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LANGDELL'S CONCEPT OF LAW AS SCIENCE: THE BEGINNING OF ANTI-FORMALISM IN AMERICAN LEGAL THEORY

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INTRODUCTION

The caricature we have of Christopher Langdell shows him as an arid conceptualist, a "brilliant neurotic" whose spirit choked legal education;[1] or not even that: "an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius."[2] Having said that law should be

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I thank Paul Brest for honest criticism and kind encouragement; mistakes that are left are my own.

1. Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1303-04 (1947).

By "conceptualism" I mean that approach to law which assumes the existence of a rationally connected scheme of preexisting and unchanging, true, rules of law that are discoverable by judges. Conceptualism is antithetical to positivism (which says that individual cases comprise rules of law in the form of predictions of future case results). Conceptualism is anti-empirical (a method that views legal principles as hypotheses, always subject to revision). Conceptualism deals in fixed absolutes, which refer only to each other in a self-contained system—the Law.

Gilmore sets up Christopher Langdell as the arch-conceptualist, and portrays "Langdellianism" as starting from the assumption that

> the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor corrections can be made, but the truth, once arrived at, is immutable and eternal.

G. GILMORE, THE AGES OF AMERICAN LAW 62 (1977).

2. G. GILMORE, *supra* note 1, at 42.

studied by way of cases, piercing them for principles,[3] Langdell was jokingly called a "legal theologian."[4] Having said that the lawyer's library was his research laboratory and that the university was a proper place for legal study, Langdell came to be seen as a dry logician, "divorced from society and life."[5] Such a Langdell was a wonderful formalist target for the skeptical Realists who sought to apply the behavioral sciences to law and for those who stressed the dynamism of the legal process in society.[6] Not only has the memory of Christopher Columbus Langdell suffered from this distorted exaggeration, but so has our understanding of American legal thought.

For the people who lived in the late nineteenth century, science was anything but a superstructure of absolute natural laws. In 1849 Darwin had declared that species originate by chance variation—evolution—and this idea was widely embraced by scientists and lay persons alike. Empiricism and the formulation of working hypotheses prevailed as the scientific method, replacing the monistic notion of a rationally connected universe.[7]

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3. *Id.* at 43; Hurst, *Changing Responsibilities of the Law School: 1869-1968*, 1968 WISC. L. REV. 336, 336 (1968).

4. Holmes, Book Review, 14 AM. L. REV. 233, 234 (1880).

5. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 535 (1973).

6. *See* Gilmore, *Legal Realism: Its Causes and Cure*, 70 YALE L.J. 1037, 1038 (1961); Hurst, *supra* note 3, at 336.

Samuel Williston describes the Realists in this way:

> The revolt against the method sponsored by Langdell as a means of prophetic determination of the law took a more emphatic form in recent years, in the writings of a group of legal thinkers, who with the zeal of new discoverers called themselves "realists" and called those "conceptualists" who seemed to them to lay too great stress on general principles. The new zealots were clear that the results achieved in litigation not only were not but should not be always what deduction from rules discovered from earlier decisions would lead one to expect. The so-called realists did not all think alike, and in the use of names for themselves and for others they were sometimes guilty of the fault that they most objected to—a too inclusive generalization.

S. WILLISTON, LIFE AND LAW 209-10 (1940).

I use "formalism" in the same sense that I use "conceptualism." *See* note 1 *supra*.

7. G. MEAD, MOVEMENTS OF THOUGHT IN THE NINETEENTH CENTURY 160-61 (M. Moore ed. 1936).

See generally NINETEENTH-CENTURY AMERICAN SCIENCE (G. Daniels ed. 1972); G. DE SANTILLANA, THE DEVELOPMENT OF RATIONALISM AND EMPIRICISM (1941); E. BURTT, THE METAPHYSICAL FOUNDATIONS OF MODERN PHYSICAL SCIENCE (rev. 2d ed. 1932).

If we look at Langdell in this late-nineteenth-century context, the caricature of "Langdellianism" begins to crumble. In keeping with the spirit of his age, he entreated law students to go to the original sources of law and apply the scientific method. He refused to lecture (thereby implicitly rejecting the notion that a professor could impart knowledge of the law via fixed, true maxims), instead inviting students to journey with him through the sea of cases. The principal occupation in his classroom was the endeavor to extract the essences of judicial opinions and to discern patterns among them. Nothing that he did or said was inconsistent with the positivist approach to law that sees rules as constructs of cases and predictions of future decisions.[8] Langdell never directly said so, but he may have ascribed to organicism; Langdell may have been asserting that the law grows and develops by cases which we perceive in configurations, but which have nothing to do with an immutable absolute.[9]

The crystallized picture of Langdell as a formalist believer in true, discoverable legal order obscures the empirical Langdell, who threw over dry lectures and fixed maxims in favor of reading and discussing cases—a learning approach more akin to the everyday practice of law. If he was not the very first legal realist, Christopher Langdell must at least be seen as the bridge from formalism

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8. By "positivism" I mean that approach to science, and to law, that uses an experimental method and assumes an openness to the replacement of old hypotheses or principles by new ones that are constructed from concrete data (cases), not deduced from preestablished absolute laws, or Law.

The most famous exposition of the positivist approach was by Oliver Wendell Holmes, who said: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," for "a legal duty so called is nothing but a prediction that if a [person] does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458, 461 (1897).

9. The order achieved by [Langdellian] legal scientists was . . . not intended to be static. Once a principle had been extracted, refined, and applied, it was not frozen forever. This perception was not emphasized in early scientific scholarship, but it ultimately emerged. Behind the scientists' sense that legal principles were capable of change lay a faith in the existence and value of "evolution" or "progress."

White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213, 229 (1978).

to what came later in American legal theory.[10]

I. PRE-LANGDELL LEGAL EDUCATION

The earliest American method of learning law was to apprentice in the office of a colonial practitioner. In 1779, the first professorship of law was established at the College of William and Mary, and in 1784, Judge Tapping Reeve expanded his law practice into the Litchfield Law School. But apprenticeship remained the basic avenue to the legal profession until about 1850.[11]

After the Civil War, colleges and universities assumed most of the responsibility for legal instruction, and their primary teaching method was the lecture. Textbooks were the natural outgrowth of this system, with many professors publishing expanded versions of their lectures.[12]

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10. Contrary to the caricature, formalism did not begin with Langdell. Morton Horwitz points to a "Treatise Tradition" that arose in the 1820s and 1830s, Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 255-56 (1975), and Perry Miller portrayed the 1850s as a time when law was thought to be deductive, P. MILLER, THE LIFE OF THE MIND IN AMERICA 156-64 (1965). The question is whether formalism began to end with Langdell.

11. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 158-60 (1965).

Abraham Lincoln wrote that "the cheapest, quickest and best way" to become a lawyer was to "read Blackstone's *Commentaries*, Chitty's *Pleadings*, Greenleaf's *Evidence*, Story's *Equity Pleading*, get a license and go to the practice and still keep reading." A. Lincoln, *quoted in* J. SELIGMAN, THE HIGH CITADEL 26-27 (1978).

Accounts of early American legal education appear in: Cohen, *Thomas Jefferson Recommends a Course of Law Study*, 119 U. PA. L. REV. 823, 839-44 (1971); Cullen, *New Light on John Marshall's Legal Education and Admission to the Bar*, 16 AM. J. LEGAL HIST. 345 (1972); E. Swanson, Tapping Reeve (pamphlet at Tapping Reeve's house and law school in Litchfield, Connecticut); Northrup, *The Education of a Western Lawyer*, 12 AM. J. LEGAL HIST. 294 (1968). *See also* L. FRIEDMAN, *supra* note 5, at 525-27.

12. There may not, however, be such a simple causal chain from lectures to textbooks. The first textbooks in England and America were used by practitioners and the apprentices in their offices, supplemented by reading case reports. As the numbers of cases grew, they were digested into new textbooks. When law schools arose, some of them prided themselves on providing independent analyses in lecture form. "It was impossible, however, to ignore textbooks, especially Blackstone; and when the lecturers began themselves to publish, their schools drifted back to the use of texts." Both lectures and texts "possessed . . . the characteristic that the student was encouraged and obliged to take the lecturer's or text writer's word that the principles had been correctly derived from the decisions." A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 377 (Carnegie Found. for the Advancement of Teaching Bull. No. 15 1921).

> In the Harvard Law School before 1870, as well as in other law schools, law was taught from treatises and from lectures. The authors of the treatises and the lecturers gained their knowledge from the reported decisions of the courts. The knowledge thus acquired was retailed at second hand to the students. There was little disposition to question the validity of precedents or to compare the logical consistency of decisions in one category with decisions in other categories.[13]

Students were required to take notes while the professor read to them, or they were quizzed on the specific portions of the textbook that had been assigned for memorization.[14] General discussion was rare, for it "was assumed that the author of the textbook had examined the subject and had found out the true rules of law relative thereto. Thus the rules were given . . . [and] it was assumed that these rules were right."[15]

The increasing number of judicial decisions in the nineteenth century may have urged law teachers to simplify for their students the undigested material of the law.[16] The "Treatise Tradition" that arose in the 1820s and the 1830s is said to have sprung from the belief that law proceeds according to reason, not by will. "Through its 'black letter' presentation of supposed 'general principles' of law it sought to suppress all controversy over policy while promoting the comforting ideal of a logical, symmetrical and, most importantly, inexorable system of law."[17] A combination of these forces, perhaps, insured the domination of treatises and lectures in the

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13. S. WILLISTON, *supra* note 6, at 198.

14. J. REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 7-8 (Carnegie Found. for the Advancement of Teaching Bull. No. 8 1914); Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 498 (1920).

15. Fessenden, *supra* note 14, at 500.

> Such of the students as attended [the lectures] and did not read a newspaper meanwhile might hear in a pleasant, informal way the rule of law on almost any given point. Such of them as attended, or at any rate paid their term-bills, for eighteen months, received the LL. B. as a sort of reward of constancy. To an occasionally expressed doubt of the actual legal ability represented by such a degree the answer was ready: "Can't you take the word of a gentleman that he has learned the law?"

Batchelder, *Christopher C. Langdell*, 18 GREEN BAG 437, 437 (1906).

16. *See* note 12 *supra*.

17. Horwitz, *supra* note 10, at 255-56. *See also* P. MILLER, *supra* note 10, at 156.

classroom of legal education until 1870.

Toward the last third of the nineteenth century, many people were unhappy with legal training at Harvard. Among them were Oliver Wendell Holmes, Jr., and Arthur Sedgwick, who wrote in the 1870 *American Law Review*:

> For a long time the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts. . . . So long as the possession of a degree signified nothing except a residence for a certain period in Cambridge or Boston, it was without value. . . . "The object of a law department is not precisely and only to educate . . . practising lawyers, . . . [but] to furnish all students who desire it the same facilities to investigate the science of human law, theoretically, historically, and thoroughly, as they have to investigate mathematics, natural sciences, or any other branch of thought."[18]

Holmes, for example, had received a law degree in 1866 from Harvard "after three terms of unrequired and, therefore, casual attendance at lectures."[19] A course of study was suggested, not prescribed, by the faculty, and most legal instruction revolved around the extensive and intensive reading of treatises. There were no examinations, no graduation requirements, and many, like Holmes, did not even complete the normal two-year course. This situation alarmed the Board of Overseers, which reported in 1869 that the " 'whole subject' " of the " 'condition and prospects of the Law School . . . should be carefully considered by a committee so constituted as fully to represent and command the respect of the legal profession.' "[20]

Harvard seemed to have stagnated in self-satisfaction. Between 1849 and 1869, no changes were made in the catalogue as to entrance, course of study, and degrees, and there is no record of

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18. 5 AM. L. REV. 177 (1870).

19. M. HOWE, JUSTICE OLIVER WENDELL HOLMES, THE SHAPING YEARS, 1841-1870, at 204 (1957).

20. 2 C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 358-59 (1908) (quoting 1869 Report of Harvard University Board of Overseers).

even a single faculty meeting.[21] The three professors, Parker, Parsons, and Washburn, lectured well but unimaginatively.[22] By 1870, Harvard Law School was ripe for pedagogical and structural change. The overseers' report prompted the resignation of the sixty-three-year old Dane Professor, Parsons, who admitted that after twenty-one years he could not accommodate the clamored-for reforms. A large measure of anticipation surrounded the selection of his successor: Christopher Columbus Langdell.

II. C.C. LANGDELL, THE NEW DANE PROFESSOR AND THE FIRST DEAN OF HARVARD LAW SCHOOL

Christopher Langdell was the choice of the new young president of Harvard, Charles W. Eliot, because Langdell "clearly . . . had in mind some reform in legal education, some reconstruction of the Law School" which Eliot "much wished to hear about, having some visions of [his] own about educational reform."[23] The obscure, "bookish New York lawyer"[24] had come to Eliot's attention when he was an undergraduate studying the physical sciences and Langdell was research assistant for *Parsons on Contracts*. Eliot recalled:

> He was generally eating his supper at the time, standing up in front of the fire and eating with good appetite a bowl of brown bread and milk. I was a mere boy, only eighteen years old; but it was given to me to understand that I was listening to a man of genius. In the year 1870, I recalled the remarkable character of that young man's expositions, sought him in New York, and induced him to become Dane Professor. So he became Professor Langdell. . . . He told me that law was a science: I was quite prepared to believe it. He told me that the way to study a science was to go to the original sources. I knew that was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscien-

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21. HARVARD LAW SCHOOL ASSOCIATION, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917, at 22-23 (1918) [hereinafter cited as CENTENNIAL HISTORY].

22. A. SUTHERLAND, THE LAW AT HARVARD, A HISTORY OF IDEAS AND MEN, 1817-1967, at 158-59 (1967).

23. Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 518 (1920).

24. E. GRISWOLD, LAW AND LAWYERS IN THE UNITED STATES 51 (1964).

> tious student of science is never to take a fact or a principle out of second hand treatises, but to go to the original memoir of the discoverer of that fact or principle.[25]

Christopher Langdell was relatively unknown to the Boston bar and he had not published any treatises, so "[c]uriosity battled with astonishment"[26] when it was announced on January 6, 1870, that the Corporation of Harvard University had appointed Langdell to be the new Dane Professor, at the insistence of President Eliot.

Christopher Langdell was born in the small farming town of New Boston, New Hampshire, in 1826. His mother died when he was seven years old, so he lived with different families, worked in the summer, and went to the district school in winter. He entered Exeter in the spring of 1845 and worked his way through with the aid of his two sisters, and later, a scholarship. Exeter was to him, he said, "the dawn of the intellectual life."[27]

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25. Speech by C. Eliot, Harvard Law School Ass'n Dinner (Nov. 5, 1886), *quoted in* 2 C. WARREN, *supra* note 20, at 560-61, *and* A. HARNO, LEGAL EDUCATION IN THE UNITED STATES 55-56 (1953).

> It is well known that it was President Eliot, the great second founder of Harvard, who, on his own initiative and through his own insight, singled out Langdell, a hitherto obscure New York lawyer, to be the reformer of the Harvard Law School, and at the very beginning of his presidency put through the appointment in the face of very real obstacles. . . . To an enthusiastic scientist like Eliot it was an illuminating and attractive idea, this favorite one of Langdell's, that the law ought to be studied from its own concrete phenomena, from law cases, in the same way that the laws of the physical sciences are derived from physical phenomena and experiments. He was ready to subscribe to the theory that just as the laws of physical science, so here the principle, the rule, should be derived and taught in a purely inductive manner.

J. REDLICH, *supra* note 14, at 15.

26. Batchelder, *supra* note 15, at 437.

> Who was he? Few could remember even the name. A searching of old college catalogues revealed it among the undergraduates in the sophomore class of 1849. Also he appeared to have been for three successive years, 1851-54, in the senior class of the Law School and its librarian. He had not received the A.B., but an LL.B. in 1853. He was unknown to the Boston bar, though it was understood he had practised in New York City. He had held no public station. He had made few friends in Cambridge. And he had published no text-books!

Id. at 437-38.

27. C. Langdell, *quoted in* CENTENNIAL HISTORY, *supra* note 21, at 225.

Langdell entered Harvard College in 1848 as a fresh-soph, but left after little over a year, partly for pecuniary reasons and partly because he was eager to get on with his legal education. He acted as a private tutor for a few months and then returned to Exeter and studied law for eighteen months with a law firm. Someone who knew him then recalled: "One noon when we returned from the Academy, a young man was sawing wood in the back yard, and was at the same time reading a law book that lay upon a pile of wood before him. That was Langdell."[28]

In 1851, Langdell entered the Harvard Law School and stayed three years, acting as student librarian and assistant to Professor Parsons in his work on his contracts treatise. He was said to have had "almost fanatical and somewhat contagious enthusiasm as a student."[29] A colleague reminisced:

> Under his auspices there were a dozen of us who clubbed together. There I saw his "case system" in the making, although at the time I did not realize it. Over our sausage and buckwheat, or whatever it was, we talked shop, nothing but shop, discussed concrete cases, real or hypothetical, criticised or justified decisions, affirmed or reversed judgments. From these table-talks I got more stimulus, more inspiration, in fact, more law, than from the lectures of Judge Parker and Professor Parsons.[30]

For more on the life of Langdell, see J. Ames, *Christopher Columbus Langdell, reprinted in* LECTURES ON LEGAL HISTORY (1913), and a series of articles dedicated to Langdell in 20 HARV. L. REV. 1-13 (1906).

28. *Quoted in* CENTENNIAL HISTORY, *supra* note 21, at 225.

> Though a hard student he was not a brilliant one. He possessd as he afterwards said of himself, "the virtues of a slow mind."
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> . . . For the most part . . . he lived alone, perfecting his reasoning powers as quietly and patiently as the diamond-cutter perfects one by one the facets of the gem that, completed, will dazzle the world.

Batchelder, *supra* note 15, at 438.

29. CENTENNIAL HISTORY, *supra* note 21, at 226.

> [H]e lived in the library by day, and still by night his lamp burned till near the dawning. He was indeed "seeking the fountains" of the law. He browsed among the reports as a hungry colt browses among the clover. The yearbooks in particular enthralled him.

Batchelder, *supra* note 15, at 439.

30. Charles E. Phelps, *quoted in* CENTENNIAL HISTORY, *supra* note 21, at 226.

At commencement in 1854, Langdell received an A.M. *honoris causa.*

He began the practice of law in New York City in December 1854 and spent most of the next sixteen years in the library of the New York Law Institute. Little did he go into court. Indeed, a "narrow winding staircase led from the office of his firm to a room above, which was his private office, and adjoining it was his bedroom."[31] His reputation was that of an industrious worker and brilliant briefwriter: "when the triumphant advance of opposing counsel was turned to rout by a sudden pitfall in the pleadings or an unexpected ambush in the argument, the well-informed would mutter, 'Damn it, Langdell's at the bottom of this somewhere!' "[32] The Harvard position was offered to him when he was forty-four years of age, and he took it as an opportunity to apply to legal education the same painstaking thoroughness that he brought to law study and law practice.

Almost upon his arrival at Harvard, Christopher Langdell was made the first Dean of the Law School. A new university rule required that each professional school elect a dean from among its faculty to keep its records and prepare its business. President Eliot later recalled that the faculty meeting to select the law dean was "rather an awkward one."[33] Deans were "rather recent creations in Harvard University" and no one knew whether the functions of the office were "chiefly clerical and eleemosynary or not."[34] Professors Washburn and Nathaniel Holmes declined to serve; that left Langdell, the only other faculty member.

> Professor Langdell himself said nothing. Professor Washburn, after explaining his complete ignorance of such matters, moved that Professor Langdell be elected Dean. This motion was carried by the votes of Professors Washburn and Holmes, Professor Langdell not voting. Then began in 1870 a process of conservative experimentation and construction in the Law

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31. CENTENNIAL HISTORY, *supra* note 21, at 227.
32. Batchelder, *supra* note 15 at 439.
33. Eliot, *supra* note 23, at 519.
34. *Id.*

> School. . . .[35]

And so it was that Harvard Law School's newly-drafted professor fell into the deanship.

III. What Langdell Said

"It is better to go up to the wellsprings than to follow rivulets downhill."[36] Christopher Langdell chose this maxim from Coke to adorn the flyleaf of the now-famous book he published in 1871, *A Selection of Cases on the Law of Contracts.* Langdell believed that judicial reports were the original sources of the common law and one could best tap its substance by reading them firsthand. Langdell therefore presented a selection of cases, devoid of headnotes or annotations as primary material that students could use in preparing for class.

Professor Langdell explained the design of his new book by recounting its genesis:

> I entered upon the duties of my present position, a year and a half ago, with a settled conviction that law could only be taught or learned effectively by means of cases in some form. I had entertained such an opinion ever since I knew anything of the nature of law or of legal study; but it was chiefly through my experience as a learner that it was first formed, as well as subsequently strengthened and confirmed. Of teaching indeed, as a business, I was entirely without experience; nor had I given much consideration to that subject, except so far as proper methods of teaching are involved in proper methods of study.[37]

He decided that the best way to systematically instruct large classes was to focus attention on a series of cases as "the subject alike of study and instruction."[38] Through this device, all the pupils and the professor would be engaged in a common pursuit; the required preparation would yield "the greatest and most last-

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35. *Id.*
36. *Melius petere fontes quam sectari rivulos.*
37. C. Langdell, A Selection of Cases on the Law of Contracts at v (1871).
38. *Id.* at v-vi.

ing benefit";[39] and class time would be of greater advantage than private study. To facilitate this method of teaching, Langdell devised the casebook.[40]

As an editor, Langdell chose cases to illustrate the growth and development of principles and doctrines comprising the "science" of law:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.[41]

A relatively small number of cases could chart the unfolding of the

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39. *Id.* at v.

40. Redlich reported that Langdell's

> pioneer work was soon revised and followed by many such case-books, until, ultimately, there arose in America a whole great literature of this sort, at present including pretty nearly the whole domain of private, criminal, and constitutional law and the law of procedure, with the various institutions and natural divisions of the law more and more specialized and differentiated.

J. REDLICH, *supra* note 14, at 12.

Actually, Zephaniah Swift of Connecticut is said to have published the first casebook in the United States in 1810. It was a 174-page treatise on evidence with a 68-page appendix containing the principle cases. And John Norton Pomeroy taught by cases at New York University between 1865 and 1867. "But case study and case instruction as an exclusive, all-absorbing educational method came in with Langdell." A. HARNO, *supra* note 25, at 54.

John Barnard Byles of England emphasized the importance of studying law as the judges themselves declared it as early as 1829. Alfred Reed used this as a reminder "that not literally all good things are first thought of in Cambridge." A. REED, *supra* note 12, at 372.

But Williston was of the view that Langdell revolutionized not only law study, but the study of many other subjects as well. S. WILLISTON, *supra* note 6, at 199. *See also* A. SUTHERLAND, *supra* note 22, at 176 n.19 ("The Harvard Medical School now furnishes a beginner in the study of histology with his own collection of microscope slides, which he can carry away and study with his own microscope.")

41. C. LANGDELL, *supra* note 37, at vi.

law because many cases involve similar principles and "the number of fundamental legal doctrines is much less than is commonly supposed."[42]

Did Langdell use "science" in the late-nineteenth-century evolutionist/organic sense? What were these fundamental principles of which he wrote; were they ineluctable truths? And why were they fewer in number than most thought?

Langdell's reference to the principles or doctrines of the science of law has been taken as an indication of formalism, belief in an inexorable superstructure of discoverable legal absolutes.[43] His casebook has been criticized for being closed and narrow, consisting mostly of old English cases.[44] But at the same time, Langdell wrote of a growth of doctrine by cases over the centuries. He seems to have been most concerned to make the point that cases should be pierced for principles that could then be applied to "the ever-tangled skein of human affairs."[45] Langdell appears to be advocating both the quest for unchangeable legal truths and the search for patterns of cases that constantly reshape themselves as new cases are decided: there is a tension in the casebook's preface between Langdell as formalist and Langdell as organicist.

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42. *Id.*

> [T]he most startling and most fruitful of the changes introduced by Langdell was the innovation in the mode of teaching and studying the law. The lawyer bases his brief, and the judge his opinion not upon treatises but upon careful study of the reports of decided cases. Langdell maintained that the law student should pursue this same method; and that collections of cases upon the different branches of the law, arranged systematically and in such order as to exhibit the growth and development of legal doctrines, should be analyzed and discussed by pupil and teacher in the class room.

Ames, *supra* note 27, at 478.

43. G. GILMORE, *supra* note 1, at 64.

44. *See, e.g.*, A. HARNO, *supra* note 25, at 52-53, 137, 143; J.W. HURST, THE GROWTH OF AMERICAN LAW 265-66 (1950); Frank, *supra* note 1, at 1303-04; L. FRIEDMAN, *supra* note 5, at 535; A. REED, *supra* note 12, at 378-80; Book Review, 5 S.L. REV. (n.s.) 872 (1879).

But Williston suggested that Langdell focused on English cases "both because a thorough study of any fundamental legal principle in American law necessarily must go back to the English cases and because they were the one great common factor in the basic law of all the states." S. WILLISTON, *supra* note 6, at 200.

45. C. LANGDELL, *supra* note 37, at vi.

An after-dinner speech given in 1886 before the Harvard Law School association on the occasion of Harvard's 250th anniversary was the next—and the only other—time[46] that Langdell publicly articulated his ideas about the study of law. Law, he said, should be taught and studied in universities, as it is done in "the rest of the civilized world" aside from the English-speaking countries.[47] He had tried to do his part "towards making the teaching and the study of law [at Harvard Law School] worthy of a university . . . and the law school not the least of its departments."[48]

> To accomplish these objects, so far as they depended upon the law school, it was indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books. If law be not a science, a university will consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it. Again, law can only be learned and taught in a university by means of printed books.[49]

Langdell said that, if books are the ultimate source of all legal knowledge, then only the university could afford the facilities for teaching and learning law.[50]

Here we see another tension, between Langdell as legal theologian and Langdell as the practitioner, the briefwriter. Langdell told students to do what judges and lawyers do—read cases; but he distinguished the science of law from handicraft when he chose university legal study over apprenticeship. Perhaps by "handicraft" Langdell meant pleading, making motions and the like,

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46. CENTENNIAL HISTORY, *supra* note 21, at 230-31; E. BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 67 (1938).

47. C. Langdell, *reprinted in* 21 AM. L. REV. 123, 123 (1887) *and* 3 L.Q. REV. 118, 123 (1887).

48. 21 AM. L. REV. at 123, 3 L.Q. REV. at 123-24.

49. 21 AM. L. REV. at 123, 3 L.Q. REV. at 124.

50. 21 AM. L. REV. at 124, 3 L.Q. REV. at 124.

without contemplation of the principles underlying judicial decisions. His plea was for recognition of both the importance of legal theory and the necessity of devising a practical mode of law study. Law was for him an applied empirical science that unfolded case by case.

IV. How Langdell Taught

Charles W. Eliot described Langdell's new method of teaching with admiration: "He tried to make his students use their own minds logically on given facts, and then to state their reasoning and conclusions correctly in the classroom."[51] First, the Dane Professor led his students to exact reasoning and exposition by his own example; then he gave them "abundant opportunities for putting their own minds into vigorous action, in order, first, that they might gain mental power, and, secondly, that they might hold firmly the information or knowledge they had acquired."[52] Essentially active, the mode of instruction did not emphasize absorption of information from a book or a teacher; it was a constant "giving-forth."[53]

Christopher Langdell's new method was an outgrowth of his philosophy of legal education:

> I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law is . . . not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in

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51. Eliot, *supra* note 23, at 523.

52. *Id.*

53. *Id.* at 524.

> Professor Langdell's method resembled the laboratory method of teaching physical science, although he believed that the only laboratory the Law School needed was a library of printed books. His case system has been widely applied in this country to the teaching of clinical medicine and surgery, as a useful addition to the ordinary practice of teaching those subjects at the bedside of actual patients.

Id.

> using law, but experience in learning law . . . .[54]

Langdell felt that the law teacher and the law student should work together through the reports of judicial decisions. The law library, their "proper workshop," should be the object of their "constant solicitude": "it is to us all what the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists."[55] These were the ideals that Langdell strove to meet when he undertook the Dane Professorship.

A new sentence was added to the Harvard Catalogue for 1870-71. It said that each instructor would adopt the mode of instruction "as in his judgment will best advance the pupil in his course."[56] The rumor spread at the opening of the fall term that the new professor had a wholly new plan and that he had been collecting cases for a book to be used in the course. Curiosity having thus been raised, almost all the school turned out on the first day:

> The class gathered in the old amphitheatre of Dane Hall—the one lecture room of the School—and opened their strange new pamphlets, reports bereft of their only useful part, the headnotes! The lecturer opened his.
>
> "Mr. Fox, will you state the facts in the case of Payne *v.* Cave?"
>
> Mr. Fox did his best with the facts of the case.
>
> . . . .
>
> "Mr. Adams, do you agree with that?"
>
> And the case-system of teaching law had begun.
>
> Consider the man's courage. . . . Langdell . . . was the David facing a complacent Goliath of unshaken legal tradition reinforced by social and literary prejudice. His attempts were met with the open hostility, if not of the other instructors, certainly of the bulk of the students. His first lectures were followed by impromptu indignation meetings.—"What do we care whether Meyers agrees with the case, or what Fessenden

54. 21 AM. L. REV. at 124, 3 L.Q. REV. at 124.
55. *Id.*
56. 2 C. WARREN, *supra* note 20, at 372.

> thinks of the dissenting opinion? What we want to know is: What's the *Law*?"[57]

This novel approach displeased most students: the first term all but seven students dropped Langdell's Contracts class; the average yearly enrollment at the law school declined from 136 in 1870-71 to 113 in 1872-73.[58] Indeed, the "situation made anxiety at Cambridge,"[59] and Professor Langdell waited with President Eliot for acceptance of his method.[60] The turning point came in 1873-74,[61] and by 1890 Harvard Law School was flourishing and Langdell's techniques were spreading to other universities.[62]

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57. Batchelder, *supra* note 15, at 440.

Fessenden reports that Langdell's questions baffled the students, who had not read the cases critically and had not presumed to form opinions of their own. "It was to learn rules of law that they had come to the School."

> Langdell asked more and more questions. As it now comes to the memory of one who was present, there was a series of admirable, analytical inquiries. At the time, the general judgment of the students was that it was a childish performance; for nearly all, if not all, failed to see at the beginning that the method was to analyze the case closely and to extract the essential elements, and in this way to grasp the real legal principles involved . . . . By far the greater number openly condemned the new way. . . . Yet there were a few who felt a quickening of their zeal, who were certain that they had received an impulse, who insisted that they got "something which somehow lasted. . . ."

Fessenden, *supra* note 14, at 499-500.

58. A. SUTHERLAND, *supra* note 22, at 180-81. Other factors that contributed to the decline of enrollment are: heightened standards of scholarship as a condition for continuance at the school; extension to two years of the time required to earn the degree; substantial increase in tuition; appointment of James Bart Ames (who used Langdell's method) as an instructor when he was only a year out of law school. *Id.* at 180. But Williston thought that the decline was "an immediate consequence" of Langdell's change of method and of the requirement of written examinations for securing a degree. S. WILLISTON, *supra* note 6, at 71.

59. Schouler, *Cases Without Treatises*, 23 AM. L. REV. 1, 2 (1889).

The idea behind the 1886 University commemoration at which Langdell spoke "was used to bring up the Harvard Law School once more; . . . and by means of a new association of graduates and a prodigious expenditure of money, a sort of revival was started." *Id.*

"A justice of our highest court predicted that Langdell would ruin the school." Fessenden, *supra* note 14, at 508.

60. Eliot, *supra* note 23, at 524.

61. Fessenden, *supra* note 14, at 510.

62. As teachers of science were slow to put the microscope and the scalpel into the hands of students and permit them to study nature, not books, so we have been fearful of putting reports into their hands and permitting them to

Langdell's method was slow, thorough, ponderous, and deliberate. Cases were analyzed and principles were elucidated, but precious little information was given. Professor Langdell often came back with further questions instead of giving his own opinion in response to inquiries. This approach frustrated most students. And so it is not surprising that violent applause rocked the hall and dust arose from the settee cushions when once he was routed by a student in discussion.[63]

Langdell was gentle, cheerful, painstaking, exact, with a "single-minded desire to get to the root of the matter."[64] Although some criticized his plodding style and emphasis on old cases, he soon acquired a core group of students who praised him for his "quietness of intensive force" and asserted that he really did give them a grounding in contemporary law.[65] A fellow instructor later said that Langdell took up each case in class as if he were seeing it for the first time and that he made discussion that would otherwise have been listless and unprofitable become stimulating and fruitful:

> study the living law. The merit of revolutionizing legal instruction and putting it on a sound basis in this regard belongs solely to Langdell.

R. POUND, THE EVOLUTION OF LEGAL EDUCATION 14 (Sept. 19, 1903).

See E. Wambaugh, *Professor Langdell—A View of His Career*, 20 HARV. L. REV. 1, 3 (1906); Address of Professor William A. Keener, *reprinted in* Harvard Law School Association Report of the Ninth Annual Meeting at Cambridge, June 25, 1895, at 76 (1895); Ames, *supra* note 27, at 479.

63. Fessenden, *supra* note 14, at 501.

The incident happened at the end of the hour, and in the next class, Langdell again took up the question "and treated it most profoundly. Not many appreciated the treat given them; and very few saw that it was a sincere pleasure to him that the students should study the subject so carefully as to be able to put such pregnant questions." *Id.*

Austen G. Fox was one who did appreciate Professor Langdell, and he later wrote in memoriam:

> Your whole nature led you to an unremitting quest after the governing principle in every new set of facts. You drew us with you in this daily search, and taught us not to rest content until we found for ourselves the governing principles of the law. Who can estimate how much we owe, not merely to your instruction, which never suggested the pedagogue, but to that gentle influence which came to us as an emanation?

Fox, *Professor Langdell—His Personal Influence*, 20 HARV. L. REV. 7, 7 (1906).

64. Ames, *supra* note 27, at 479.

65. This was the opinion of Joseph H. Beale, Jr., Beale, *Professor Langdell—His Later Teaching Days*, 20 HARV. L. REV. 9, 10 (1906).

> Professor Langdell was always willing to reconsider a conclusion in the light of new suggestions. . . . A student recently informed me of a course in which Professor Langdell changed his opinion in regard to a case three times in the course of one week, each time advancing with positiveness a new doctrine. That he could do this without losing the respect or confidence of his students shows the esteem in which he was held. . . . To lose confidence in him for changing his position upon a legal proposition would be as absurd as to lose confidence in Charles Darwin if he withdrew a tentative conclusion found to be false after more extended investigation. Professor Langdell studied the law as contained in the reports in the same spirit in which the great scientists study the phenomena of nature.[66]

Toward the end of his life, Christopher Langdell was burdened with increasing blindness, making it necessary for him to resort to lecturing. By then, he had many former students and colleagues to champion his educational reforms. And President Eliot was not alone in thinking that as a man, "he was worthy of all love and reverence."[67]

While there is no necessary connection between Langdell's method and organicism, the case method is akin to the idea that cases group together to form rules of law, with the patterns reformed by the addition of each new case.[68] The student who accepts predigested maxims formulated by others and takes notes from a professor's prepared lecture is more apt to be a passive re-

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66. W. Schofield, *quoted in* 2 C. WARREN, *supra* note 20, at 457.

67. Eliot, *supra* note 23, at 525.

68. Redlich described Langdell's method in organic terms:

> [I]n the method of legal instruction developed by Langdell law is conceived as the expression of social order in judicial form, which begins its separate existence all over again in every single case. Teacher and pupil approach it in the same way, the learner discovering it, under the guidance of the teacher, as a new and original joint creation.

J. REDLICH, *supra* note 14, at 13.

And Peter Teachout suggests that Langdell's method was antithetical to the unitary view of law: "If there is one thing a unitary conception of law cannot tolerate, it is the presence of a critical and independent mind, in the class, say nothing of a classroom full of them." Teachout, *Gilmore's New Book: Turning and Turning in the Widening Gyre*, 2 VT. L. REV. 229, 257 n.98 (1977).

ceiver of information, "the Law." But the student who is asked to look at the similarities and differences of cases—to distinguish fact situations and construct rules—gets a dynamic feel for law and a sense that it develops over time.

Evidence of Langdell's empiricism and organicism is found in the criticism levelled at his method by Simeon E. Baldwin of the Yale Law School. Baldwin said that the law could not be learned "purely from particulars."[69] Texts and lectures were superior because fundamental principles could never be learned by reading cases. "The young man who has learned by heart a legal maxim or definition, of acknowledged authority and unexceptionable phrase, weighing every word, as weigh he must, in order to learn it, has put an arrow in his quiver that he will find his best weapon on a sudden call."[70] A book review of the second edition of *Cases on Contracts* also criticized Langdell's abandonment of maxims; the reviewer said that the chief value of the work was the *Summary of Contracts,* that is, the part that was most like a treatise.[71]

Pedagogically, Langdell's revolution meant that professors and students would be more involved in case scrutiny. For legal theory, the implication seems to have been that law is not a superstructure of rules from which to deduce the proper results of particular cases, but rather that law consists of sets of cases out of which multiple theories constantly spring forth. The quiet, intensive, painstaking man had blown apart some assumptions, and they could never wholly be pieced together again.

V. Science in the Late Nineteenth Century

Darwin published *The Origin of Species* in 1859, and the effect on science and the world was profound. He said that species

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69. Baldwin, *Teaching Law By Cases,* 14 Harv. L. Rev. 258, 259 (1900).

70. Baldwin, *The Study of Elementary Law, The Proper Beginning of a Legal Education,* 13 Yale L.J. 1, 11 (1903).

Baldwin went on to note that Louis Aggassiz used to begin his ichthyology class at Harvard by giving each student a fish and telling him to describe it. "It was not a bad way," Baldwin admitted, but he wondered if its application to law was not like trying to learn algebra "by having quadratic equations flung at us." *Id.* at 12.

71. Book Review, 5 S.L. Rev. (n.s.) 872, 873 (1879).

emerge as the result of minute variations in organisms subject to varying conditions with natural selection taking place. Darwin was thus radical in his denial of purpose in the universe;[72] he pierced the "transcendental brooding of theology" of the eighteenth century.[73]

> In laying hands upon the sacred ark of absolute permanency, in treating the forms that had been regarded as types of fixity and perfection as originating and passing away, the "Origin of Species" introduced a mode of thinking that in the end was bound to transform the logic of knowledge, and hence the treatment of morals, politics, and religion [and of law].[74]

The popularity of the idea that a species—a fixed form and final cause—could originate by evolution signalled the abandonment of mechanical determinism and the rise of the notion that laws are probable and contingent, not immutable.[75]

The three years before *The Origin of Species* was one of the most productive periods of equal length in the entire history of science.[76] Methodologically, also, the middle of the nineteenth cen-

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72. J. BARZUN, DARWIN, MARX, WAGNER 10-11 (rev. 2d ed. 1958).

73. P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 1 (1949).

74. J. DEWEY, THE INFLUENCE OF DARWINISM ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT 1-2 (1910). See B. KUKLICK, THE RISE OF AMERICAN PHILOSOPHY 21-22 (1977) for more on the spread of evolutionary theory.

75. P. WIENER, *supra* note 73, at 29, 200-02; G. MEAD, *supra* note 7, at 157-58.

> The need for unity is a historical fact and, as such, unresolved. It is also a symbol of science, and its myth. Science is a finely defined and articulated system of symbols; but the ultimate symbol, that of unity, can have no referent. Rather, one might say it stands for the totality of the knowable and the unknowable. A confusing situation for the scientific mind, but one it cannot escape. For the conflict at the heart of rationalism is the source of its strength, as long as it lasts.
>
> Once the faith is lost, something else has to be found.
>
> Under the relentless pressure of social change, with the growing operationalism of physical theory and the metaphysical devastations attendent on Darwinism, the myth of unity could no longer hold. It had to be replaced by unification. But with that the status of science is changed and also that of the scientist. The mirror of nature that reason had endeavored to build up through the ages is shattered, and we look for the first time straight out into an unknown world.

G. DE SANTILLANA, *supra* note 7, at 47.

76. P. WIENER, *supra* note 73, at 3 (quoting Charles S. Peirce).

tury was an "orgy of scientific triumph,"[77] due to the convergent effect of the new power for scientific advance that resulted from the ideas of atomicity, organicism, the doctrine of the conservation of energy, and the doctrine of evolution. "Learned dogmatism . . . suffered a heavy defeat"[78] and the "method of invention"[79]—the scientific method—was invented. Science was in the air in the late nineteenth century, and it was a science of empiricism, relativity, contingency, fallibility, and flux.[80]

Darwin's contemporaries recognized themselves in him and openly embraced his ideas.

> [T]he idea that fortuitous events may result in physical law, and further that this is the way in which those laws which appear to conflict with the principle of the conservation of energy are to be explained, had taken a strong hold upon the minds of all who were abreast of the leaders of thought. By such minds, it was inevitable that the *Origin of Species*, whose teaching was simply the application of the same principle to the explanation of another "non-conservative" action, that of organic development, should be hailed and welcomed. . . . [T]he extraordinarily favorable reception [Darwin's theory] met with was plainly owing, in large measure, to its ideas being those toward which the age was favorably disposed . . . .[81]

Neptune was discovered in 1846, as the result of mathematical calculations and telescopic observations; the kinetic theory of gases was devised through statistical calculations of the average or probable net behavior of large numbers of individual particles; in 1847, Joule experimentally determined the mechanical equivalent of heat; in 1849 and 1850, the velocity of light in air was measured and found to diminish in denser media, contrary to the authority of Newton. Microscopes were made available to more American scientists; there were great advances in bacteriology, cytology, embryology, and histology. *See* P. WIENER, *supra* note 73, at 1-2; H. JONES, THE AGE OF ENERGY 331 (1971).

77. A. WHITEHEAD, SCIENCE AND THE MODERN WORLD 142 (1925).

78. *Id.* at 143.

79. *Id.* at 136.

80. P. WIENER, *supra* note 73, at 191.

In the late nineteenth century, the laboratory became the "new setting for science. . . . The rise of the laboratory is one of the great unwritten chapters in the history of science; by the end of the nineteenth century it had become the dominant institutional home of the scientific community in America." G. DANIELS, *supra* note 7, at 35-36.

81. C.S. Peirce, *quoted in* P. WIENER, *supra* note 73, at 3-4.

So Darwin's words fell on welcoming ears. Scientists and nonscientists alike had begun to challenge the "theological fusion of scientific and ethical considerations"[82] and to reject absolutism. American intellectuals of the nineteenth century ranged themselves against formalism, logic, abstraction, deduction, mathematics, and mechanics; instead they emphasized organicism, historicism, and the life of experience.[83]

The dominant methodology of science at the end of the last century was that of research: the observation of facts and the building of hypotheses around exceptions to accepted principles. Divergences of facts from dogma give rise to new hypotheses which last until exceptions to them appear. Thus, the necessary conclusions of science are always hypothetical. "There are no laws of nature which are given in such a fashion that they can be made dogmas. That is, you cannot say that any law is absolute and fixed."[84] Reconstruction of scientific laws is always possible, for none are final.[85]

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82. *Id.* at 17.

83. White, *supra* note 9 at 214-17.

John Dewey believed that the influence of Darwin upon philosophy "resides in his having conquered the phenomena of life for the principle of transition, and thereby freed the new logic for application to mind and morals and life." J. DEWEY, *supra* note 74, at 8-9. By saying that species evolve continually, Darwin emancipated, "once for all, genetic and experimental ideas as an organon of asking questions and looking for explanations." *Id.* at 9.

For Charles Peirce, the Darwinian controversy was "in large part, a question of logic."

> Darwin, while unable to say what the operation of variation and natural selection in every individual case will be, demonstrates that in the long run they will adapt animals to their circumstances. Whether or not existing animal forms are due to such action, or what position the theory ought to take, forms the subject of a discussion in which questions of fact and questions of logic are curiously interlaced.

C. Peirce, *The Fixation of Belief, reprinted in* P. WIENER, ed., CHARLES S. PEIRCE: SELECTED WRITINGS (VALUES IN A UNIVERSE OF CHANCE) 94-95 (1958).

84. G. MEAD, *supra* note 7, at 285.

85. George Herbert Mead illustrated the research attitude of the nineteenth century by his explanation of the sporadic appearance of contagious disease. At one time, scientists assumed that disease was spread by actual contact. To account for the fact that uncontacted people contracted diseases, the theory of microorganism arose. Bacteria could be carried in water or milk or in other ways, transmitting the disease. The postulate that diseases are spread by contact had not been dogma, but a replaceable hypothesis. The research scientist starts with certain postulates which are open for reformulation or replacement. He seeks out problems to solve, instead of rationally deducing explanations for an already-established

Other aspects of the "knowledge revolution" of the nineteenth century that are related to the scientific method, are organicism and classification.[86] Examination of pieces of information over time yields a picture of the development of an area of knowledge, from which principles can be extracted. But unchanging dogma is no part of this picture; there are instead organic patterns.

> Ultimately the scientific method sought classification: a working schema ordering an area of knowledge in accordance with inductively derived principles based on organic research. Given the changing quality of knowledge, classification systems were not absolutes. But they were orderly, organized working systems that approximated truth and reduced an area of knowledge of manageable proportions. The content of classification systems varied from one area to another, but the method by which they were derived could, so long as knowledge was empirically discernible, remain uniform.[87]

Principles or configurations were not seen as static or icily fixed.[88]

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conception of the world. *Id.* at 264-66.

Aristotle said that the nature of heavy bodies was to fall to the center of the earth. From that dogmatic statement, he deduced that the heavier the body, the higher the velocity of the fall. Galileo, using the scientific method, dropped objects of different weights from the top of the tower of Pisa to test his doubt about Aristotle's conclusion. From his data, Galileo set up the contrary hypothesis that the velocities of falling bodies vary with the time of their fall, thus replacing Aristotle's dogma with an experimental theory. *Id.* at 266-67. The late nineteenth century scientific method included "an *empirical* respect for the complexity of existence requiring a *plurality* of concepts to do justice to the diverse problems of mankind." P. WIENER, *supra* note 73, at 191.

86. White, *supra* note 9, at 215, 217.

See also J. HIGHAM, HISTORY 92-94 (1965) describing the turn from romanticism to realism that occurred in the third quarter of the nineteenth century; a "scientific history" arose.

87. White, *supra* note 9, at 218.

Llewellyn believed that Langdell "felt the drive for order earlier than most, and did a cleaner job than almost any, and over an area singularly wide." K. LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS 360 n.324 (1960).

Bruce Ackerman saw in the search for order a "movement toward the rationalization of law," which later took shape in the American Law Institute's Restatements of the Law. Ackerman, Book Review, DAEDALUS, Win. 1974, at 120.

88. Charles Peirce wrote that as he grew up the word "science" "was often in . . . men's mouths, and I am quite sure they did not mean by it 'systematized knowledge,' as former ages had defined it, nor anything set down in a book; but, on the contrary, a mode of life; not knowledge, but the devoted, well-considered life pursuit of knowledge . . . ." C. Peirce, *The Century's Great Men in Science, reprinted in* P. WIENER, ed., *supra* note 83, at 268.

Most nineteenth-century scientists embraced a faith in change as being part of evolution and progress.[89]

VI. Law as a Science

A. *A Subject for University Study*

To insure that law study at Harvard would be "regular, systematic and earnest, not intermittent, desultory or perfunctory," Dean Langdell instituted a number of changes: entrance exams were required for those who had not been graduated from college; a three-year curriculum was prescribed for the degree; an order for law courses was established; examinations had to be passed each year for admission to the next year; and, the amount of instruction given by the professors each week was increased from ten hours to thirty hours.[90] The plan was to make the study of law a professional education in a dignified field of knowledge.

When Christopher Langdell called law a science, one thing that he was saying was that it is an intellectual discipline worthy of a place in the university.[91] In the nineteenth century, the American college was being transformed into the university that housed independent specialized schools.[92] Under the direction of Charles William Eliot, Harvard became a frontrunner among these institutions of learning;[93] and under Christopher Columbus Langdell, Harvard Law School became the pacesetter for American legal

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89. White, *supra* note 9, at 229.

90. 21 Am. L. Rev. at 124.

Langdell's changes had great impact on legal education in the United States. E. Griswold, *supra* note 24, at 51. For details, see 2 C. Warren, *supra* note 20, at 354-78.

91. Dicey, *The Teaching of Law at Harvard*, 13 Harv. L. Rev. 422, 423-24 (1900):

> The Professors of Harvard have, throughout America, finally dispelled the inveterate delusion that law is a handicraft to be practised by rule of thumb and learned only by apprenticeship in chambers or offices; they have convinced the leaders of the Bar that the Common Law of England is a science, that it rests on valid grounds of reason, which can be so explained by men who have mastered its principles as to be thoroughly understood by students whose aim is success in the practice of law.

See also L. Friedman, *supra* note 5, at 536; J.W. Hurst, *supra* note 44, at 263, 270; Centennial History, *supra* note 21, at 71-72.

92. J.W. Hurst, *supra* note 44, at 268.

93. B. Kuklick, *supra* note 74, at 129-31. *See also* J. Redlich, *supra* note 14, at 17.

education.[94]

B. *The Case Method as a Scientific Method*

Like Galileo starting with doubts about Aristotle's dogma, the Langdellian legal scientist starts with cases that posit rules of law and principles based upon precedent. He then reads new cases, and by observing exceptions and looking at the resemblance of reasonings, he derives new rules or recasts the old. Sir Frederick Pollock once declared that no person

> has been more ready then Mr. Langdell to protest against the treatment of conclusions of law as something to be settled by mere enumeration of decided points. Decisions are made; principles live and grow. This conviction is at the root of all Mr. Langdell's work,, and makes his criticism not only keen but vital. Others can give us rules; he gives us the method and the power that can test the reason of rules.[95]

James Barr Ames, Langdell's student (who later taught by the

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94. [V]irtually no one today challenges the propriety of the law school's place in the university. The achievement is Langdell's greatest contribution to both legal education and legal history. . . . He made it an inductive science at a time when the idea of a university, and indirectly knowledge itself, was being similarly secularized in terms of the scientific method.

Woodward, *The Limits of Legal Realism; An Historical Perspective,* 54 VA. L. REV. 689, 715-16 (1968).

In 1903, Roscoe Pound said that

> Harvard was the pioneer in almost all of the improvements that recent years have brought about. . . . [I]n little more than one hundred years, the American law school has grown into a true teaching school, with an ample course, suitable requirements for admission, adequate tests for graduation, and scientific methods of instruction.

R. POUND, *supra* note 62, at 8.

95. Sir Frederick Pollock, reprinted in 1895 Harvard Association, *supra* note 62, at 17.

Professor J.C. Gray of Harvard Law School thought that one of the advantages of the case method was that it

> accustoms the student to consider the law not merely as a series of propositions having, like a succession of problems in geometry, only a logical interdependence, but as a living thing, with a continuous history, sloughing off the old, taking on the new. The acquisition of this attitude towards the law is likely to be deemed of fundamental importance according as a professor is a believer in the common law. We are all here firm believers in it. We desire that the students may be filled with its spirit.

Gray, *Symposium, Methods of Legal Education,* 1 YALE L.J. 139, 159 (1892).

Langdellian method more effectively than did Langdell),[96] called it the "inductive method of studying law."[97] Josef Redlich termed it "empirical."[98] Langdell himself simply said that his method was "scientific."

Ever since Christopher Langdell described the library as the law student's laboratory, analogies from the natural sciences to the law have had appeal. Cases are specimens,[99] or molecules and atoms;[100] judicial decisions are legal experiments;[101] and jurists' writings are

> the "original memoirs of the discoverers," arrangers, and condensers of the principles of the law. They are not the apple which suggested to Sir Isaac Newton the law of gravitation, but his Organon. [The result of] [a]n adjudged case is the apple, and the showers of apples, and the glorious ingatherings of fruit, not unfitly emblem the vast accumulations of our reports of adjudged cases.[102]

Following this analogy, the law student should look beyond the case result, the apple, to the written opinion of the judge, the memoir of the discoverer—the organon—seeking legal principles. Case reports, not texts, are the place to learn about law "scientifically."

William Keener, who also taught in the manner of Langdell, wrote an article in 1894 and said that the law student, like the

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96. A. SUTHERLAND, *supra* note 22, at 180; CENTENNIAL HISTORY, *supra* note 21, at 37.

97. Ames, *supra* note 27, at 362.

98. J. REDLICH, *supra* note 14, at 54-57. See text accompanying note 114, *infra*, for a description of Redlich's task.

99. Keener, *Symposium, Methods of Legal Education*, 1 YALE L.J. 144 (1892).

100. E. GRISWOLD, *supra* note 24, at 52.

101. Dicey, *supra* note 91, at 224.

Professor Roscoe Pound once said:

> As teachers of science were slow to put the microscope and the scalpel into the hands of students and permit them to study nature, not books, so we have been fearful of putting reports into their hands, and permitting them to study the living law. The merit of revolutionizing legal instruction and putting it on a sound basis in this regard belongs solely to Langdell.

R. POUND, *supra* note 62, at 14.

102. Bishop, *The Common Law as a System of Reasoning—How and Why Essential to Good Government; What Its Perils, and How Averted*, 22 AM. L. REV. 1, 18 (1888).

natural scientist, can choose between two ways of studying. The student can take a specimen that is regarded as establishing a great truth and look at it in the light of the memoir of the discoverer of the fact or principle. Or, throwing away both, the student can take instead the deduction that the writer has drawn after looking at the specimen and the memoir.[103] "Under the approved methods of to-day, the student would be referred to the specimen and to the memoir, if accessible, and not to the opinion that some writer has expressed about them."[104]

> Now the case is, to the student of law, both a laboratory and a library. The facts of the case correspond to the specimen, and the opinion of the court, announcing the principles of law to be applied to the facts, correspond to the memoir of the discoverer of a great scientific truth, and constitute the library. . . . [T]he facts of the case correspond to the apple which suggested to Sir Isaac Newton the law of gravitation, the opinion is his Organon. . . . The facts of a case together with the opinion of the court, are given to the student during his course to enable him to prepare himself in advance for the exercise of the lecture room, and to acquire by the study and discussion thereof, . . . a scientific and practical working knowledge of the fundamental principles of law.[105]

Keener thought it better to have the student study in original sources rather than to study "conclusions which are merely derivative."[106] Because law has developed by way of cases, it should be studied by means of them. Although it is an applied, not an exact, science, the law is "not the less worthy of scientific study."[107]

Others who employed the Langdell method preferred it because it fostered individuality in students, teaching them how to extract underlying principles.[108] The method was praised by Josef

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103. Keener, *The Inductive Method in Legal Education*, 28 AM. L. REV. 709, 713 (1894).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 721.

108. Gray, *supra* note 95, at 153; Brown, *The Purpose and Method of a Law School*, 18 L.Q. REV. 78, 86 (1902).

Redlich, the Viennese law professor who was charged by the Carnegie Foundation in 1914 with the task of making a detached study of legal education in America. Professor Redlich reported that the study of cases trained

> the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases: material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system.[109]

The case method schools the student both in substantive law and in case analysis, leading him or her to full powers of legal understanding and legal acumen. Cases contain principles, concepts, and rules of law "not as dry abstractions but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating social and economic life."[110]

Langdell's return to original sources—the cases, his activization of the classroom, and his preference for principles over maxims parallel nineteenth-century empiricist and evolutionist thinking.[111] Indeed, it had always seemed to Wigmore that

> Langdell's method was an unconscious product of the scientific spirit of realism—that realism which was then just beginning to obtain the dominance now universal,—the scientific realism of Darwin, Comte, and Spencer, which has gradually spread in Art, Religion, and Industry. Of this aspect of his method, he himself may or may not have been conscious; but it was conceived in the spirit of looking at the ultimate facts as they are and of treating them inductively.

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109. J. REDLICH, *supra* note 14, at 39.

110. *Id.* at 40.

111. *See* Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL ED. 1, 3 (1951); Wambaugh, *supra* note 62, at 2; Eliot, *supra* note 24, at 525.

One commentator argued that the "scientific method" has always been important to law but that the physical scientists have kidnapped the term and "almost made it their private slave." Lavery, *Scientific Method in Law—Its Uses and Limitations*, 36 CHI. BAR REC. 303, 308 (1955).

> But I think that he must indeed have been conscious of the relation of his ideas to the modern movement of Science . . . .[112]

There is scant evidence as to what Langdell actually knew of the developments of scientific theory of his day. Because he articulated his own ideas about teaching the law only twice in public, no direct causal relation between experimental science and Langdell's theories can be proven. But, we can at least say that the scientific aura of the late nineteenth century provided the synapse between the research method of science and Langdell's approach to law study.[113]

C. *A System of Mutable Principles*

Gilmore caricaturized:

> The quality of scientific truth, as most nineteenth-century minds understood it, is that once such a truth has been demonstrated, it endures. It is not subject to change without notice. It does not capriciously turn into its opposite. It is, like the mountain, there. *The jurisprudential premise of Langdell and his followers was that there is such a thing as the one true rule of law, which, being discovered, will endure without change, forever.*[114]

This image of science does not match with what we know of the nineteenth century; and this view does not necessarily coincide with Langdell's spoken ideas and teaching methods.

The second edition of *A Selection of Cases on the Law of Contracts* included a volume entitled *Summary of Contracts,* in which Langdell attempted to set down some of the principles that he and his students had discerned in the cases they studied. Some seized upon the volume as the only helpful part of the casebook.[115]

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112. Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae,* 30 HARV. L. REV. 812, 816 (1917).

113. "Langdell has left no . . . record of his reading as Holmes left, but he cannot have escaped the deep intellectual currents of the time." A. SUTHERLAND, *supra* note 22, at 176.

114. G. GILMORE, *supra* note 1, at 42-43 (emphasis added). *See* Teachout, *supra* note 68, at 251.

115. Book Review, 5 S.L. REV. (n.s.) 872, 873 (1880):

Others, such as Oliver Wendell Holmes, Jr., found Langdell's search for "consistency" annoying.[116] Although Holmes admired the work as a "*tour de force* of patient and profound intellect working out original theory through a mass of detail,"[117] he cautioned that Langdell had gone too far:

> He is, perhaps, the greatest living legal theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together. . . .
>
> If Mr. Langdell could be suspected of ever having troubled himself about Hegel, we might call him a Hegelian in disguise, so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law. The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce everything to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements.[118]

So Holmes set experience against logic. With this book review, he is said to have taken an anti-"conceptualist" (anti-Langdellian) stance, marking himself as the first of the Realists.[119] But Holmes used "logic" in a very strict and formal sense in this epigram, oversimplifying Langdell's ideas and exaggerating the differences between their two approaches to law.

Holmes did not disagree with Langdell's emphasis on cases. He praised the first edition of *A Selection of Cases on the Law of Contracts* because it traced the growth of doctrine through a

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> In our judgment, the chief value of the present work consists in the summary which Prof. Langdell has appended to the second volume. . . . We cannot doubt that it is a valuable review of the matter presented in the cases. At a glance we can see that it performs one important office: it points out which of them are overruled!

116. Holmes, *supra* note 4, at 234.

117. *Id.* at 233-34.

118. *Id.* Note that this declaration that "the life of the law has not been logic" predates the publication of *The Common Law* in 1881, in which context the words became famous.

119. *See* note 6 *supra*.

chronological arrangement of cases, and he even suggested that "some contradictory and unreasoned"—inconsistent—decisions could have been spared.[120] Holmes advised that every student of law buy and study the book because it was a certain improvement over textbooks.

When Holmes later taught torts using Langdell's method, he found that his class "examined the questions proposed with an accuracy of view which they never could have learned from textbooks" and that he himself "gained a good deal from [the] daily encounters."[121] Holmes stated:

> I am certain from my own experience that Mr. Langdell is right. I am certain that when your object is not to make a bouquet of the law for the public, nor to prune and graft it by legislation, but to plant its roots where they will grow, in minds devoted henceforth to that one end, there is no way to be compared to Mr. Langdell's way. Why look at it simply in the light of human nature. Does not a man remember a concrete instance more vividly than a general principle? And is not a principle more exactly and intimately grasped as the unexpressed major premise of the half-dozen examples which mark its extent and its limits than it can be in any abstract form of words? Expressed or unexpressed, is it not better known when you have studied its embryology and the lines of its growth than when you merely see it lying dead before you on the printed page?[122]

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120. Holmes, Book Review, 5 AM. L. REV. 539, 540 (1871). *See* M. HOWE, JUSTICE OLIVER WENDELL HOLMES, THE PROVING YEARS, 1870-1882, at 250-51 (1963).

Holmes warned, however, that students not be blind to principles: the student of law should have a system—something "more than a rag-bag of details" so that she may see "how it hangs together." Holmes, *supra* note 4, at 234.

121. *Justice Holmes' Oration, reprinted in* 3 L.Q. REV. 118, 122 (1887).

Bishop called Holmes a "graduate of the Harvard Law School under its former system, and a thorough convert to the new." Bishop, *supra* note 102, at 19.

122. Holmes, *supra* note 120, at 121-22.

We can see similarities elsewhere between Holmes and Langdell:

> The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time.
>
> . . . .
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> . . . Even if every decision required the sanction of an emperor with des-

Holmes did not quarrel with Langdell's belief that the law should be studied by taking principles from cases firsthand. He endorsed that idea, but he did not want to see experience squeezed out by logic.

Oliver Holmes, the "master of epigram,"[123] posed logic against experience even though this is not their necessary relation. What he meant was that one must not treat legal history as if a logician had written it. In that sense the life of the law has not been logic.[124] He did not dispute that lawyers are trained to think logically, nor that "[t]he process of analogy, discrimination, and deduction are those in which they are most at home."[125] "The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct."[126] Langdell would not have disagreed. In seeking to apply evolving legal principles to "the ever-tangled skein of human affairs"[127] he had never postulated that the life of the law is the syllogism writ large.

John Dewey wrote *Logical Method and Law* in 1925, in which he said that Holmes had used a scholastic model of logic that is antithetical to experience or good sense.[128] Against this "logic of fixed forms," Dewey set up logic of search and discovery:

> If we trust to an experimental logic, we find that general principles emerge as statements of generic ways in which it has been found helpful to treat concrete cases. . . . The "universal" stated in the major premise is not outside of and antecedent to particular cases; neither is it a selection of something

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potic power and whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation and some principle of growth for the rules which he laid down. In every system there are such explanations and principles to be found.

Holmes, *supra* note 8, at 458, 464-65.

123. Gilmore, *supra* note 6, at 1037.

124. M. WHITE, PRAGMATISM AND THE AMERICAN MIND 43-45 (1973).

125. Holmes, *supra* note 8, at 465.

126. *Id.*

127. C. LANGDELL, *supra* note 37, at vi.

128. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1925).

> found in a variety of cases. It is an indication of a single way of treating cases for certain purposes or consequences in spite of their diversity. Hence its meaning and worth are subject to inquiry and revision in view of what happens, what the consequences are, when it is used as a method of treatment.[129]

For Dewey, general legal rules and principles were working hypotheses in a constant test by application to concrete situations. Dewey's experimental logic is the "dynamic logic" that George Herbert Mead described as coming to dominance in the late nineteenth century.[130] It is a logic consistent with the case method of legal study, and with an organic view of law, allowing us to interpret Langdell in a way that would have been palatable to Holmes.

Christopher Langdell's *Summary of Contracts* may have been a partial retreat, a giving-in to students (and scholarly critics) who yearned for a statement of "the law"—a response to the uncharitable reviews of his first edition and his first year of teaching. Or it may have been the outgrowth of an organic approach to law: Langdell could have been trying to group cases and formulate the patterns of principles without any judgment about their immutability. Langdell's *Summary* may have been his attempt at charting out the changing principles that he had extracted from cases. But the search for patterns in cases is consistent with organicism; it is not the telltale sign of a conceptualist legal theologian. As Gilmore himself observed:

> The temptation today is . . . to conclude that doctrine, because it is not immutable, is therefore meaningless. Such an attitude is quite as false as the naive belief that law is all logic and reason. . . . [W]e must recognize that we build, not for all time, but for a generation at most. But, recognizing that, we must also dedicate ourselves to this: in the diversity, which is only too apparent, there is unity; in the formlessness there is form; in the process of change there is order; in the organization of experience there is logic.[131]

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129. *Id.* at 22-23.

130. G. MEAD, *supra* note 7, at xvi-xvii, 153-68.

131. Gilmore, *Law, Logic, and Experience*, 3 How. L.J. 28, 41 (1957).

The logic of discernible patterns, not the syllogism, may have been Langdell's guiding force. If so, he is closer to Holmes than is commonly supposed, and further from that other, formalist, Langdell.

CONCLUSION

Christopher Langdell believed that his method was sound both substantively and pedagogically. But as the numbers of cases grew, advocates of his method gave up the argument that it could successfully convey substantive rules of law.[132] Rather, they focused attention on the pedagogical prong: Langdell's method was best for teaching students how to think like lawyers. No particular jurisprudential premises are necessarily tied to the Langdell teaching method. One may believe Langdell's pedagogical message and still espouse the immutability of legal principles. Or one may adopt his substantive point and still ascribe to an organic view of law. But Langdell's return to original sources, his dynamic classroom style, and his references to the "growth" of doctrine, when seen in their late-nineteenth-century context, suggest organicism rather than unitary conceptualism. And if Langdell did share the scientific conceptions of his time, he has been misplaced in the field of legal theory.

The Realists criticized Langdell for looking only at cases and

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132. A. REED, *supra* note 12, at 379. *See also* Ehrenzweig, *The American Casebook: "Cases and Materials,"* 32 GEO. L.J. 224, 225-26 (1944).

> It was soon discovered, if the chief end of the case method is to furnish information, that as an exclusive vehicle it must fail of its purpose simply because the whole field, nor any important parts of it, could be mastered within the time allotted. . . . Here was a dilemma; either the case method must be abandoned, or its function must be re-declared. The latter alternative was chosen, and the chief purpose of the case method was now said to be to develop the "power of legal reasoning."

Kocourek, *The Redlich Report and the Case Method,* 10 ILL. L. REV. 321, 324-25 (1915). *See, e.g.,* 2 C. WARREN, *supra* note 20, at 419-20, and Ames, *supra* note 27, at 364:

> If it be the professor's object that his students shall be able to discriminate between the relevant and the irrelevant facts of a case, to draw just distinctions between things apparently similar, and to discover true analogies between things apparently dissimilar, in a word, that they shall be sound legal thinkers, competent to grapple with new problems because of their experience in mastering old ones, I know of no better course for him to pursue than to travel with his class through a wisely chosen collection of cases.

not considering statutes, administrative rulings, sociological and psychological factors. But Langdell saw mostly common law cases when he looked at law in 1870, and the social sciences were barely emerging. His direct resort to the sources of law was realistic. Certainly, he represented a break from the dogmatic, predigested treatises that were at least one step from reality.

Those who see law as process criticize Langdell for saying that law is a fixed body of knowledge.[133] But when he told students to read cases to capture the growth and development of law, Langdell was not taking a static view. Nor was science in the nineteenth century static. We now live in a more complex world than did Langdell. He thought that he could go to the roots of law by looking only at common law cases; then there was no collective bargaining, no corporate finance, no public welfare administration.[134] Even a dynamic or organic view of law for 1870 would appear static to twentieth-century eyes.

It has been said that Langdell's method was not experimental: because he looked only at cases his was a geology without rocks, an astronomy without stars.[135] If anything, Langdell proposed a geology with only rocks, an astronomy with only stars. His method was limited by underinclusiveness, but that does not make it unscientific. A broadening of legal study to include today's social sciences would be consistent with Langdell's empirical approach to law and his urge to go to original sources. By revolting against dogmatic lectures and treatises, looking at case reports, and making class more dynamic, Langdell in fact opened the way for the Realists, the Legal Process School, and other anti-formalists.

Christopher Columbus Langdell spoke at Harvard in 1870 with a voice that still rings in law school halls, but the echo is now that of a goblin quite separate from the other Langdell. When, in

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133. Hurst, *supra* note 3, at 336.

134. In the Preface of their Legal Process materials, Hart and Sacks pointed out that their method was "nothing more than an application of the method of teaching law first popularized by Christopher Columbus Langdell in the 1870's"—it was just that the materials were more inclusive.

135. L. FRIEDMAN, *supra* note 5, at 535.

the nineteenth century, he said that the law was a science, he meant that it was not a manner of craft but a dignified intellectual discipline, fit for study in the then-emerging universities. He meant that the method of legal education should be scientific in the empirical, inductive, research sense; and one should start with the raw data—the cases. His logic was experimental *a la* nineteenth century and he saw law as growing out of cases and changeable by them. He felt that no superstructure of absolutes should be imposed upon the learners of law. Rather, they should approach cases with the idea of extracting principles and establishing some patterns. But the patterns are subject to change with each new case. In this way, Langdell bestowed pluralism on the world of law; he opened up the possibility of multiple or succeeding legal theories. His call for resort to the wellsprings may be seen as the first faint cry for a more realistic approach to law. By rejecting lectures and predigested texts, he called into question the old formalities. And he really might have been the first "anti-Langdellian."