richard Henry Dana, Jr. and found himself in agreement with the older man's criticism of the case method as an inefficient way of imparting knowledge. Thayer believed that "all the advantage that is practicable to be gained from the method of studying cases and a minute examination, comparison & sifting of them" can be had in moot court and through the investigation of particular points.[5] Boston University's law school was founded by disaffected Boston practitioners who found instruction at Harvard "particularly technical and historical" and insufficient preparation for practice.[6] Kimball cites another contemporary criticism that described the cases on forbearance in the contracts case book as having been collected "with an over-scrupulous minuteness" (116, n. 145). In short, this new evidence can certainly be interpreted to show that contemporary criticisms of Langdell's teaching were not baseless. Langdell did spend a great deal of time closely examining judicial opinions. Of course, his contemporary critics misunderstood his reasons for doing so. He wanted his students to learn law from the sources, not secondhand from treatises. They would eventually learn what they needed by finding it themselves; and what they did not learn in school about the mechanics of practice they would learn by working for established lawyers.

Later criticisms of Langdell were very different. Langdell was excoriated for omitting life from legal education, for concentrating, in Holmes's famous phrase, on logic rather than experience. The case method became synonymous not with rigorous instruction in analysis by working through primary sources, but with indoctrination in a bloodless view of law that was a short step from an amoral view of law, which, in turn, lived next door to a view of the lawyer as the hired gun for the wealthy and powerful. In our own day, of course, Langdell and everything he is assumed to have stood for is set in opposition to a legal education based on skills and the experience of "lawyering." The Langdell revealed in the annotations is deeply concerned with the technical details of pleading and in that way looks a bit like the Langdell of legend.

Consider the colloquy about accounts annexed and Langdell's laughter. There does appear to have been a New England custom involving annexing accounts to pleadings, which may have also involved the use of the

5. James Bradley Thayer, Memorandum Book B, January 1874, Harvard Law School Library, reprinted in Mark DeWolfe Howe, "The First Law School Lecture of James Bradley Thayer, Preliminary Note," *Journal of Legal Education* 2 (1949): 2.

6. George Swasey, "Boston University Law School," *Green Bag* 1 (1889): 55.

common counts.[7] Perhaps both of the comments attributed to students in the reconstruction (97) were correct. Why then did Langdell laugh? Was he amused by students who knew only part of the story and confidently asserted they knew it all? Was he so pleased at his students' enthusiasm that he laughed out of pure pleasure? We shall never know.

More challenging is the larger question. What did Langdell think he would accomplish by spending so much time on the historical development of equity practice? He believed that there were "true" theories. For example, he maintained that "allowing *indebitatus assumpsit* for money had and received to lie upon an obligation to account, involves one of two false assumptions" about the pleading system.[8] He devoted most of his article on the Circuit Court opinion in the *Northern Securities Case* and the Sherman Act to illustrating the iniquity of the court's decree, unsanctioned by principles of equity or the statute itself.[9] Surely Langdell believed his studies were important to the working of law, but the importance is not as clear to us as it was to him and his contemporaries.[10]

In recent years, scholars have attempted to find a more balanced and sophisticated view of Langdell and his relationship to American legal thought and legal education.[11] As that task continues, the sources Kimball has uncovered and his meticulous work in assembling Langdell's bibliography and reconstructing the chronology of his career will play an indispensable role.

7. Emory Washburn, *Sketches of the Judicial History of Massachusetts from 1630 to the Revolution in 1773* (Boston, 1849; reprt. New York, 1974), 190; William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, 1975), 201, n. 73. On the practice of suing on book accounts in colonial Connecticut, see Bruce H. Mann, "Rationality, Legal Change, and Community in Connecticut, 1690–1760," *Law and Society Review* 14 (1980): 187–221.

8. C. C. Langdell, "Brief Survey of Equity Jurisdiction, Part IV," *Harvard Law Review* 2 (1889): 256. Compare Ames's treatment of the same subject, J. B. Ames, "The History of the Assumpsit. II—Implied Assumpsit," *Harvard Law Review* 2 (1888): 66–69 where the growing use of assumpsit is celebrated as an illustration "of the flexibility and power of self-development of the Common Law." On the influence of Ames's scholarship in this area, see J. H. Baker, *An Introduction to English Legal History* (3d ed.; London, 1990), 424–25.

9. C. C. Langdell, "The Northern Securities Case and the Sherman Anti-Trust Act," *Harvard Law Review* 16 (1903): 539–54.

10. At least one student of the subject believed that Langdell's theory "that equity is only a system of remedies" led to pernicious results. Charles Andrew Huston, *The Enforcement of Decrees in Equity; Harvard Studies in Jurisprudence* (Cambridge, 1915), 1:152.

11. For example: Thomas Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1983): 1–53; John Henry Schlegel, "Langdell's Legacy Or, The Case of the Empty Envelope," *Stanford Law Review* 36 (1984): 1517–33; William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York, 1994); Neil Duxbury, *Patterns of American Jurisprudence* (Oxford, 1995), 10–25; Paul D. Carrington, "Hail! Langdell!" *Law & Social Inquiry* 20 (1995): 691–764 and the *Commentaries* by William P. LaPiana, John Henry Schlegel, and Laura Kalman, ibid., 761–73.