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## Langdell and the Invention of Legal Doctrine

CATHARINE PIERCE WELLS†

### INTRODUCTION

This Article addresses two distinct issues. The first relates to C.C. Langdell, his invention of legal doctrine, and his enduring contribution to American law. The second relates to legal doctrine generally, seeking a more precise understanding of what it is, where it comes from, and the role it plays in deciding legal cases.

There are a number of reasons why Langdell remains an important figure in American law. First, he originated the case method as a means of legal education;<sup>1</sup> second, he initiated and inspired the effort to formulate classical contract theory;<sup>2</sup> and third, he represents to modern readers a symbol of legal formalism.<sup>3</sup> Indeed, it is this last fact that

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1. It was his reforms that that lengthened the law school curriculum to three years; that required law students to possess an undergraduate degree; and that instituted the case method as the primary form of legal instruction. See Bruce A. Kimball, *Young Christopher Langdell, 1826-1854: The Formation of an Educational Reformer*, 52 J. LEGAL EDUC. 189, 189 (2002).

2. For discussions of classical contract theory, see GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald K.L. Collins ed., 2d ed. 1995).

3. The case method of legal instruction remains in use today although it is much changed from Langdell's time. See, e.g., WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994); Bruce A. Kimball, "Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": *The Inception of Case Method Teaching in the*

is responsible for the low regard in which he is held today. Contemporary writers have treated Langdell as a straw man.<sup>4</sup> To him, they have attributed such notions as:

- The law consists of self-evident legal propositions that are independent of policy or justice.
- Legal decision making is a simple exercise of deductive logic.
- Every case has a uniquely correct outcome.<sup>5</sup>

Ironically, this caricature of Langdell has increased his importance while at the same time diminishing his reputation. Most everyone has come to regard Langdell as espousing an overly simplistic and erroneous view of the law. Thus, despite the importance of his work, it has received relatively little serious attention. There are two books about him<sup>6</sup> and only a few law review articles.<sup>7</sup> Some

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*Classroom of the Early C. C. Langdell, 1870-1883*, 17 LAW & HIST. REV. 57 (1999); Russell Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518 (1991).

4. Posner's characterization of formalism is typical:

[Formalism is] the use of deductive logic to derive the outcome of a case from premises accepted as authoritative. Formalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect.

Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986-87). Note though that Posner characterizes this view as "related but not identical to the 'formalism' of Langdell and the other nineteenth-century American legal formalists." *Id.* (footnote omitted).

5. *E.g.*, M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 96 (1986).

6. BRUCE KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826-1906* (2009); LAPIANA, *supra* note 3.

7. There are few articles that discuss Langdell's views beyond a superficial level. Of particular interest are Thomas C. Grey's, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Bruce A. Kimball's, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345 (2007); Howard Schweber's, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421 (1999); and Marcia Speziale's, *Langdell's Concept of Law as*

histories have described his contributions to legal education. Others have mentioned his legal theories, but there is little extended discussion. In short, there has not been much interest in the substance of his work.

In attending to the substance of Langdell's work, it becomes apparent that legal doctrine plays a central role. For example, he describes his *Summary of the Law of Contracts*<sup>8</sup> ("Summary") as a "concise statement and exposition of the doctrines involved in [the] cases." Here it is important to see that Langdell's use of the term "doctrine" is entirely new and original. If one reads both the cases in his casebook and his summary thereof, it is apparent that what Langdell describes as the "doctrines involved" are neither articulated nor expressed by the cases directly. In fact, the notion of legal doctrine as something "involved" in the cases is at the heart of Langdell's contribution to American jurisprudence.

The invention of legal doctrine brings us to the second focus of this Article. Langdell's great innovation was the formulation of a theory about contracts that could stand as the basis for legal decision making. Unlike previous theories, this was not a mere summary of the cases. Nor did it depend upon another type of normative theory such as natural law. Instead Langdell's doctrine represented a freestanding legal theory based upon an analysis of legal concepts. Thus, the modern notion of legal doctrine was at the center of Langdell's contribution to American law. It was doctrine that Langdell sought to teach by the case method; doctrine that formed the substance of his contract theory; and doctrine that he believed should be consulted in the decision of cases. We have difficulty understanding Langdell precisely because of this fact. Modern theorists tend to minimize the importance of legal doctrine.<sup>10</sup> We do not think of it as a freestanding legal theory; rather, we think it is a guise for other more practical considerations

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*Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980).

8. C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880) [hereinafter LANGDELL, SUMMARY].

9. *Id.* at iv.

10. *E.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

such as policy, efficiency, or substantive notions of justice. Nevertheless, Langdell's conception of doctrine remains an important part of our legal culture. Like the air we breathe, it is essential although it rarely excites our interest. Whether we like it or not, we inevitably teach doctrine to our students.<sup>11</sup> We may teach other things as well; we may even teach our students to be skeptical of doctrinal arguments. Nevertheless, our students will emerge from our classes with a fine-tuned sense about doctrine itself.

While we underestimate the importance of doctrine, we overestimate its simplicity. We think of doctrine as a form of legal analysis whose use is so well understood that there is no need for methodological analysis. Our views about it are casual and unreflective. We think about it as "Black Letter Law," and, just as we acknowledge that commercial outlines are inadequate accounts of the law we teach, we think of the "Black Letter Law" as an equally inadequate explanation of legal decision making. If we talk about doctrine at all, we do so in the shadow of many unstated assumptions. What we think about doctrine depends upon what we think about the nature of legal reasoning, the significance of precedent, or the relationship between doctrine and policy. By contrast, Langdell utilizes a particular conception of doctrine that has both insight and power.

To explore these issues, I will proceed as follows:

Part I will examine the state of contract law prior to Langdell. This is important because it is difficult to see how innovative Langdell truly is unless one can compare his theory to what went before.

Part II will compare the theory of contract formation contained in Langdell's Summary to the law as described by the cases in the Casebook. This essentially enables us to take Langdell's course. We, with the students, learn how the theory is derived from the cases.

Part III talks about Langdell's method. There has been a lot of confusion about the nature of Langdell's enterprise. I address this confusion by referring to the text that was

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11. In each substantive course, students learn some form of doctrine—a particular legal language that enables them to make arguments that are both well formed and legally relevant.

used to teach Langdell and his contemporaries about logic and the methodology of science.

Part IV considers the issue of justification. Part IV.A articulates a justificatory argument that Langdell himself might have deployed. Part IV.B returns to the contemporary non-Langdellian world in order to consider the value of doctrine in legal knowledge and legal decision making. Doctrine, I argue, is a strategy that mediates between the rule of law and a jurisprudence of intuition in individual cases. I also argue that a correct understanding of legal doctrine clarifies what most lawyers already seem to know—that legal doctrine is only one of a number of considerations that guide a skillful legal analysis.

The last part is a conclusion.

## I. PRE-LANGDELL CONTRACT LAW

Prior to Langdell, there were several influential sources of contract law. First and most importantly, there were the cases. These will be discussed in the next section. There were also the commentaries by Blackstone<sup>12</sup> and Kent<sup>13</sup> as well as Parsons' treatise on Contract law.<sup>14</sup> In this part, I describe the content of these materials.

### A. *Blackstone's Commentaries*

Blackstone's *Commentaries*,<sup>15</sup> published in 1752, represented the first comprehensive survey of English law. It quickly became the mainstay of legal education and scholarship. At the heart of its influence was its structure.<sup>16</sup> The work was based on a central vision of law as a unified subject that could be dissected into logical segments. Thus, for example, one part dealt with rights and a second with

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12. 2 WILLIAM BLACKSTONE, COMMENTARIES.

13. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW (1827).

14. THEOPHILUS PARSONS, THE LAW OF CONTRACTS (5th ed. 1864).

15. 2 BLACKSTONE, *supra* note 12.

16. While the Commentaries do begin with a discussion of the nature and origins of English law, these philosophical reflections were controversial and hardly responsible for the continuing influence of the Commentaries. See JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970, at 15 (1990).

wrongs.<sup>17</sup> These two parts were further subdivided—the first into the rights of persons and the rights of property; the second into private wrongs and public wrongs. Within each of these subdivisions a group of chapters was loosely organized around individual legal concepts. This organization served a practical purpose. Blackstone had not only provided a teaching text; but also, by providing a logical structure, he had facilitated legal research. Mastering his structure became the key to locating relevant legal authority.

There are two things that are striking about Blackstone's treatment of contracts. First, in Blackstone's scheme, there was no general notion of contractual obligation.<sup>18</sup> Instead, he presents the field of contract law only as an adjunct to a well-developed law of property. Contracts are discussed in a chapter called—"Of Title by Gift, Grant, and Contract"—which is one of seven chapters dealing with questions of title to personal property.<sup>19</sup> This chapter appears in the title part of the section on personal property, which is a subdivision of the section on property, which is a subdivision of the rights of things, which is a subdivision of the section dealing with rights. Thus, in Blackstone, the concept of contract must be considered an extremely marginal category.

The second thing that is striking about Blackstone's treatment is its extreme generality. The discussion begins with a definition: "A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing*."<sup>20</sup> This definition, in turn, gives rise to a tripartite division of the subject: first a discussion of "Agreements";

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17. See 2 BLACKSTONE, *supra* note 12, *passim* (rights); 3 BLACKSTONE, *supra* note 12, *passim* (wrongs).

18. Indeed, it would have been inconsistent with his organization to do so. Blackstone treats theories of liability in the section on private wrongs—a section that was exclusively devoted to what we would now think of as torts. See 3 BLACKSTONE, *supra* note 12.

19. When Blackstone discusses the different types of contracts, we learn that, despite the placement of the contracts discussion into the section on title, some common contracts—such as the insurance and debt—have little to do with the issue of title as we think of it today. See 2 BLACKSTONE, *supra* note 12, at \*460-70.

20. *Id.* at \*446.

second, a discussion of “Consideration”; and third, a discussion of the “Thing Agreed to be Done.” Only the first two parts deal with contracts generally, and these are exceedingly brief.<sup>21</sup> Blackstone’s analysis of “the agreement” can be summed up as follows:

- An agreement is a mutual bargain made by two parties having legal capacity.<sup>22</sup>

- Such bargains can be express, as when “the terms of the agreement are openly uttered and avowed at the time of the making.”<sup>23</sup>

- They can also be implied as when “reason and justice dictate.”<sup>24</sup>

- An agreement can be executed or executory.<sup>25</sup>

Similarly, Blackstone does not tell us much about consideration. Much of his exposition is taken up with the technicalities of the Civil Law doctrine.<sup>26</sup> He then briefly states that the English doctrine requires consideration but does not duplicate the technicalities of the Civil Law. He states that “any degree of reciprocity” will preserve the validity of the agreements.<sup>27</sup> He also reports that certain kinds of contracts, notably notes and bonds, require no consideration as they have been “authentically proved by written documents.”<sup>28</sup>

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21. The discussion of agreements and consideration take up five pages of the thirty-eight that are devoted to contract law. *Id.* at \*442-46.

22. *Id.* at \*442.

23. *Id.* at \*443.

24. *Id.*

25. *Id.*

26. The Civil Law, Blackstone states, makes a distinction between good and valuable consideration. Under the Civil Law, there are only four permissible categories of valuable consideration—money or goods, labor, marriage, or the forbearance of litigation. *Id.* at \*444-45.

27. *Id.* at \*445.

28. *Id.* at \*446. Note that lack of consideration is not a defense for the maker of the note but may be for third-party creditors.



To a modern reader, Blackstone's analysis is remarkable not for what is included but for what is left out. There is no discussion of questions that will assume great importance a century later. For example: How do the parties make a contract? When is it complete? What is meant by the mutuality requirement? Under what circumstances would reason and justice require the inference of a contract? To understand these omissions, it is necessary to consider the commercial context in which Blackstone wrote. When Blackstone wrote, the use of contracts to order private affairs was mainly limited to four particular contexts:

1. the purchase of goods (Sales);
2. the entrusting of goods (Bailments);
3. the lease of goods (Hiring or Borrowing); and
4. the memorializing of money owed (Debts).<sup>29</sup>

Blackstone's analysis treats each of these areas separately. In each case, the legal rules reflect the customs surrounding their use. For example, the discussion of sales reflects the following rules:

- The vendor has the right to sell his goods to any person and on such terms as he pleases.<sup>30</sup>
- The person who buys the goods cannot take them away until he has paid for them.<sup>31</sup>
- If a bargain is struck, but both sides walk away, the vendor is free to dispose of the goods to someone else.<sup>32</sup>
- If, however, any fraction of the price has been paid, the vendor must hold the goods for the purchaser.<sup>33</sup>

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29. These are reflected in the four sections Blackstone uses to describe the "thing agreed to be done." *Id.*

30. *Id.* at \*447.

31. *Id.* This is a default rule. The sales contract can expressly provide otherwise.

32. *Id.*

33. *Id.* at \*447-48.

These represent the customary rules in a market situation where all bargaining is face-to-face and the subject of the sale is a particular piece of property that can be inspected equally by buyer and seller.<sup>34</sup> Thus, these simple rules are more than sufficient to regulate such issues as consideration, description, disclosures, delivery, title, etc.<sup>35</sup>

It is in these banal circumstances that we can see the true nature of Blackstone's enterprise. Blackstone saw himself as a scientist, whose job was to organize the law. While the point of his work was organization, its ongoing method was descriptive. Blackstone does not analyze legal doctrine, nor does he attempt to theorize it. Instead, he is reporting on the traditions and customs of the English people as they are assumed and enforced by English courts. If the resulting legal rules seem to be general and indeterminate, it makes little difference because they are supplemented by custom and usage. Certain questions will not arise because the parties are acting in accordance with norms—both stated and unstated—that have been long recognized in a particular context. In such a context there is little room for the “law of contracts” as that term is understood today. A commercial society that has long-standing, but relatively simple, commercial practices has little need for doctrinal theorizing.<sup>36</sup> In such societies, the term “contract” does not denote a broad substantive area of the law. Instead, as is evident in Blackstone's writings, it names a collection of commercial practices that share only a few definitional requirements.

It is important to see this aspect of Blackstone, because, soon after the *Commentaries* were published, the traditional

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34. More complicated sales transactions require more specific rules. Thus, there is a separate discussion that deals with the sale of horses. *See id.* at \*450-52.

35. Of course, warranties remain a problem, but they are specifically dealt with in a separate section. *See id.* at \*452.

36. And, as the third section shows, to the extent that commercial practices had developed in Blackstone's time, they tended to be governed by a particular set of technical rules that arose from the practices themselves. *See*, for example, the discussion of insurance contracts, bills of exchange, and promissory notes. *Id.* at \*460-70.

contexts began to change.<sup>37</sup> This change can be clearly observed in Kent's *Commentaries*.

### B. *Kent's Commentaries*

Seventy-five years after Blackstone, Kent's *Commentaries*<sup>38</sup> were published in the United States. It was the first comprehensive treatment of American law that was entirely independent of Blackstone.<sup>39</sup> But, while the text was original, the structure was not. Contract law, for example, was treated as a part of the section on personal property<sup>40</sup> and, as in Blackstone, the discussion was divided into some very brief remarks about contracts in general<sup>41</sup> and a more extensive treatment of the specific types of contracts.<sup>42</sup> Despite these similarities, there is much that is

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37. We can see this in Blackstone's discussion of marine insurance where he recognizes that "[t]he learning relating to marine insurances [has] of late years been greatly improved by a series of judicial decisions." *Id.* at \*461. Having stated this, however, he rues the fact that these rules "being founded on equitable principles, which chiefly result from the special circumstances of the case, [are] not easy to reduce them to any general heads in mere elementary institutes." *Id.*

38. 2 KENT, *supra* note 13.

39. The earliest American treatise was edited by Henry St. George Tucker who used Blackstone's basic text and added annotations detailing the decisions of American courts. HENRY ST. GEORGE TUCKER, NOTES ON BLACKSTONE'S COMMENTARIES: FOR THE USE OF STUDENTS (1826).

40. See 2 KENT, *supra* note 13, at vi-vii. Note though that Kent does not rigorously adhere to the structure. For example, see the discussion of sales contracts, contained in Part V dealing with personal property, which includes cases that relate to the sales of real property. *Id.* at 367-74.

41. Like Blackstone, Kent divides the general law of contracts into three sections. Section 1, "Of the different kinds of contracts," covers much the same ground that was covered in Blackstone's section on the "Agreement of the Parties." Like Blackstone, Kent distinguishes the various types of contracts (executory and executed contracts; verbal and written contracts; contracts under seal and contract not under seal; and express and implied contracts). *Id.* at 363-64. He then outlines the difference between an interest in possession and an interest in action. *Id.* Kent then adds a brief discussion of the fact that contracts are governed by the law of the place where they are made. *Id.* at 364.

42. There are eight lectures dealing with the various types of contracts: Lecture 39, "Of the Contract of Sale"; Lecture 40, "Of Bailment"; Lecture 41 "Of Principal and Agent"; Lecture 43, "Of the Law of Partnership"; Lecture 44, "Of Negotiable Paper"; Lecture 47, "Of the Contract of Affreightment"; Lecture 48,

original in Kent's work. For Kent, contract law is no longer a matter of simply recording certain commercial practices. He begins his discussion with a few introductory words:

In entering upon so extensive and so complicated a field of inquiry as that concerning contracts, we must necessarily confine our attention to a general outline of the subject; and endeavour to collect and arrange, in simple and perspicuous order, those great fundamental principles which govern the doctrine of contracts, and pervade them under all their modifications and variety.<sup>43</sup>

Thus, even though Kent joins Blackstone in seeing contracts as an adjunct to property law; he nevertheless recognizes contracts as a "complicated" field requiring "great fundamental principles" arranged in a "simple and perspicuous order." Despite this recognition, however, we find in Kent the same abbreviated discussion of the general concept of contract. First, there is a section that deals with the types of contract. It begins with a general definition of contract as "an agreement upon sufficient consideration, to do or not to do a particular thing."<sup>44</sup> It then proceeds to describe the various kinds of contracts, defining the difference between contracts under seal and those not under seal, those that are executed and those that are executory, and those that are express and those that are implied. The second section "explains" consideration. The explanation, though, is simply a matter of stating that American courts, like English courts, require consideration but reject the Civil Law's technical treatment of the issue.<sup>45</sup> Beyond this, Kent has little to say except to state the requirement that nature of the consideration may not be "repugnant to law, or sound policy, or good morals."<sup>46</sup>

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"Of the Law of Insurance"; and Lecture 49, "Of Maritime Law." *See id.* at vii-viii; 3 KENT, *supra* note 13, at iv-v.

43. 2 KENT, *supra* note 13, at 363.

44. *Id.*

45. Unlike Blackstone, however, he does not treat consideration as a "motive" or "cause" of the contract, and instead gives it its modern meaning as something that is "either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made." *Id.* at 365 (citing *Jones v. Ashburnham*, (1804) 102 Eng. Rep. 905 (K.B.)).

46. *Id.* at 366.

Like Blackstone, the bulk of Kent's discussion relates to the subject matter of various contracts.<sup>47</sup> Again, I will take as an example the discussion of sales. The length of this discussion reflects the fact that, in the decades since Blackstone, sales transactions have become more complex.<sup>48</sup> Furthermore, compared to Blackstone, Kent's analysis is decidedly more analytical. Gone are the simple declarative sentences, annotated with historical authority. In their place, Kent has substituted a critical account of the relevant precedents, agreeing with some and disagreeing with others. For example, in the context of a discussion of the seller's inability to perform a sales contract, he goes to great lengths to show the considerable inconsistencies in the case law.<sup>49</sup> He also is quick to point out discrepancies between what he understands to be "the technical rule" and the "[t]he justice of the case."<sup>50</sup> And, finally, he concludes the discussion by calling for a more rational approach:

It is to be regretted, that the embarrassment and contradiction which accompany the English and American cases on this subject, cannot be relieved by the establishment of some clear and definite rule . . . which shall be of controlling influence and universal reception.<sup>51</sup>

Thus, Kent begins by reciting the need for clear and definite rules and ends by recognizing that such rules have not been found in the cases.

The absence of rules has important consequences for the theory of contracts. If there are rules, then new cases must be decided in accordance with them.<sup>52</sup> Without rules,

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47. Lecture 39 deals with sales contracts; Lecture 40 deals with bailments; Lecture 41 deals with principals and agents; and Lecture 42 deals with maritime law. *Id.* at vii-viii.

48. Under the topic of sales, Kent discusses warranties, disclosures, passing title by delivery, the Statute of Frauds, sales affected by fraud, sales at auction, and stoppage *in transitu*. *See id.*

49. *See id.* at 368-69.

50. *Id.* at 371.

51. *Id.* at 374.

52. While rules are not entirely outcome-determinative in their application, they represent a particular way of comparing cases. A rule specifies the characteristic that makes a case similar to one previously decided. Without a rule, one is left to a more general comparison.

however, precedent must operate on a case-by-case basis. This means that the inquiry in each new case is whether the case is so similar to a prior case that the result in the prior case must be controlling. This judgment of similarity can be very subjective—one person’s “similar” facts are “distinguishable” to another. This might leave the court with little reason to decide the case one way or another. To address this, Kent’s arguments take on a modern cast. Similarity, for him, is not simply likeness, but involves two other considerations. First, there is the question of consistency. Because Kent highlights the underlying reasoning that supports a judicial decision, he facilitates inquiry into the consistency of this reasoning among a large number of cases. Second, there is the question of policy. Kent highlights justice and policy as important grounds of legal decision making.<sup>53</sup> This adds an additional dimension to discussions of similarity by allowing the litigants to compare not only the facts of the two cases but also the policies that are implicated. Cases can be seen as similar not just because they invoke similar facts, but also because they involve similar considerations of justice and utility. Thus, even though Kent does not supply us with an articulation of contract doctrine, he provides the beginning of an analysis that deepens the discussion of relevant precedent.

### C. *Parsons’* The Law of Contracts

*The Law of Contracts*<sup>54</sup> by Parsons was published in 1855 and occupies a special place in any discussion of Langdell’s theory of contract law. Parsons not only taught Langdell, but served as a kind of mentor. It was Parsons who helped to arrange the Harvard librarianship that allowed Langdell to continue his studies.<sup>55</sup> From his post in the library, Langdell made substantial contributions to Parsons’ work on his treatise and these were duly acknowledged by the author.<sup>56</sup> Thus, we know that Langdell was thoroughly familiar with Parsons’ work and that it

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53. *See id.* at 364, 368.

54. PARSONS, *supra* note 14.

55. Langdell held the post from 1852-1854. *See* Kimball, *supra* note 1, at 225.

56. PARSONS, *supra* note 14, at xiv.

makes sense to regard it as a kind of starting point for Langdell's own thoughts about contract law.

Parsons' book is a three-volume work devoted exclusively to contracts. Its length indicates the growing volume and diversity of commercial activity. It also reflects a growing sense that the notion of contract was a central rather than a marginal category of American law. In fact, Parsons begins his treatise with just this sentiment:

The Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather, is, the continual fulfillment of contracts.<sup>57</sup>

Note that, in little more than a century, what was treated by Blackstone and Kent as a technical device for conveying title had become, in Parsons' hands, the source of all, or nearly all, human obligation.

Parsons' treatise has a distinctly modern look. In Blackstone and Kent, the bulk of the discussion related to particular types of contracts and the rules that governed each type. In Parsons, less than half of the text is devoted to this type of analysis.<sup>58</sup> Instead, the text is organized around certain contract doctrines which are presumed to apply to all types of contracts. This gives the appearance that contracts is not only an important aspect of law, but also a unified one. However, the presumption of general applicability creates a need to note the many exceptions and counterexamples for each given category. This means that the text becomes more complicated and that clarity must be sacrificed to subtlety and particularity. All of this makes

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57. *Id.* at 3.

58. The first volume is divided into three parts: the first deals with the parties to a contract, the second with consideration and assent; and the third with the subject matter of contracts. The second volume assumes a binding contract and considers the various issues that arise in connection with its enforcement. Thus, it is only the third section of the first volume that deals with individual types of contracts. *Id.* at xxiii-xxxvi.

reading Parsons a frustrating experience as the following brief excerpt amply demonstrates:

A promise is good consideration for a promise. And it is so previous to performance and without performance. As if one promises to become a partner in a firm, and another promises to receive him into the firm, both of these promises are binding, each being a sufficient consideration for the other. If one promises to teach a certain trade, this is consideration for a promise to remain with the party a certain length of time to learn, and serve him during that time; but, without such a promise to teach, the promise to remain and serve, though it be made in expectation of instruction, is void. The reason of this is, that a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.

This has been doubted, from the seeming want of mutuality in many cases of contract. As where one promises to see another paid, if he will sell goods to a third person; or promises to give a certain sum if another will deliver up certain documents or securities, or if he will forbear a demand, or suspend legal proceedings or the like. Here it is said that the party making the promise is bound, while the other party is at liberty to do anything or nothing. But this is a mistake. The party making the promise is bound to nothing until the promisee within a reasonable time engages to do, or else does or begins to do, the thing which is the condition of the first promise. Until such engagement . . . on the part of the promisee which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation . . . But if without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a completed consideration; and the original promise to do something, if the other party would do something, is a continuing promise until that other party does the thing required of him.<sup>59</sup>

This passage begins with a clear statement that promises will count as consideration, but, as the passage continues, it becomes less clear as the matter becomes entangled with the issue of mutuality—“a promise is not good consideration for a promise unless there is an absolute mutuality of engagement.” A reader unfamiliar with modern contract doctrine might well conclude that a promise will count as consideration only in certain

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59. *Id.* at 448-51 (footnotes omitted).



circumstances, though he might be confused as to exactly what those circumstances are.

Compare the confusion in Parsons' treatise with the relative clarity of Langdell's treatment twenty years later. Langdell treats the issue not as a question of consideration, but as part of a newly invented topic of contract formation. In addition, he introduces the now familiar distinction between unilateral and bilateral contracts as a way of clarifying the problem. This is his description:

Acceptance has hitherto been considered with reference to such offers only as contemplate unilateral contracts. When the contract is to be bilateral, though the principles are the same, the application of them is very different. It still remains true that the offer requires an acceptance and the giving of the consideration to convert into a binding promise; but as the consideration consists of a counter-promise, so the giving of the consideration consists in making this counter-promise. It follows also that the original offer cannot become a binding promise until the counter-promise also becomes valid and binding.<sup>60</sup>

In this way, Langdell reconceptualizes the problem with the result that it is possible to specify a relatively simple rule regarding mutuality of promises: *an offer to make a promise in exchange for a promise does not become binding until the offer is accepted.*

### *Conclusion and Summary to Part I*

The progression from Blackstone to Kent, and then on to Parsons, represents a certain set of developments in contract law. We began with Blackstone and a relatively simple exposition of the commercial practices that utilized private contracts. The law that governed these practices reflected the customs in the market place. Nearly a century later, Kent's treatment is also descriptive, although the practices themselves have become more sophisticated. Kent sees the need to bring consistency and order to these practices, but is unable to attain this ideal within the confines of the relevant case law. Parsons, twenty five years later, puts together a thorough compendium of contract law, but in some ways makes the situation worse. His attempt to unify the law of contracts results in confusion and

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60. LANGDELL, SUMMARY, *supra* note 8, at 12.

inconsistency. It is therefore left to Langdell to restore order and simplicity. In the next part, we will consider how he accomplishes this.

## II. LANGDELL'S INNOVATION

Langdell's work in contract law is contained in two separate volumes. The first is a casebook meant to be used in his class on contract law ("Casebook");<sup>61</sup> and the second is his Summary.<sup>62</sup> The Summary was first published as a supplement to the Casebook and, only later, published independently as a freestanding treatise. What is remarkable about the two volumes is that the "law" contained in the Casebook is so different from what is contained in the Summary. This discrepancy makes it clear that Langdell did not use the case method solely to question and drill students on what they had already read in the cases. Nor did he use class discussions merely to raise minor points of clarification or comparison.<sup>63</sup> Instead, he expected the students—obviously with his help—to learn lessons from the cases that were not directly stated in the cases themselves. Specifically, Langdell is not teaching the theory articulated in the cases. Rather, he is showing that a new theory makes better sense of the cases. In order to show the nature of Langdell's theory, it is necessary to compare it to the legal theory contained in the cases. I will therefore begin by going through a part of the Casebook as a student might have done in 1880 (Part II.A). I will then, by way of contrast, demonstrate the way in which his theory analyzes and decides these same cases (Part II.B). This will show that Langdell's theory, rather than being some mechanical compilation, is in fact a creative effort to synthesize a complex and confusing area of law.

I apologize in advance to readers who teach contracts. These readers will certainly find the following discussion somewhat obvious and pedantic. However, for those of us

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61. See C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (2d ed. 1879) [hereinafter *LANGDELL, CASEBOOK*].

62. LANGDELL, *SUMMARY*, *supra* note 8.

63. Bruce Kimball argues that Langdell's marginalia suggest the kind of technical questions that Langdell addressed to his students. See Kimball, *supra* note 3, at 66-77.

who do not teach contracts, the various points require elaboration. And for all readers, it is important to distinguish Langdell's actual theory from those that came later, and are presumed by modern casebooks.

A. *The Law Expressed in the Casebook*

It seems important to note that Langdell's Casebook is quite different from those in use today. There are no notes or commentary. The only organization is that there are three sections, and a number of subsections into which the cases are divided. I will specifically examine the first section of the Casebook which is entitled "Mutual Consent."<sup>64</sup> The twenty-five cases in this section are not presented in any particular order beyond the obvious fact that: one, there are two lines of cases, the first English and the second American; and, two, the cases within each line progress from the oldest and simplest, to the most recent and most complex. In this section of the Article, I will confine my comments to the first line of English cases solely to avoid length and repetition.

The first two cases are from the eighteenth century and provide a framework for analyzing the problem of contract formation. The first, *Payne v. Cave*,<sup>65</sup> is an auction case involving the following sequence: (1) the plaintiff put up a piece of merchandise; (2) the defendant placed a bid; and, (3) the defendant revoked his bid before the hammer fell. The court held that there was no contract because the auctioneer had not brought down the hammer before the revocation was made. The decisive argument on behalf of

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64. LANGDELL, CASEBOOK, *supra* note 61, at xi. This first section is followed by two others: "Consideration" and "Conditional Contracts." The section on Consideration is further subdivided as follows: Nature of Consideration; From whom the Consideration must move; What Contracts Require a Consideration; Sufficiency of Consideration in General; Forbearance; Compromise; Moral Consideration; Gratuitous Bailment; Mutual Promises; Consideration Void in Part; and Executed Consideration. The section on Conditional Contracts is further divided: Conditions Precedent; Independent Covenants and Promises; Mutual and Concurrent Conditions; Conditions Subsequent; Performance of Conditions, and how it should be averred; Part Performance of Conditions, and Effect thereof; Waiver of Performance, and Effect thereof; Contracts Conditional Upon Demand; and Contracts Conditional upon Notice. *Id.* at xi-xiii.

65. (1789) 100 Eng. Rep. 502 (K.B.), *reprinted in* LANGDELL, CASEBOOK, *supra* note 61, at 1.

the defendant was that there was no mutuality of obligation. Before the hammer fell, the court reasoned, the seller could have walked away from the sale.<sup>66</sup> Since the seller had no obligation, he had furnished no consideration, and this left the buyer's agreement to pay without consideration as well.

The second case, *Cooke v. Oxley*<sup>67</sup> involved a similar situation. In that case, a merchant offered to sell a certain amount of tobacco to the plaintiff. The seller also agreed to give the buyer until 4 p.m. to accept his offer. The plaintiff did accept the offer before 4 p.m., but the defendant, in the meantime, decided not to sell. The court held there was no contract. Again, the seller's promise to wait for an answer was without consideration, and could not itself serve as consideration for the buyer's promise to purchase.<sup>68</sup>

These two cases seem strange to a modern reader, but they are both decided upon a particular principle. I will refer to this principle as the "mutuality principle." The mutuality principle follows from the definition of contract as an agreement upon sufficient consideration.<sup>69</sup> The courts understood this as requiring that each party must agree to the contract and furnish consideration. If either party failed either requirement, then no contract was formed—there was simply a *nudum pactum* that could not be legally enforced. These requirements resulted in a number of issues about timing. Indeed, the timing issue proved crucial in many cases. The reason for this is not hard to see. If there is any time between one promise and the other, then, for that time, the first promise will not be binding. This means that

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66. "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; and that is signified on the part of seller by knocking down the hammer, which was not done here until the defendant had retracted." *Payne*, 100 Eng. Rep. at 503. This illustrates the indecisiveness of the rule about mutuality of obligation. Why is there no contract before the hammer came down? Could the seller really have walked away? The mutuality rule does not decide this case unless both questions are answered in the affirmative.

67. (1790) 100 Eng. Rep. 785 (K.B.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 2.

68. *Cooke*, 100 Eng. Rep. at 786.

69. See 2 KENT, *supra* note 13, at 363 ("An executory contract is an agreement upon sufficient consideration to do or not do a particular thing.").

the second promise fails because the original promise, being a *nudum pactum*, does not count as consideration. The only way to make a contract, given these requirements, is for both parties to make their agreements simultaneously. Since true simultaneity is seldom achieved, the courts treated the agreements as simultaneous if they were made in the course of an ongoing, face-to-face discussion. This created a problem for the plaintiff in *Cooke*, because the initial discussion had been terminated when he left to consider the defendant's offer.

One problem with this result is its potential unfairness. Not knowing the law, a buyer will be deceived by the seller's promise of time to consider. An even more serious problem, however, arises when the contract is negotiated by mail. This is illustrated by *Adams v. Lindsell*.<sup>70</sup> In *Adams*, the defendant wrote to the plaintiff, offering to sell goods at a certain price. The letter was misaddressed and arrived three days late. When it arrived, the plaintiff accepted by return post. In the meantime, the defendant, having not heard from the plaintiff, sold the goods to someone else. The defendant argued that there was no contract because of the mutuality requirement. The court rejected this argument, reasoning that if there was no binding contract until plaintiff's answer was received, then

no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*.<sup>71</sup>

Thus, the court recognizes the problem that would result if it required simultaneity in the context of contracts by mail. They therefore developed a fiction to deal with this situation. They would treat the offer as being continuously reaffirmed so long as the letter is travelling. In this way, contracts by letter came to resemble the face-to-face situation where simultaneity is presumed from the fact that

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70. (1818) 106 Eng. Rep. 250 (K.B.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 4.

71. *Adams*, 106 Eng. Rep. at 251.

the promises take place in the course of the same conversation.

Following *Adams* are two more cases where simultaneity was at issue. *Routledge v. Grant*<sup>72</sup> is another case where the defendant-lessor sought to revoke his promise before he had received the counter-promise of the plaintiff-lessee. The plaintiff argued that the court had abandoned the simultaneity principle in *Adams*. However, two members of the court rejected this argument and held that there was no valid contract.<sup>73</sup> A third relied on alleged variances between the two promises to reach the same result.<sup>74</sup>

The second case, *Head v. Diggon*,<sup>75</sup> involved similar facts. The defendant in *Head* made an offer to sell and left three days for the plaintiff's response. Whether the plaintiff's response was timely depended on whether Sunday was included in the calculation. The court, however, ignored the Sunday issue and applied the mutuality principle to hold that there was no contract.<sup>76</sup>

After *Head*, it must be taken as clearly established that the only exception to the mutuality principle was the mail rule developed in *Adams*. This being so, the result in *Hyde v. Wrench*<sup>77</sup> should not surprise us. In *Hyde*, there was a face-to-face price negotiation. The defendant offered to sell at 1200 and the plaintiff refused. The defendant then offered a sale price of 1000, and the plaintiff countered at 950. At that point the interview was over, and the defendant asked for time to think it over. When they

72. (1828) 130 Eng. Rep. 920 (C.P.D.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 6.

73. *Routledge*, 130 Eng. Rep. at 922-23.

74. One was a seven-day variance related to the time of occupancy; the second occurred because although the plaintiff had accepted the offer, he had not yet executed a lease that would have given him the legal right to sublet the property for the entire period. *Id.*

75. (1828) 3 Man. & R. 97 (K.B.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 10.

76. *Head*, 3 Man & R. at 98-100.

77. (1840) 49 Eng. Rep. 132 (L.R.Ch.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 13.

resumed negotiations, the defendant rejected the offer of 950. When the plaintiff tried to take advantage of the earlier offer of 1000, the defendant refused. The court, confronted with these facts simply said:

The Defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the Plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the Defendant. I think that it was not afterwards competent for him to revive the proposal of the Defendant . . . and that, therefore, there exists no obligation of any sort between the parties. . . .<sup>78</sup>

Note that the mutuality principle alone would be enough to settle the case, but the court seems to indicate a further reason, namely that, once a proposal is rejected, it cannot be revived.

The next case, *Williams v. Cardwardine*,<sup>79</sup> does not seem to belong in a set of cases dealing with the mutuality principle. In *Williams*, the defendant offered a reward for information leading to the arrest of a murderer. The plaintiff, who had been beaten by the murderer, made a statement that led to his arrest. The reason for this statement was that she "believ[ed] she had not long to live, and to ease her conscience[.]"<sup>80</sup> When she subsequently claimed the reward, the defendant refused, arguing that she had provided the information for her own reasons and that her action was not intended as consideration.

The mutuality principle was not relevant to this case.<sup>81</sup> Instead, the question was whether the plaintiff's actions

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78. *Hyde*, 49 Eng. Rep. at 133.

79. (1833) 110 Eng. Rep. 590 (K.B.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 12.

80. *Williams*, 110 Eng. Rep. at 590.

81. The modern reader, familiar with Langdell's distinction between unilateral and bilateral contracts, has no trouble discerning the reason that mutuality is not relevant here. The defendant's offer was an offer for a unilateral contract that could be accepted by performing the act required in the offer, namely the provision of information. The offer to reward was never revoked. It remained open until the time when the plaintiff did the act that completed the contract. From Langdell's point of view, however, the problem in

provided the required consideration given that they were not intended as such. The court held that they did, ruling that the plaintiff's motives were irrelevant.<sup>82</sup>

The next two cases return to the postal context and address the issue of what happens when letters cross in the mail. The first case, *Potter v. Sanders*,<sup>83</sup> does not involve a contract at all. This case involved the sale of real estate where the seller, Sanders, had been negotiating with two different parties. The first was the plaintiff, Potter. The second was a man named Coates who was negotiating with Sanders' father. The plaintiff sued for specific performance alleging that the father had notice of the sale to the plaintiff before he completed the second sale.<sup>84</sup> While there were numerous questions that affected the case, the court chose its issue carefully. It said that the issue was one of notice: did the father, whose son had written to him the day before informing him of the first sale, have notice of the first sale absent proof that the letter had actually been received by the father prior to the second sale? The court decided that it did not matter when the son's letter had been received, so long as the letter had been mailed on the 23rd. It wrote:

I think the vendor, when he put into the post office the letter to the Plaintiff of the 23d of April, did an act which, unless it was interrupted in its progress, concluded the contract between himself and the Plaintiff. I cannot, in short, doubt but that the letter of the 23d was a revocation of the authority which the vendor had given to his father to make a contract for him for the sale of the estate.<sup>85</sup>

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this case is that the plaintiff's act should not count as consideration unless she intended it as such.

82. *Williams*, 110 Eng. Rep. at 591.

83. (1846) 67 Eng. Rep. 1057 (L.R.Ch.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 15.

84. *Potter*, 67 Eng. Rep. at 1059. The knowledge that the property had been sold would have terminated his agency for the son in the sale of the property, thereby rendering his subsequent actions null and void.

85. *Id.* at 1061.



Thus, it held that, with respect to termination of agency, notice given by mail was effective at the time when it was mailed, rather than when it was received.<sup>86</sup>

*Dunlop v. Higgs*,<sup>87</sup> applies this rule to the contract situation, where the plaintiff's acceptance crossed in the mail with the defendant's revocation. The exact timing was as follows:

- The defendant made the offer by mail on January 28th.
- The plaintiff received the offer on the 30th.
- It posted the acceptance on the afternoon of the 30th, misdating the letter to the 31st.
- The letter was delayed in transit and received on February 1st.
- The defendant posted a letter on February 1st rescinding the offer.

Under *Adams v. Lindsell*,<sup>88</sup> the offer was deemed to be renewed and continued until the plaintiff had had time to reply by return mail. This he did, however, notice of his action did not come to the defendant until he received the delayed letter on February 1. The court held that this delay was irrelevant. "The mailbox rule" permitted the court to deem that the contract was complete the moment that the letter was placed in the mailbox.<sup>89</sup>

*Offord v. Davies*<sup>90</sup> involves a guarantee. In *Offord*, the defendants rescinded their guarantee during the period between making the guarantee and plaintiff's reliance upon

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86. *Id.*

87. (1848) 9 Eng. Rep. 805 (H.L.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 21.

88. *Dunlop*, 9 Eng. Rep. at 808.

89. *Id.* at 807-08.

90. (1862) 142 Eng. Rep. 1336 (C.P.D.), reprinted in LANGDELL, CASEBOOK, *supra* note 61, at 33.

it. The court held that the rescission was valid since there was no binding contract during this period.<sup>91</sup>

This seems a straightforward application of the mutuality principle; since the plaintiff had not yet furnished consideration, and indeed was not yet bound to furnish it, the furnishing of consideration was not simultaneous, and therefore the parties had failed to form a contract. Note, however, that the application of the simultaneity requirement would make it virtually impossible to have a binding guarantee in these circumstances. In any case, the court declines to find that there was no contract, but rather ruled that the guarantor's agreement could be revoked at any time before the other party had relied on the contract.<sup>92</sup>

Like *Offord*, the next three cases involve delays, but, in these cases, the delays prove fatal. In the first, *Ramsgate V. H. v. Montefiore*,<sup>93</sup> the defendant applied to purchase certain shares of stock. The transaction was delayed by the board's failure to act promptly on the application. In *In re National Savings Bank Association*,<sup>94</sup> the delay was the result of the corporate agent's failure to transmit the Board's action in a timely fashion. And in *Eliason v. Henshaw*,<sup>95</sup> the seller sent the acceptance by mail rather than by giving it to the man who delivered the offer as required by the purchaser. In each of these cases, the courts upheld revocations of the offer made during the period of delay. Thus, we can see that the postal rule is a special case. Offers remain open in the postal case out of necessity. When, however, there is a delay beyond the normal operation of the mail, the offer can be rescinded.

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91. *Offord*, 142 Eng. Rep. at 1340.

92. *See id.* at 1339-40.

93. (1866) L.R. 1 Exch. 109, *reprinted in* LANGDELL, CASEBOOK, *supra* note 61, at 43.

94. (1867) 4 L.R. Ch. 9, *reprinted in* LANGDELL, CASEBOOK, *supra* note 61, at 42.

95. 17 U.S. 225, 226-27 (1819) (first of the American cases), *reprinted in* LANGDELL, CASEBOOK, *supra* note 61, at 71.

*Summary and Conclusion to Part II.A*

These cases, taken together, suggest the following about the topic of mutual consent.

The operative definition of a contract is: a contract is a promise supported by consideration.

Without consideration, promises are unenforceable, and this gives rise to the mutuality principle: one side cannot be bound if the other is not.

Thus, "I will sell you this for ten dollars," is not an enforceable promise since it remains unsupported by consideration. There is still no contract if the buyer replies: "I will buy it for ten dollars." This is because the seller's promise is unsupported by consideration and therefore not binding, and a non-binding promise cannot count as consideration. This gives rise to the simultaneity requirement: both parties must become bound at the same time.

The simultaneity requirement creates some difficult issues about timing. Courts have resolved these issues as follows:

- Two promises are simultaneous if they are made in the course of a face-to-face interview.
- Two promises are simultaneous if they are made in the regular course of the mail.
- If the second promise is made in the regular course, it completes the contract at the time it is posted (the mail box rule).

*B. The Theory Contained in the Summary*

Langdell's theory does not consist of the rules outlined above. Indeed, the point of the theory is to provide an explanation of the cases while, at the same time, resolving some of the inconsistencies and irrationalities. One of the chief problems with the pre-Langdell theory is that, without more, a promise on one side: "I will sell you this for ten dollars" coupled with a promise on the other: "Fine, I will pay ten dollars" does not result in a contract unless the

parties are face to face or make their contract through the mails.

One solution to this problem would be to eliminate the requirement of consideration. This is obviously a radical solution that would thoroughly change the law of contracts.<sup>96</sup> Langdell's solution, however, leaves the law of consideration intact, but instead modifies the requirements for contract formation by introducing two new terms: offer and acceptance. Langdell begins by referring to the Roman rule that a promise is not a legal promise until it has been accepted by the promisee.<sup>97</sup> Prior to that, it is only an offer. For example, if A promises to meet B at ten, A has made an offer that can only be converted to a legal promise by B's act of acceptance. Thus, if a contract is a legal promise supported by consideration every contract will require three elements:

1. an offer;
2. an acceptance; and
3. consideration.<sup>98</sup>

It is important to note that the terms "offer" and "acceptance" are technical terms, each having their own particular properties.

1. *Offer*. An offer references two promises. One promise, the proposal, is actually made in the offer—the offeror promises that a specific promise will be forthcoming if the offeree makes his acceptance. The second is the counter-promise that will not be made until acceptance is made.<sup>99</sup> It is the second promise that gives rise to the contractual

96. Langdell is reluctant to consider altering the rules with respect to consideration. For example, in a passage where he examines the possibility of eliminating consideration with respect to bills of exchange and insurance policies, he writes, "[i]t can easily be shown, however, that this opinion is irreconcilable with the nature of these contracts, even when judged by our law, still more when judged by the custom of merchants, and that the decisions by which it is supported, if they cannot be pronounced erroneous, must at least be deemed anomalous." LANGDELL, SUMMARY, *supra* note 8, at 63.

97. *Id.* at 1.

98. *See id.* at 1-5 (discussing the process of contract formation).

99. *Id.* at 14.

obligation, but only if it, the second promise, is supported by consideration from the other party.

*An offer is a promise to make a promise. The offer can be in words or signs and must be communicated to the offeree.*<sup>100</sup>

So defined, the concept of an offer allows Langdell, to introduce a radically new idea: the proposal in the offer, i.e., the promise to make a promise, is binding without consideration so long as the offer remains open. Langdell's analysis therefore makes an important distinction between offers and promises; with offers, a promise to make a promise is binding once it is accepted by the offeree; with promises, a promise is not binding until it is supported by consideration. In these circumstances, the consideration requirement applies only to the second promise, i.e. the one that is promised in the offer. If the second promise is without consideration, then it will not be binding.

If a plaintiff who makes an offer is bound thereby, it is important to know when an offer expires. Under Langdell's theory,

An offer remains open until one of the following three things happens:

1. It is rejected by the other party;<sup>101</sup>
2. It expires in accordance with its terms;<sup>102</sup> or
3. It is revoked.<sup>103</sup>

The fact that proposals are binding in accordance with their own terms has consequences for the cases described in

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100. This summarizes Langdell's description of a bilateral offer. *See id.*

101. *Id.* at 22-23.

102. *Id.* at 198. If an offer specifies its duration, then its expiration date is stated in the offer. If it does not, then the following presumptions apply:

1. If the offer is made in a face to face interview, it expires at the end of the interview. *Id.*
2. If the offer is made by mail, it expresses a willingness to receive the acceptance in the same way. *Id.*
3. With respect to time, there is no general rule. The issue of reasonable time is for the jury. *Id.* at 201.

103. *Id.* at 204, 240.

the Casebook. For example, consider the situations described in *Cooke*, *Routledge*, *Head*, and *Hyde*. Using Langdell's analysis, each of these cases involves an offer that was binding until one of the above three things happens. In *Cooke*, none of these had happened and so the contract would be valid. In *Routledge*, if the variances were fatal, then the offer had been revoked before any acceptance became valid. In *Head*, the issue would be whether the offer had expired. And, finally, in *Hyde*, the offer was closed because the offeree had rejected it.

The notion of a binding offer also provides a different result in auction cases such as *Payne*. Langdell notes the confusion that the *Payne* rule can cause at an auction by permitting uncertainty to attach to stated bids. He also notes that there is no way for sellers to eliminate the rule by contract since whatever effort they make to impose a different rule will fall afoul of the mutuality principle. On the other hand, Langdell's theory disposes of the problem with clarity. He suggests that a seller who puts up a good for auction is making a legal offer to sell the item to the highest bidder. As an offer, the promise (I will sell to the highest bidder) is binding unless revoked. Therefore the sale is completed when the highest bid is made. There is no need to wait for the hammer to drop.<sup>104</sup>

In addition to distinguishing between an offer and an acceptance, Langdell also makes a distinction between bilateral and unilateral offers.<sup>105</sup> A bilateral contract is a two-sided contract—each side makes a promise in exchange for the other side's promise.<sup>106</sup> A unilateral contract consists of a promise on one side and an action on the other.<sup>107</sup> Every offer therefore is either an offer to make a unilateral contract, or an offer to make a bilateral contract.

An example of an offer to make a bilateral contract is: I promise to pay you ten dollars if you will promise to clean your room.

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104. *Id.* at 24-25 (comparing actual practice to holding in *Payne v. Cave*, (1789) 100 Eng. Rep. 502 (K.B.)).

105. I believe it is Langdell who originates this distinction as there is no mention of these in Kent, Blackstone, or Parsons.

106. LANGDELL, SUMMARY, *supra* note 8, at 249.

107. *Id.*

An example of an offer to make a unilateral contract is: I promise to pay you ten dollars if you clean your room.

In the first case, the offeror has indicated that the offer can be accepted by making a promise. In the second, he or she has indicated that the offer can only be accepted by the offeree's act of cleaning his or her room.

The offer in *Offord* must be understood as a unilateral offer. The defendant offeror promises to guarantee certain bills of exchange for a period of twelve months. The act sought was that the plaintiff would discount the bills at the plaintiff's request. Since the defendant revoked its guarantee before any bills had been discounted, no valid contract had been formed. The contract could not be binding until the plaintiff had accepted the contract by doing the required act.

2. *Acceptance.* In Langdell's theory, acceptances are different from offers in a variety of ways. First, the proper form of an acceptance is stipulated in the offer. For example, it is the offeror who determines when the acceptance must be made and how it must be communicated. It is also the offeror who determines whether the contract will be unilateral or bilateral by stating whether the offer may be accepted by an act or by a promise.<sup>108</sup>

*Acceptance—An offer is accepted by performing the act or making the promise required in the offer.*<sup>109</sup>

In addition, the acceptance contains not just an explicit acceptance of the original offer, but also an implied counter-offer. The counter-offer proposes the same contract as the original offer and it is accepted by the acceptance that was implied in the original offer. Thus, each contract represents two sets of offer and acceptance: (1) the explicit offer made in the original offer with the explicit acceptance contained in the acceptance; and (2) the implied counter-offer made in the acceptance with the implied acceptance made in the original offer.<sup>110</sup>

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108. *See id.* at 12.

109. *See id.*

110. *See id.* at 14.

There is an asymmetry between offers and acceptances. An offer is not considered made until it is communicated to the offeree, whereas an acceptance is complete upon the mental act of the offeree. This does not mean, however, that notice of an acceptance is irrelevant. First it is the offeree's responsibility to give notice of the acceptance within a reasonable time. Second, there is the additional concern that every acceptance contains an implied offer. It is this implied offer which, when accepted by the original offeror, creates a binding promise for the original offeree, and without this binding promise there is no consideration for the contract. Because the acceptance contains an implied counter-offer, it must be communicated to the original offeree before any contract is formed. Thus, there is no contract until the acceptance that implicitly contains the counteroffer is received by the original offeror. This means that despite the fact that acceptances need not be communicated in order to be effective, the implicit counter-offer contained in the acceptance must be communicated.<sup>111</sup>

Certainly all of this seems convoluted, and one might well ask: what is the point of including the implied counter-offer and acceptance? The answer is this. Langdell's formulation does two very desirable things. First, it provides that there is no contract until both parties have committed themselves and informed the other of their commitment. Second, it avoids the inevitable regress noted in *Adams v. Lindsell*. Once there is an exchange of letters, the contract has been formed. The first party has made an offer and has received an acceptance. The second party has made an offer (implied in his acceptance) and received an acceptance from the first party (implied in his offer). Thus, at that point there are two promises, each supported by the consideration provided in the other. There is no need for further communication.

3. *Consideration*. In addition to an acceptance, the offeree must provide consideration. In the case of a bilateral offer, the consideration will be another promise. In the case of a unilateral offer, it will be an act.<sup>112</sup> In many cases, the

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111. See *id.* at 15.

112. And further, the act must be complete to count as consideration. This means, in an example familiar to first-year contracts students, that an offeror



acceptance and the consideration will be the same act. For example, if A makes an offer to pay B for going to the store (an offer to make a unilateral contract), B's trip to the store will count as both the acceptance of A's promise and consideration for it. In other cases, however, one could have consideration without acceptance. For example, B might respond to the offer by deciding to go to the store as a favor to A. In this case, B's intention is fatal to the formation of any contract. Acceptance and consideration must be intended as such, and this requirement has an impact on the reward cases such as *Williams*. Since the plaintiff in *Williams* had her own reasons for giving the desired information and was, in fact, ignorant of the reward for doing so, his information could not count as an acceptance or as consideration and there was therefore no contract upon which he could recover. This means that Langdell's theory is at odds with the result in *Williams*.

4. *Bilateral Contracts by Mail*. Just as the mail cases caused a problem for the simultaneity principle, they also cause a problem for Langdell's theory. In a simple case, there is not much of a problem. If A mails an offer to B, expecting a reply by return mail, then A's letter is an offer and the acceptance takes place as soon as B decides to accept. Return mail provides reasonable notice of acceptance. In Langdell's theory, there is no need for a fiction that the offer was remade continuously until acceptance. So long as the offeror does not revoke the offer, there is no problem. The difficulty rises when the offeror decides to revoke during the period when the letters are in transit.

In order to analyze such cases, it is necessary to review the requirements for a contract. In the case of a bilateral contract, each side must provide consideration and consideration will be in the form of a promise. Each promise requires an offer, an acceptance and consideration. Thus, an offeror must not only make his offer; he must also accept whatever promise is made by the offeree. Similarly for the offeree, he must not only accept the offeror's offer, but he must also make an offer of his own. Consider then the problem posed by the mailbox situation. The mailbox situation is represented in the following chart:

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who has promised to reward someone for climbing a flagpole can revoke at any time before the offeree reaches the top.

Time	Party A, Initial Offeror	Party B, Initial Offeree
T <sub>1</sub>	I promise to pay you if you will promise to do X.  I accept your promise to do X if such a promise is forthcoming. (Implied)	
T <sub>2</sub>		I accept your promise to pay me.  I promise to do X. (Implied)
T <sub>3</sub>	A revokes his original offer and implied acceptance.	
T <sub>4</sub>	B's acceptance and implied offer arrives in A's mailbox.	

At T<sub>3</sub>, the acceptance of A's promise is complete, but B's counter-offer has not been communicated. There is therefore no second promise and no consideration. As a result, A's revocation anytime before T<sub>4</sub> will be effective to block formation of a contract.

This result denies the so-called "mailbox rule," and, as Langdell acknowledges, is quite controversial.<sup>113</sup> It is at this point that he makes the statement about justice and convenience that was so notably criticized by Holmes: "The true answer to this argument[,] (i.e., that justice and convenience require the mailbox rule) "is that it is irrelevant."<sup>114</sup> But, having said that it is irrelevant, Holmes goes on to pursue the argument with some vigor, offering

113. See LANGDELL, SUMMARY, *supra* note 8, at 18-22.

114. Oliver W. Holmes, *Book Notices*, 14 AM. L. REV. 233, 234 (1880).

two separate arguments: (1) the mailbox rule results in a more substantial harm to the parties; and (2) rejection of the mailbox rule facilitates prevention of the difficulty.<sup>115</sup>

However one feels about the mailbox rule, I take my point as amply proven. The theory that Langdell articulates in the Summary can be found nowhere in the cases. What he has done, in offering his theory, is to tell a larger story, and, given that no trace of the story can be found in the cases, it must be regarded as solely his creation. To tell the story, he has had to make up a technical vocabulary that, while not as precisely defined as a mathematical formula, is at least more definite than the mutuality principle and the simultaneity requirement. Since so much of Langdell's theory is not found in the cases, one might reasonably ask: why should anyone suppose that Langdell's theory is true? If it is not a description of how courts actually think, why should anyone accept it as a theory of legal decision making?

This brings us to the question of justification. However, the difficulty in thinking about the justification for Langdell's theory is that he, himself, does not address the issue. In fact, given that his theory represents a significant innovation in American law, it is odd that he should be so reticent about offering reasons to embrace it. He explains some of the considerations that led him to use it as a teaching method. He has also provided arguments that favor certain results in particular cases. But nowhere does he offer reasons to embrace the theory itself. For this reason, the issue of justification requires a bit of a detour. Langdell wrote in the late nineteenth century and, fortunately, there are a number of sources that will help us understand the notion of scientific method utilized by his contemporaries. In the next part, I will examine these materials and argue that one of the methods they describe is, in fact, the method Langdell was using. This will permit us, in the following part, to think about the problem of justification.

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115. *Id.*

## III. LANGDELL'S METHOD

Langdell was emphatic in describing his work as legal science.<sup>116</sup> As science, Langdell insisted that our approach to law should be both rigorous and systematic.<sup>117</sup> An understanding of Langdell's theories, however, requires more than just some vague notion of what is logical and scientific. In the nineteenth century, science was not a precise concept.<sup>118</sup> The term "science" could be applied to a number of strikingly different methodologies. For example, it was used to describe the classificatory systems of biology and zoology as well as the predictive methods of physics and chemistry. It could also be used to describe mathematics, even though its method was not generally understood as empirical.<sup>119</sup> In addition, there were a number of ideas about how science could be applied to law. One such idea, of course, was that exemplified by Blackstone whose "scientific" method was solely a matter of organization.<sup>120</sup> Another is illustrated by Holmes' *Common Law*<sup>121</sup> which traces legal doctrines to their common law origins. Given these variations, it is necessary to be specific about the type of method Langdell used.

One way to understand Langdell's method is to look at the standard logical text that was used in his time. Understanding what Langdell was taught about science is a

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116. LANGDELL, CASEBOOK, *supra* note 61, at vi-vii. This description may have been partly political since, during Langdell's time, the term "legal science" was the rallying cry for those who wished to move legal education out of the practitioner's offices and into university libraries. Nevertheless, it is clear that Langdell's interest in legal science was more than just political.

117. *Id.*

118. A general account of the method did not emerge until the twentieth century when the logical positivists provided a rigorous analysis. *E.g.*, KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1935). While later philosophers of science would quarrel with this account, the account itself remained the center of discussion.

119. John Stuart Mill famously suggested that mathematics might be empirical. *See generally* JOHN STUART MILL, A SYSTEM OF LOGIC 147-72 (1906). Thomas Grey adopted this suggestion, when he argued that Langdell's method was, in fact, inspired by geometry, but by Mill's empirical account. *See* Grey, *supra* note 7, at 19.

120. *See supra* Part I.A.

121. O. W. HOLMES, JR., THE COMMON LAW (1881).

good start towards understanding his use of a scientific method. Thus in the first section, I will examine this text as a guide to understanding Langdell's own outlook on method (Part III.A). I will then consider the common view that Langdell's theory is based on a logical system such as the one used by geometry, concluding that this view is mistaken (Part III.B). In the third section (Part III.C), I will consider the possibility that Langdell's work should be analogized to the classificatory systems used by botany and zoology. I will argue that this approach is incorrect because it overlooks the fact that Langdell's theory is normative as well as descriptive. And finally, after rejecting both the demonstrative and classificatory descriptions of Langdell's theory, I argue that it is synthetic in the sense that it should be understood as utilizing the predictive model of empirical science (Part III.D).

#### A. *Langdell's Logic Book*

During the nineteenth century, logic was a required course for undergraduates at Harvard.<sup>122</sup> The course used a series of books that began with Brattle's *Compendium of Logick* in 1687.<sup>123</sup> When Langdell studied logic, the book in use was *Elements of Logick; or a Summary of the General Principles and Different Modes of Reasoning*, by Levi Hedge.<sup>124</sup> Hedge's book was not limited to symbolic logic.

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122. See SAMUEL ELIOT MORISON, *THREE CENTURIES OF HARVARD 1636-1936*, at 235 (1964). Langdell went to Phillips Exeter and may have taken the course there. In any case, the course at Exeter used the same book, Hedge's *Logick*, that was used at Harvard. See Letter from Shelley C. Bronk, Achieves Assistant at Phillips Exeter Academy, to Sharon Fry (July 23, 2004) (on file with the Buffalo Law Review).

123. See 1 ELIZABETH FLOWER & MURRAY G. MURPHEY, *A HISTORY OF PHILOSOPHY IN AMERICA* 367 (1977). Brattle's book was used at Harvard from its publication until 1865 when it was followed by Isaac Watts' *LOGIC; OR THE RIGHT USE OF REASON IN THE INQUIRY AFTER TRUTH* (1825). Watts' book was in use until 1827 when Hedge's book was published. Nor was Hedge's book the last in the series. During Langdell's time, Francis Bowen and his student Charles Peirce were at work on a new text *Treatise on Logic*, published in 1864. *Id.* at 382-87; FRANCIS BOWEN, *A TREATISE ON LOGIC* (10th ed. 1890).

124. LEVI HEDGE, *ELEMENTS OF LOGICK; OR A SUMMARY OF THE GENERAL PRINCIPLES AND DIFFERENT MODES OF REASONING* (1816); see FLOWER & MURPHEY, *supra* note 123, at 373 (describing the history surrounding the use of Hedges' book). The course at Phillips Exeter used the same book as was used at Harvard. See Letter from Shelley C. Bronk, *supra* note 122.

Instead, it resembled what we would now call practical reasoning or critical thinking. The logic course was taught in the hope that Harvard graduates would internalize these methods and one can see the success of this effort in the writings of those they trained.<sup>125</sup> Indeed, Hedge's logic forms a kind of rule book for mid-nineteenth century inquiry and debate.

There are two ways in which Hedge's account of scientific method differs from modern accounts. The first has to do with what Hedge describes as the involuntary operations of the mind. There are two of these.<sup>126</sup> The first is the power to perceive the external world through the five senses. The resulting perceptions are similar to what the British empiricists called sense impressions. The second is the power of introspection by which each person knows his own internal emotional states. In both cases, the processes are not subject to conscious control.<sup>127</sup> This characteristic is important. The things in consciousness that we do not control are "reality"; that is, they are the very beliefs that science and logic are meant to explain.<sup>128</sup>

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125. One familiar with the writings of Oliver Wendell Holmes or Charles Peirce will recognize the influence of the book on their thinking.

126. Hedge calls the first operation perception and the second consciousness. HEDGE, *supra* note 124, at 15-20.

127. *Id.* at 19. The incorrigibility of sense impressions is a common claim in epistemology. Less common is the claim that the results of introspection are similarly incorrigible, although you do find this claim made by philosophers such as Descartes. Incorrigibility does not mean that I cannot be mistaken about what is in the world or in consciousness, but simply that I am not mistaken in reporting what I see. For example, while I cannot be incorrect in reporting truthfully that I see a red balloon; I can still be convinced that the balloon is not red if I am told that I am observing it through a red filter.

128. The reliability of internal states is much more controversial than the reliability of perception, but it must be understood in the same way. It does not mean that I cannot be mistaken in knowing that I am angry though I can admit that I might not be if I knew all the facts. It is important to see how differently we think about the emotional realm today. The account in Hedge presumes that our emotional states are transparent; that at any given time we will know what we are feeling. *Id.* at 20. This presupposition is just the opposite of how we think about emotional states today. We are uncertain about our powers of introspection. We believe in repressed feelings and unconscious drives, and therefore believe that it takes of our feelings are repressed and that it therefore takes real work to know what they are. All of this was missing in 1857 when

A second difference with contemporary accounts of science centers on what Hedge calls the voluntary operations of the mind. Contemporary theories tend to focus on observation and logical reasoning. Hedge, however, points out the importance of certain other aspects of cognition. These include:

1. Attention—the ability of the mind to focus on some particular aspect of experience;<sup>129</sup>

2. Comparison—the mind's ability to contemplate two things with respect to one another;<sup>130</sup>

3. Abstraction—the ability to consider one particular aspect of a thing while disregarding other aspects;<sup>131</sup>

4. Association—the ability of one idea in the mind to call forth another;<sup>132</sup>

5. Analysis—the ability of the mind to separate out one aspect of a compound subject and to focus on that aspect to the exclusion of all others.<sup>133</sup>

Hedge's focus on the voluntary operations means that his conception of right method is only partially rooted in right reasoning. Scientists must also be careful about how they utilize their perceptions.

Modern philosophers of science tend to emphasize the formal reasoning process, overlooking the ways in which perceptions and feelings are processed by the mind. They urge scientists to be accurate in their observations and rigorous in their formal reasoning. Hedge, however, emphasized that good science requires more. He writes:

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Hedge wrote his *Logick*. For Hedge, feelings were like perceptions—our minds reacted to things in the real world both in positive and negative ways. These responses were not dismissed as somehow irrational. Rather they appeared to be attached to the things that caused them in a way that let us know whether these things were to be avoided or pursued.

129. *Id.* at 20-23.

130. *Id.* at 23-25.

131. *Id.* at 25-27.

132. *Id.* at 28-32.

133. *Id.* at 32-34.

[I]f there be any thing that can be called *genius* in matters of mere judgment and reasoning, it seems to consist chiefly in being able to give that attention to the subject, which keeps it steady in the mind, till we can survey it accurately on all sides. . . . the powers of judging and reasoning depend chiefly on keeping the mind to a clear and steady view of the subject.<sup>134</sup>

Thus, the focus on the voluntary operations of the mind helps us to see the difference between raw data and reliable observation. It is not enough to be a passive receptor for perceptions and feelings. One must also focus one's attention on individual aspects of experience, make comparisons, and analyze one's experiences into their component parts.

These, then, are the two distinctive aspects of Hedge's philosophy of science. They have significant consequences for legal science. Modern theorists tend to dismiss the idea that we can study law as a natural science.<sup>135</sup> The reason for this is tied up with the distinction that is commonly made between matters of fact and matters of value. Science, we presuppose, is an inherently descriptive activity—all of its findings are based upon observations of facts in the material world. Law, on the other hand, is concerned not only with the law as it is, but also with the law as it ought to be. It is therefore an inherently normative activity; and, as such, remains unrelated to physical observation. This, according to current theories, means that the normative aspects of law cannot be studied scientifically.<sup>136</sup> Hedge, however, did not share the assumption that there is a radical division between fact and value. By privileging our feelings as well as our perceptions, a science of value becomes possible. The

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134. *Id.* at 20-21 (quoting THOMAS REID, *ESSAYS ON THE ACTIVE POWERS OF MAN* 80 (1788)). Thomas Reid (1710-1796) was a Scottish logician whose work was very influential with the logicians at Harvard. See FLOWER & MURPHEY, *supra* note 123, at 245-54.

135. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 107-10 (1994).

136. Of course, legal positivism is consistent with this kind of scientific positivism. Legal positivism reduces law to facts about what legislatures and courts do. It is important to see, however, if we treat legal positivism as a science, that is, if we try to make predictions on the basis of observing courts and legislatures, it is necessary make assumptions about the normative commitments of certain actors. In any case, when Langdell called law a science, this kind of positivistic science was not what he had in mind.



feeling that some result is both fair and just counts as evidence that it is so in the same way that the sensation of red is evidence of a red object. Of course it is possible that something may appear red even though it isn't. In the same way, something may feel fair and just, but still not be so. That is why the voluntary operations of the mind are so important. In this connection, Hedge writes:

Without [analysis], our perceptive powers would give us only confused and imperfect notions of the objects around us. . . . Nature dictates this process. . . . The objects, which nature presents to us, consist of assemblages of different qualities, some more and others less easily distinguished. . . . Things, which have no immediate reference to material objects, such as thoughts, affections, and mental operations, are analyzed in the same manner, as objects of sense. . . . The same may be said of moral qualities, as justice, prudence, benevolence, and the like.<sup>137</sup>

Thus, with both facts and values, it is important to think critically about the perceptions and feelings one experiences. One can ask: "Is this object really red or am I seeing it through a red filter?" Equally, one can ask: "Is this outcome really just? Would I feel it to be so if I were the plaintiff or the defendant?"

As a result of Hedge's influence, Harvard students were led to organize their thoughts in a particular way. The raw material of any inquiry consisted of the things described as intuitive evidence—what we see, hear, and feel. The next step involved cleaning up the raw material by subjecting it to thorough inspection and analysis. The final step was logic. Inferences could be drawn in accordance with a number of approved methods. These included deduction, induction, analogy, probability theory, and "reasoning from facts."<sup>138</sup>

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137. HEDGE, *supra* note 124, at 32-34.

138. The last category is particularly interesting to lawyers. It is a description of principles that can be used to analyze bits of evidence and testimony in order to determine the true fact of the matter. Examples of these principles are:

- We rely upon the assertions of others. *Id.* at 108.
- Written testimony is better than oral testimony. *Id.* at 114.
- General notoriety is a ground for belief. *Id.* at 117.

One should note that this is a very loose conception of scientific method. There is no canonical form of inquiry. Whether the inquiry is descriptive or normative, rational inquirers were urged to use whatever techniques suited their subject matters. This diversity of method, however, does not prevent us from further analyzing the method that regulated the formulation of Langdell's theory. Indeed, Hedge makes a number of distinctions that are helpful in this process. The first is a distinction between the demonstrative method used in mathematics and other less formal methods of reasoning.<sup>139</sup> In the next section (Part III.B), I will use this distinction to consider the common claim that Langdell modeled his legal analysis on the deductive methods of geometry. A second distinction is between an analytic method that aims primarily at classification and a synthetic method that adopts an explanatory hypothesis to account for observed data. In this context, I will address the claim that Langdell's project is primarily one of classification (Part III.C).

### B. *Langdell's Theory as Demonstrative Reasoning*

It is commonly thought that Langdell utilized a logical method similar to that used in geometry or mathematics. There are a number of reasons why this view is so widespread. First, there is Holmes' review<sup>140</sup> of Langdell's

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- Circumstantial evidence is reliable when there is enough so that they cannot be accounted for in any way except by supposing the truth in question. *Id.* at 120.
  - Exceptional facts need much testimony. *Id.* at 123-24.

139. Hedge describes two types of reasoning—demonstrative reasoning and moral reasoning. He defines the first—“demonstrative reasoning”—as reasoning that “is employed about abstract and independent truths, or those relations, which are considered as necessary, and whose subjects may be exactly measured and defined.” *Id.* at 84-85. The second—“moral reasoning”—includes all forms of correct reasoning that is not demonstrative. *Id.* at 83-84. It is important to note that the term “moral” reasoning is misleading. It is not limited to normative reasoning such as practical syllogisms and deontic logic. It includes not only these, but also the methods of science—be it the classificatory method of the life sciences or the predictive method of the physical sciences. *Id.* at 85-86. In fact, Hedge's notion of moral reasoning is what we might today refer to as applied reasoning, and to avoid confusion, from here on out, I will refer to this second type of reasoning as “applied reasoning.”

140. Holmes, *supra* note 114, at 233-34.

Summary. The review, in typical Holmes fashion, rings with memorable phrases. For example Holmes accuses Langdell of being “the greatest living legal theologian,” and sums up his disagreement with Langdell with the oft-quoted statement: “The life of the law has not been *logic*; it has been experience.”<sup>141</sup> These words were fatal for Langdell. They lie at the heart of the realist movement that saw Holmes as a far-sighted realist and Langdell as an old-fashioned formalist. This led to a picture of Langdell as one who equated law with an internal logic that remained unaffected by world events. Notwithstanding the stereotype of Langdell as a formalist, there is no quicker way to misunderstand his theory than to assume that he is engaged in creating a logical system. To illustrate the point, we might take a careful look at Hedge’s description of demonstrative reasoning.<sup>142</sup> Demonstrative reasoning, in Hedge’s terms, is a closed deductive system of the kind utilized in mathematics.<sup>143</sup> It begins with a fixed number of

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141. *Id.* at 234.

142. In talking about the nature of mathematical reasoning, I am using the terminology and the description given by Hedge. It should be noted, however that there is nothing unusual about Hedge’s account. It more or less mirrors what we understand about such studies today. It is also fairly consistent with the view of mainstream experts in mathematical logic.

143. The distinction between demonstrative reasoning and applied reasoning is further described by Hedge by noting six differences between them: the following table is constructed from Hedge’s text. See HEDGE, *supra* note 124, at 84-89.

<b>Demonstrative Reasoning</b>	<b>Applied Reasoning</b>
About abstract matters that can be precisely measured.	About matters of fact; things that are contingent.
It leaves the reasoner with a definite conclusion.	May have arguments of weight on both sides and therefore the result may be regarded as uncertain or tentative.
The opposite of its conclusion is absurd.	The opposite of its conclusion is considered false.
Its conclusion is certain.	Its conclusion is only probable.
Its conclusion is supported by a single thread of argument where each step has an intuitive connection to what went before.	Its conclusion may be supported by a number of independent arguments each one of which adds weight to the conclusion.

clear and precise axioms which are intuitively obvious to all.<sup>144</sup> It then proceeds *solely* by means of deductive arguments. It is this combination—incontrovertible premises and a deductive method—that gives mathematical truths their timeless, universal, and necessary character. If one were to apply such a method to law, then each legal case: (1) would have one and only one right answer; and (2) the answer would be correct for all time and under all circumstances. To determine whether Langdell is using such a method, we should apply these criteria to what we have learned about his theory.

Langdell's theory is different from a demonstrative argument in a number of ways. First his premises are not intuitively obvious. They are, by his own account, derived from the cases, and even for someone who has closely read the cases there is nothing obvious about them.<sup>145</sup> Furthermore, his theory is built upon more than deductive reasoning. One cannot, for example, deduce his conclusion—offer and acceptance are required for the formation of a contract—from the rule most commonly found in the cases—one side cannot be bound unless the other side is. In addition, even Langdell does not believe that the results of his theory are timeless, universal and independent of circumstances. If he did believe this, he would not offer so much explanation and justification for the results in particular cases. Finally, the notion of the Summary as an instance of demonstrative reasoning is hard to square with Langdell's own humility about his enterprise. Certainly, if he believed that he had succeeded in reducing contract law to a logical system, he would not have published it solely as a teaching aid for students. Indeed, in explaining why he has called the work a summary, he states that "it has at

Chief problem is finding the intermediate steps to construct a proof.	Chief problem is the lack of exact definitions to our words and the difficulty of keeping the factual context steadily in view.
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144. *Id.* at 84-85.

145. *See* Holmes, *supra* note 108, at 233-34.

least the recommendation of not leading the reader to expect too much[.]”<sup>146</sup>

There is one variation on the theme of Langdell as a legal logician that deserves special consideration. Thomas Grey, in an article entitled *Langdell's Orthodoxy*,<sup>147</sup> argues that Langdell's system resembles mathematics only if one thinks about mathematics in the empirical terms suggested by John Stuart Mill. Mill believed that the truths of mathematics were empirical generalizations.<sup>148</sup> For example, he thought that one knew that  $2 + 2 = 4$  because every time we counted two things and two more things we ended up with four. Grey thought that Langdell intended a similar process to be undertaken by his students: they would read the cases, select the rules, and generalize to a collection of rules that formed the basis of contract law.<sup>149</sup> Grey makes the sensible point that if Langdell had been committed to deriving his theory from intuitively obvious first principles, then students would not have been expected to extract the principle from the cases.<sup>150</sup> This use of an empirical model of mathematics permits Grey to explain why it is that the principles had to be gleaned from the cases and, at the same time, to argue that Langdell was a formalist in all the ways that count, i.e., that he claimed universality and certainty for his mathematical conclusions.<sup>151</sup> Grey's description, however, hardly matches what we have seen of Langdell's theory and the cases that support it. In particular, we have seen that the theory contains principles that are not enumerable from those articulated in the cases. Arriving at Langdell's conclusion requires more than just observing and counting. As we shall see in the next section, the creation of a freestanding theory is an essential part of his enterprise.

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146. LANGDELL, SUMMARY, *supra* note 8, at iv.

147. Grey, *supra* note 7, at 19.

148. MILL, *supra* note 119, at 147.

149. Grey, *supra* note 7, at 20.

150. *Id.*

151. The empirical model portrays the first principles of mathematics as empirical generalizations about the world. The resulting mathematical conclusions are relatively certain—they are correct so long as the relatively simple observations are done correctly.

C. *Langdell's Theory as a Classificatory System*

Hedge makes another distinction that is useful in trying to analyze Langdell's method. This is the distinction between analysis and synthesis.<sup>152</sup> An analytic method is one in which a compound subject is reduced to its elementary parts. For example, if I want to analyze the concept of a unicorn, I might divide it into (1) a horse like creature and (2) the existence of one horn coming from its forehead. On the other hand, a synthetic method is one that brings certain unlike things together. For example, conceiving of both a robin and a blue jay, I can synthesize these conceptions into the concept of a bird. This synthesis will require a certain amount of analysis. I must analyze each concept to find out what they have in common and then use this to define the more general concept. For Hedge, the important difference between analysis and synthesis is their different functions.<sup>153</sup> Analysis is essential if we are trying to increase our store of knowledge and synthesis is useful in conveying knowledge previously achieved. For students, synthesis can be an aid to comprehension and memory.

When these methods are applied to observational sciences, there are important differences between them. With analysis, each observation is broken down into its constituent parts. Therefore, each statement that is made will be descriptive; that is, each term in such a statement will describe some aspect of the observation. For example, I see a robin. I note that a distinguishing feature of the robin is its red breast. The term "red breast" is descriptive in the sense that it refers to a property of the thing that is observed. On the other hand, if I am using a synthetic method, I might categorize the robin as "something we saw on our walk today." Such a categorization might be useful if I am trying to teach my daughter what a robin is. Or, when added to the rabbit and the deer that we also saw today, it

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152. This distinction is similar to Kant's distinction between analytic and synthetic judgments. For Kant, an analytic judgment is one that breaks a concept down into its constituent parts. For example, all bachelors are unmarried. On the other hand, Hedge is using these terms to describe not just statements but a method. For example, an analytic method is one that focuses on a single conception and lays out its constituent parts.

153. HEDGE, *supra* note 124, at 190-91.

might be used to help her learn the concept of “animals that are not pets.” The important thing about the synthetic method is that, by its very nature, it must introduce concepts that are not directly present in the observations themselves. This is one reason why we must regard Langdell’s work as synthetic in nature.

The fact that Langdell’s theory is a synthetic theory is very important because it helps us to locate the theory within the context of mid-nineteenth century theorizing. In this context, Howard Schweber’s paper, *The “Science” of Legal Science: the Model of the Natural Sciences in Nineteenth-Century American Legal Education*,<sup>154</sup> is extremely helpful. Schweber distinguishes between the group of scientists that were active in the period before the Civil War, and a second generation that were active after the Civil War. The pre-war group included Alexander Bache,<sup>155</sup> Benjamin Peirce,<sup>156</sup> Louis Agassiz,<sup>157</sup> and others.<sup>158</sup> They espoused what Schweber calls “Protestant Baconism,” a theory marked by four distinctive characteristics:

1. A commitment to natural theology;
2. A taxonomic view of science;
3. A belief in the unity of science; and
4. A faith that public science would produce “moral and political uplift.”<sup>159</sup>

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154. Schweber, *supra* note 7, at 421.

155. Alexander Dallas Bache (1806-1867), Superintendent of the U.S. Coastal Survey (1843-1867), great-grandson of Benjamin Franklin.

156. Benjamin Peirce (1809-1880), Harvard mathematician and father of Charles Peirce.

157. Louis Agassiz (1807-1873), Harvard geologist and paleontologist who did much to establish Harvard as a world-class university. For more information generally about these men, see JOSEPH BRENT, CHARLES SANDERS PEIRCE: A LIFE 29 (1998); EDWARD LURIE, LOUIS AGASSIZ: A LIFE IN SCIENCE (1960); and HUGH RICHARD SLOTTEN, PATRONAGE, PRACTICE, AND THE CULTURE OF AMERICAN SCIENCE: ALEXANDER DALLAS BACHE AND THE U.S. COAST SURVEY (1994).

158. Schweber mentions Joseph Henry, James Dana, Oliver Gibbs, John Frazier, and Benjamin Gould. Schweber, *supra* note 7, at 425.

159. *Id.* at 423.

Agassiz was a good example of “Protestant Baconism” in action. Agassiz’s particular gift was his ability to motivate ordinary people to become investigators on his behalf. He would organize field trips and local clubs to scour the countryside for fossils and geological formations. He believed that the study of nature was the study of God. Since God created life, he reasoned, understanding God meant surveying the forms of life that he created. Furthermore, he believed that organizing the samples into classes, species, and genres would generate an insight into the nature of God’s intellect.<sup>160</sup>

The second generation identified by Schweber followed the Civil War and was typified by botanist Asa Gray whom Schweber describes as “presid[ing] over an institutional turning inward that emphasized internalist discourse, disassociation from public affairs, a rejection of theological and political implications alike, and an emphasis on the value of theoretical rather than practical scientific understanding and on the construction of explanatory theories rather than taxonomies.”<sup>161</sup>

This second generation was not content to simply catalogue their observations. They were motivated by a desire to do grand theory. Key to their method was the formulation of explanatory hypotheses that not only explained past observations but could predict future ones. This second generation included men like Charles Peirce, William James, Chauncey Wright, and Oliver Wendell Holmes, Jr.<sup>162</sup>

The question for Schweber is whether Langdell’s theory is an instance of Protestant Baconism or whether it is the kind of explanatory theory that represents the method of the post-war generation? Schweber argues for the first alternative. In doing so, he characterizes Langdell’s theory in ways that seem, given the above analysis of Langdell’s theory, clearly mistaken. For example, Schweber states that Langdell “retained the constrained inductivism” of Protestant Baconism because “his students would reason by

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160. LURIE, *supra* note 157, at 58-62.

161. Schweber, *supra* note 7, at 456.

162. It was members of the second generation who founded The Metaphysical Club described the book by LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001).



inference to already-determined principles, set out in summaries.”<sup>163</sup> As we have seen, however, the theory contained in the Summary is not an inductive generalization of the principles already contained in the cases. In another place, Schweber argues that “Langdell drew his students’ attention only to those few cases that he knew to be accurate and clear demonstrations of principles known to him to be correct[,]”<sup>164</sup> but we have seen that, from Langdell’s point of view, many of the cases in the Casebook are misleading or incorrect. Langdell may be, in many ways, a holdover from the earlier generation, but one thing is certain. Langdell’s theory is no mere classification of the principles put forward in the cases.

In Schweber’s defense, there are a number of reasons why it seems natural to place Langdell in the earlier generation of Protestant Baconists. First, Langdell’s age is closer to that generation than to the later one. Second, Hedge’s *Logick*, from which Langdell learned about scientific method, was at the heart of Protestant Baconism. Finally, Langdell’s “fuddy-duddy” image is hardly consistent with his placement at the forefront of methodological innovation. Nevertheless, it seems clear that the actual theory articulated by Langdell is an instance of the predictive methodology utilized by the post-war generation, and this should not be a surprise given certain additional facts. First, Langdell was not an academic of the old school. He had spent years practicing law in New York and only returned to Cambridge after the Civil War in 1870.<sup>165</sup> This was exactly the time when the post-war generation was developing its views.<sup>166</sup> Secondly, a man who had been educated under the influence of Hedge’s *Logick* knew that, while analysis was the method of science, synthesis was the method by which science should be taught. Teaching was, of course, exactly the enterprise in which Langdell was

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163. Schweber, *supra* note 7, at 459.

164. *Id.*

165. Bruce A. Kimball & R. Blake Brown, “The Highest Legal Ability in the Nation”: Langdell on Wall Street, 1855-1870, 29 LAW & SOC. INQUIRY 39 (2004).

166. The Metaphysical Club started meeting in 1872, and, given that Langdell shared rooms with Chauncey Wright, it is certain that he was aware of their views. Kimball, *supra* note 1, at 215-16.

engaged. The Casebook and the Summary are both the product of the following set of circumstances:

Now, however, I was called upon to consider directly the subject of teaching, not theoretically but practically, in connection with a large school . . . . To accomplish this successfully, it was necessary, first, that the efforts of the pupils should go hand in hand with mine, that is, that they should study with direct reference to my instruction; secondly, that the study thus required of them should be of the kind from which they might reap the greatest and most lasting benefit; thirdly, that the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same time to private study.<sup>167</sup>

Langdell was first and foremost a teacher of law. It was as a teacher that he proposed his theory. The theory is therefore synthetic—it provides a way of understanding the cases as well as a way of recommending outcomes for future cases. If much about his modes of expression seem old fashioned, this one thing was not. Langdell's theory represented a methodological innovation that would become the mainstay for legal education for many years to come.

#### D. *Langdell's Theory as Predictive Science*

Having argued that Langdell's theory is synthetic in Hedge's terms, it would be helpful to understand exactly what this means. Unfortunately, in this connection, Hedge is little help. While Hedge characterizes synthetic theories as providing a general explanation, he does not say much about the kind of explanation they offer. To understand this issue, we need to look not at Hedge, whose book was published in 1816, but to a logic book published by Francis Bowen in 1864.<sup>168</sup> By 1880, when Langdell published his Summary, Bowen's book was in wide use and had supplanted Hedge's as the required logic text at Harvard. Just as Hedge's book had provided guidance for the pre-war generation of scientists; it was Bowen who taught the post-war generation. Under Bowen's influence, this second generation was quickly assimilating the use of explanatory

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167. LANGDELL, CASEBOOK, *supra* note 61, at vii.

168. BOWEN, *supra* note 123.

hypotheses.<sup>169</sup> Since we have seen that Langdell is propounding such a theory, it is to Bowen's book that we must look for an explanation of how such theories work.

Bowen's text includes a full discussion of synthetic theories. In the course of this discussion, he describes three ways in which our scientific knowledge becomes more general. The three types of generalization are: (1) A General Fact, (2) A Law of Nature, and (3) A Physical Cause.<sup>170</sup> Looking at the first two of these will give us a better understanding of Langdell's theory.<sup>171</sup>

A General Fact is the result of an induction by simple enumeration. Bowen's examples include:

- All horned animals are ruminant;
- All quadrupeds are viviparous;
- Every living thing is produced from an egg; and
- Alcohol and opium intoxicate.<sup>172</sup>

A General Fact asserts a relationship between subject and predicate that is true of all observed cases.<sup>173</sup>

A Law of Nature is what Bowen describes as a "second order induction."<sup>174</sup> It is similar to a General Fact, but it

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169. See, e.g., O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-61 (1897); *infra* note 178.

170. BOWEN, *supra* note 123, at 405.

171. Bowen's discussion of the third type of generalization portrays a physical cause as something even more general than a Law of Nature, "bearing the same relation to a Law of Nature, that such a Law bears to a General Fact." *Id.* at 413. Utilizing Bowen's distinction between Laws of Nature and Physical Causes would lead us far afield into the area of nineteenth-century metaphysics and is not necessary to the analysis of Langdell.

172. *Id.* at 405.

173. *Id.* at 413.

174. *Id.* at 406. Bowen uses both terms—Law of Nature and second order induction—to describe the use of explanatory hypotheses. In this context, I prefer the latter since the term Law of Nature is a little misleading. There are obviously differences between what we generally understand to be a law of nature and the law as it is practiced by the courts. Bowen's use of term, however, is technical as he uses it to refer solely to those generalizations that

asserts that a certain relationship “must hold true on all occasions.” This means that it applies not only to all observed cases, but also to all similar cases that may be observed in the future. Indeed, the presence of even one non-conforming case means that the second order induction is false. Furthermore, a second order induction has more generality than a simple General Fact:

A Law of Nature [or second order induction], in its more definite signification, is employed to designate a group or series of General Facts, relating to the same subject or class of subjects, and differing from each other by some mode of proportional variation, so that the place of every member of the series may be easily deduced from one numerical formula.<sup>175</sup>

Thus, a second order induction does more than simply add up the properties of a group of individuals. We may have observed, for example, that a marble always rolls down Incline A in four seconds and that it always rolls down Incline B in six. Each of these is a general fact because it is the result of generalizing over a number of actual measurements. A second order induction is more general. It might give us a formula for determining how fast an object will descend an incline no matter what incline is used. For example, in a frictionless world, it would relate the time elapsed to the weight of the object and the length and angle of the incline. These inductions cannot be discovered by mere calculation. As Bowen writes:

The process of hunting for a Law of Nature [or second order induction] amid a group of General Facts is essentially tentative, resembling an attempt to find the meaning of a riddle; we try one guess after another, and at last stumble upon the right one when we least expected it. Success is usually obtained, not by trying to extend the survey, or to contemplate the largest possible number of cases, but by restricting the field of search to a few well-chosen instances, and attempting to find a pattern or construction which these few will precisely fit.<sup>176</sup>

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are made not by enumeration but by considering patterns in observed facts. *See, e.g., id.* at 308, 345, 406.

175. *Id.* at 406.

176. *Id.* at 409-10.

It is clear that Langdell's theory should be analogized to a second order induction.<sup>177</sup> This should not surprise us. By 1880, it must have been clear that no simple inductive theory could bring order to contract law. For example, we have seen that Kent acknowledged the need for general rules; but, at the same time, was unable to find any.<sup>178</sup> We have also seen that, as contract law became more complex, Parsons was only able to describe it in a lengthy and confusing text.<sup>179</sup> General facts had simply failed to organize the material. Like physics, contract law needed grand theory; that is, it needed to invent new concepts that would explain individual outcomes.

The notion that Langdell was propounding something like a second order inductive theory is supported by a number of striking similarities between Bowen's text and Langdell's description of the case method. One such similarity is apparent when we compare Langdell to Blackstone. Blackstone describes contract law by reciting certain General Facts. For example, one such fact is: if a buyer leaves the seller's place of business without leaving a deposit, the courts will not find an enforceable contract.<sup>180</sup> Langdell, by contrast, is not content with simply enumerating such facts. He is looking for something that "*must* hold true on *all* occasions":<sup>181</sup> "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

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177. Bowen's focus on physical laws leads him to describe second order inductions in terms of proportionality and mathematical formulas. Strictly speaking, then, Langdell's theory would not fit into this category. Nevertheless, as the text argues, there are enough similarities to make a sound analogy between Langdell's theory and second order induction. Furthermore, Charles Peirce whose work in logic succeeded Bowen's coined the term "Abduction" to describe reasoning that posited an explanatory hypothesis from which observed facts could be deduced. Langdell's method would count as abductive and what I write here about second order inductions is equally true of abduction. See CHARLES SANDERS PEIRCE, *Lecture VII: Pragmatism and Abduction*, in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 112, 112-14 (Charles Hartshorne & Paul Weiss eds., Belknap Press 1965) (1934).

178. See *supra* Part I.B.

179. See *supra* Part I.C.

180. 2 BLACKSTONE, *supra* note 12, at 447.

181. BOWEN, *supra* note 123, at 405.

constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer[.]”<sup>182</sup>

We can also see a similarity between Bowen and Langdell in their insistence that increased generality is not obtained by surveying increasing numbers of individual cases. Bowen speaks of the necessity of “restricting the field of search to a few well-chosen instances,”<sup>183</sup> while Langdell instructs:

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. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported.<sup>184</sup>

Finally, there is the fact that Langdell’s theory uses terms and concepts that are not contained in the cases themselves. We can see from Bowen’s description that this is a particular characteristic of second order inductions. We can formulate General Facts without changing our vocabulary, but a second order induction requires that we find something in common between two states of affairs that is not contained in a simple empirical report. For example, two marbles are subject to the law of gravity even though one can examine them closely and never see such a force. We obtain such a concept only by creating it to explain observed behavior. Similarly, one can look at the pre-Langdell contracts case law in vain for any hint that there is a distinction to be made between an offer and an acceptance. It is only Langdell’s creative power that supplies such a concept, and the test of this concept is whether it in fact predicts future events.

We can achieve additional clarity about Langdell’s method by comparing it to the notion of “abduction” as that term is used by Charles Peirce.<sup>185</sup> Like second order

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182. LANGDELL, CASEBOOK, *supra* note 61, at viii.

183. BOWEN, *supra* note 123, at 410.

184. LANGDELL, CASEBOOK, *supra* note 61, at viii.

185. Charles Peirce was in fact barely fifteen years younger than Langdell. His work in logic, however, was ahead of its time and he had a particular influence on later philosophers of science such as Karl Popper, W. V. O. Quine, and Hilary Putnam.

inductions, an abduction formulates a general hypothesis from which the observed facts can be deduced. For example, Newton's laws represent an abductive inference. The laws themselves can never be deduced from observed phenomena. Rather the laws, if we suppose them to be true, entail observed phenomena. In short, predictions about how physical objects will behave are deducible from the laws themselves. This is why abduction is the "only logical operation which introduces any new idea."<sup>186</sup> It can bring in a new idea precisely because it is not derived from the observations themselves. One can make up an abductive conclusion out of whole cloth. Obviously, then, the assertion of an abduction does not make it true. It only furnishes a suggestion that can be tested by comparison with particular cases. Thus, Peirce writes about the justification of abduction as follows:

Its only justification is that from its suggestion deduction can draw a prediction which can be tested by induction, and that, if we are ever to learn anything or to understand phenomena at all, it must be by abduction that this is to be brought about.

No reason whatsoever can be given for it, as far as I can discover; and it needs no reason since it merely offers suggestions.<sup>187</sup>

Note that Langdell's theory meets all of the requirements for an abductive theory. It formulates a general theory; it adds new terms to the analysis; and it is tested by comparison to predictions about future legal cases.

This description of abduction and of synthetic theories generally leaves us with a clear direction as to where we should look for justification of Langdell's theory. We can view Langdell's theory as correct so long as the results that it entails for individual cases match the real world results of those cases. However, with law, the question of prediction is a peculiar one. Does it mean predicting what the court will do or what it should do? If the latter, how can such a normative hypothesis be justified? These are questions that will be addressed in the next section.

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186. CHARLES SANDERS PEIRCE, *Lecture VI: Three Types of Reasoning*, in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, *supra* note 177, at 94, 106.

187. *Id.*

*Conclusion and Summary to Part III*

Langdell's innovation comes down to this: to do legal science, it is not enough to organize, compile, and classify legal authority; it is also necessary to theorize. Legal theories are made in the same way that theories are made in empirical science.

In empirical science, the scientist formulates a theory that *explains* the observed facts. The explanation may use abstract terms and concepts, such as "force" or "temperature," which are not immediately present in the observed phenomena. An empirical theory *explains* the observed data if the observed data is deducible from the theory itself. So long as the theory accurately predicts observed phenomena, the scientist is justified in believing the theory to be true and using it as the basis for further experiments.

In legal science, likewise, the theorist formulates a theory that *explains* the existing legal cases. Again, the theory may use abstract terms and concepts that are not used in the cases themselves. A legal theory *explains* the cases if: (1) it entails a non-ambiguous result for each of the legal questions it covers; and (2) the result that it mandates in each individual case is the right result. In law, the determination of a "right" result presents particular problems of justification, and these will be considered in the next part.

## IV. THE PROBLEM OF JUSTIFICATION

In the last part, I argued that Langdell's theory is predictive in the sense that it provides a general explanation of contract law from which specific results in individual cases can be derived. I have also argued that the idea of a predictive doctrinal theory for contract law is original with Langdell. In this part, I turn to the question of justification. The discussion has two parts. First, there is the question of how Langdell thought about justification. Why did he think that his theory was correct? How would he know whether he had hit upon the right explanation for the development of contract law? I will address these questions in Part IV.A. The second section (IV.B) addresses more contemporary concerns. What is the nature of a doctrinal theory, and what, for us, justifies its use? It is



important to ask this second question because Langdell wrote over a century ago; and, in that time, our ideas about scientific method and the nature of justification have changed.

A. *Justifying Langdell's Theory*

I concluded in the last part that Langdell's goal was to formulate a synthetic and predictive theory. It follows that the question of justification is entirely a matter of the accuracy of its predictions. At this point, one is tempted to throw up one's hands and say that Langdell's theory is false. After all, we have seen that it is at variance with the outcomes of a number of cases.<sup>188</sup> This would be fatal indeed if the point of the theory were to predict the actual outcome of legal cases. However, I do not think that this was Langdell's purpose. To show this, we would do well to contrast Langdell's predictive theory with the predictive theory that was advocated by Holmes in *The Path of the Law*.<sup>189</sup> Holmes argues that the point of learning law is to predict what courts will do *in fact*,<sup>190</sup> and I think it is obvious to anyone who thinks about it, that such predictions could not be made solely on the basis of doctrinal arguments. Even a first year law student knows that courts do not always follow the most recent formulations of legal doctrine. Courts sometimes change the law, or misunderstand the law, or apply some different part of the law, or find an exception to the law, or simply ignore the law because it does not make sense in a particular case. A Holmesian prediction must take account of all these possibilities. A Langdellian prediction, on the other hand, will be something simpler. It cannot, however, be too simple. For example, it would be question-begging to say, that Langdellian legal doctrine simply predicts what legal doctrine will recommend for the decision of a case. Instead, I think that Langdell is offering a genuine jurisprudential theory. It is the point of his theory, I believe, to predict what would be the right answer for each case that the theory covers.

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188. See LANGDELL, SUMMARY, *supra* note 8, at 18-22.

189. Holmes, *supra* note 169.

190. *Id.* at 457. ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.")

This raises the question: how can we determine whether the result Langdell predicts is really the right result for the individual case? To answer this, we must return to the epistemological analysis offered by Hedge. Hedge, it will be recalled, believed that we have intuitions about morality and justice just as we have intuitions about physical reality.<sup>191</sup> We feel that some particular thing is good or just in the same way that we see that a particular physical object is red or round. This is why it is so necessary for law students to study legal cases. In learning the law, students should not be content to simply know what the court did in a particular case. They also need to discern whether the case was correctly decided. To do this, they consult not just the doctrine but their own feelings of justice. This enables them to infer the legal rule—a rule that is not based on what the court did but about their own intuitions of what the court should have done in that particular case.

Note that the basis of the above described process is that a student can, as Hedge asserts, determine what the outcome should be for a particular case. This permits the student both to make the appropriate inferences and, once the explanatory hypothesis is obtained, to compare its predictions with the individual cases. If the prediction matches the preferred outcome, then the theory is confirmed. If not, the theory must be abandoned or changed. This is why the issue about the mailbox rule is so important to Langdell. On the one hand, Langdell asserts that is irrelevant if the mailbox rule serves justice and convenience of the parties. That means that if his theory is correct, then arguments about justice and convenience are irrelevant. If, on the other hand, one wonders whether the theory is correct—i.e. whether it has predicted the correct result in the mailbox case—then justice and convenience—or at least our feelings about justice are the name of the game. He is therefore particularly concerned to show that the arguments in support of the mailbox rule are erroneous. He argues:

The only cases of real hardship are where there is a miscarriage of the letter of acceptance, and in those cases a hardship to one of the parties is inevitable. Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having

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191. *See supra* text accompanying notes 126-27.

made; adopting the other view, it consists in depriving one of the benefit of a contract he supposes he has made. Between these two evils the choice would seem to be clear: the former is positive, the latter merely negative; the former imposes a liability to which no limit can be placed, the latter leaves everything *in statu quo*.<sup>192</sup>

This defense of his position raises two questions. First, what is the relationship between the arguments that Langdell gives in this case and the “feelings” of justice upon which the decision of the issue must rest. The second question relates to jurisprudence. We have paired two things—the outcome predicted by the theory and what is felt to be the just outcome. If these two things are always the same (as they must be if Langdell’s theory is correct) then why do we need the theory? Why shouldn’t everyone—student, lawyer, and judge—simply assume that each case must be decided in terms of what is felt to be just? This is a good question and a serious one for Langdell’s theory.<sup>193</sup>

We can begin to answer these questions by paying careful attention to the arguments that he makes about the mailbox case. In his mind, the question is not simply whether it is or is not just for the plaintiff to win. Rather, he begins by looking at the matter from the viewpoint of each of the parties.<sup>194</sup> This ensures that he does not reach a result that is blind to the interests of either. Having done this, he argues that either ruling will defeat the rightful expectations of one of the parties. This argument essentially places both parties on a par in terms of potential injury. Which party, he asks, will be more unjustly harmed by an

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192. LANGDELL, SUMMARY, *supra* note 8, at 21.

193. It is worth noting that this is a problem for any normative jurisprudential theory. On the one hand, we cannot verify a normatively predictive theory unless we have some way of determining the correct decision in the individual case. Since we cannot simply appeal to our original theory, we will need a method—call it method #2—to decide the question. On the other hand, if method #2 is available to decide the case, why don’t we simply use it instead of the jurisprudential theory? The only way in the normative theory could be of any use is if it were somehow simpler than method #2. As I argue in the text, this objection can only be resolved if we recognize that such theories have a dialectical element.

194. LANGDELL, SUMMARY, *supra* note 8, at 21 (“Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists in depriving one of the benefit of a contract he supposes he has made.”).

unfavorable outcome? This, he weighs, by characterizing a failure to enforce the contract as the “status quo” and an enforcement of the contract as “impos[ing] a liability to which no limit can be placed.”<sup>195</sup> Essentially, this argument reframes the situation that obtains between the parties.<sup>196</sup> Thus what was once a question of two innocent parties being disadvantaged by the vagaries of the mail service becomes a choice between maintaining the status quo and imposing unlimited liability on one of the parties. By reframing the issue, Langdell hopes to succeed in swaying the reader’s feelings in a way that favors the defendant.

This argument demonstrates an important point about our feelings of justice. These feelings are not static. We may have, as Hedge argues, an innate sense of justice which leads us to regard some outcomes with approval and others with disapproval.<sup>197</sup> Our feelings, however, are shaped not only by our perception of the situation, but also by the way in which we characterize and interpret it. We may empathize with one of the parties. We may have background assumptions that provide a context. We may see the situation in terms of one normative principle or another to which we have a preexisting commitment. Langdell’s argument works on this principle. By

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195. *Id.* (“Between these two evils the choice would seem to be clear: the former is positive, the latter merely negative; the former imposes a liability to which no limit can be placed, the latter leaves everything *in statu quo*.”).

196. I argue that Langdell is reframing the issue. An alternative interpretation is that he offering an independent abstract argument favoring the plaintiff. If this is true, it is hard to know what to make of his argument. Either it is a utilitarian argument based on the idea that it is less onerous to leave the status quo in place or he is simply asserting a normative principle that changes in the status quo are always less just than preserving the status quo. If it is a utilitarian argument, he has the problem—one that is shared by all rule utilitarians—that, by assuming that his rule is less onerous in general, he paves the way for particular outcomes that are, in fact, more onerous. (One example would be where a starving buyer loses his opportunity to buy the last morsel of food, while the rich seller gains a small increment on price by selling to a third party). Thus, it could happen, as an empirical matter, that enforcing the rule leads to less utility in the long run. On the other hand, the normative principle interpretation is even more troublesome. Is there something about the status quo that makes it more fair and just than changes in the status quo? Is it obvious to all that Robin Hood was behaving unjustly in stealing from the rich and giving to the poor?

197. See *supra* note 126-27 and accompanying text.

reformulating the situation, he hopes to evoke a particular emotional response. Langdell's contract theory does precisely this. It provides a manner of interpreting the situation that channels a normative response. This way of understanding Langdell's argument answers the first question—what is the relationship between his argument and feelings about justice? It also makes a start on the second—why isn't jurisprudence simply a matter of consulting one's feelings about the justice of a case?

Once we recognize that one's feelings about the justice of a given case are not static, we can see that a jurisprudence based upon such feelings must be highly ambiguous. Should the judge simply decide in accordance with his or her first feelings about a case? Or should there be some process by which these feelings are allowed to develop? Obviously this is a complicated question and one that I will not answer in this Article. I offer, however, a partial answer that makes sense in the context of Langdell's theory. It appears to me that a doctrinal theory such as Langdell's does not work by providing more rules or more specific rules. Rather it works by providing a context within which the rules operate. Mutuality may be the age old principle of contract law, but it is not until Langdell applies this rule to a more richly described analysis of contract formation that the rule becomes more determinate. The point of such a doctrinal theory is to force all those who read the case to characterize the facts in the same way. This in turn produces a higher degree of consensus about the desired outcome. Thus there is a distinction to be made between feelings of justice that are prompted by a "raw" description of a case and those that are prompted when the case is described in doctrinal terms. If we assume that Langdell is interested in the second possibility, then the point of his theory is to provide a canonical way of characterizing the facts. Keeping this in mind, we can be specific about the kind of confirmation that Langdell's theory requires. What is required is that the theory give a definite answer to each legal case that it addresses and that the answer it gives, described in doctrinal terms, does not provoke feelings of disapproval and injustice. There is circularity about this justification, but it is a circularity that is shared by all scientific theories—one needs the theory in order to measure the confirming instances of the theory. It

is this circularity that has led modern philosophers of science to think in more pragmatic terms,<sup>198</sup> and so in the next section, I will consider the problem of doctrinal theories in this more modern context.

### B. *The Value of Legal Doctrine*

In this section we leave Langdell behind and address the question of doctrine from a more modern perspective. I said in the beginning that my interest in Langdell was caused in part by my recognition that doctrine was an important part of legal analysis. Seeing Langdell as the inventor of legal doctrine piqued my interest in having a better understanding of his work. The time has now come to see whether our examination of his theory has helped us to a better understanding of legal doctrine. Doctrinal theories can take many forms. They can be formulated over a period of decades rather than originated by a single person. I am, however, interested in one type of theory in particular. Therefore in the first subsection (IV.B.1), I will take Langdell's theory as a sample and describe the kind of theory in which I am interested. Then, in the second subsection (IV.B.2), I will address the question of how such a theory should be evaluated, asking what are the characteristics of a good doctrinal theory? What do good doctrinal theories add to the legal enterprise?

1. *The Nature of Doctrinal Theories.* We generally think of legal doctrine as a collection of rules that synthesize judicial decisions in a given area. The discussion of Langdell indicates, however, that it is wrong to think of doctrine primarily in terms of rules. One does not create doctrine by inventing new rules or by making old rules more specific. Rather, the point of doctrine is to provide a context within which existing rules will operate more smoothly and determinately. It does this by making an abductive inference. Langdell formulates a hypothesis about contract formation and then the question becomes whether it will form the basis for correct inferences about case outcomes. Thus, he redescribes the making of a contract by

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198. See, e.g., THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); HILARY PUTNAM, *REASON, TRUTH AND HISTORY* (1981); W.V. Quine, *Main Trends in Recent Philosophy: Two Dogmas of Empiricism*, 60 *PHIL. REV.* 20 (1951).

introducing two new technical terms—offer and acceptance. This makes it easier to apply the principle of mutuality because the analytical framework that Langdell has supplied allows us to separate out two issues:

- Contract Formation—which requires an offer and acceptance but not mutuality; and
- The Requirement of Consideration—which enforces the mutuality principle.

The result is that the principle of mutuality which has been the touchstone for one hundred years of contract law, receives a new formulation—one that is more precise and more determinate.

With this understanding of Langdell's theory, we can be more specific about a particularly important form of doctrinal theory. I will call this an abductive theory after the mode of reasoning it employs. There are, I think, two main points to be made about this kind of theory. The first is that the aim of the theory is to make existing legal doctrine more determinate. The way in which it accomplishes this is by providing a descriptive hypothesis that will entail a particular result for those cases that it covers. The second is that the theory is primarily descriptive. It does not include new legal rules except to the extent that existing legal principles are modified in order to be described within the new legal context. If we take, for example, one of Langdell's rules—a binding contract requires both an offer and an acceptance—we can see that this is not a new normative proposal. Instead, it simply restates the traditional rule—contracts require mutual promises—in the context of the new theory.

With this description in mind, we can understand why Langdell's theory is so often mistaken for a deductive logical system.<sup>199</sup> A deductive system begins with axioms that may or may not be true in the real world. A statement will then

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199. I am avoiding the customary reference to geometry because the notion of geometry is ambiguous. On the one hand, Euclidean geometry uses axioms that describe the real world and therefore its theorems do so as well. On the other hand, there are alternative geometries whose axioms may not accurately reflect our intuitions about space.

be considered “true in the system” if it meets one of two alternate requirements:

1. It is itself an axiom in the system; or
2. It is deducible from an axiom in the system.

This technique shares two characteristics with an abductive theory such as Langdell’s. First, the theory receives much of its content from the precise definition of terms; and, second, there is a deductive relationship between the general statements of the theory and its description of particular phenomena. Note, however, that these two properties are also shared by Newtonian Physics and other empirical theories, which are also based on abductive reasoning.<sup>200</sup> There is, however, an important difference between deductive systems and abductive theories. Deductive theories can specify that something is true only within its own logical system. Abductive theories, on the other hand, tell us something about the real world. They are, in short, accountable for their consequences. In the case of an empirical theory, it must be discarded if it predicts false consequences. In the case of a doctrinal theory, it must be rejected if it provides legal outcomes that are unacceptable to our intuitions of justice and fairness.

I am obviously using the term “doctrinal theory” in a somewhat specialized sense, and it might therefore be helpful to give some examples. One that springs to mind is the Learned Hand formula which redescribes negligence liability in terms of the relative costs of precaution and risk.<sup>201</sup> The Learned Hand formula is based on the following hypothesis: the reasonable person will take precautions whenever they cost less than the amount of harm caused by the accident discounted by the probability of its occurrence.<sup>202</sup> The concept of a reasonable person has been the touchstone of negligence liability for over a century;

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200. The point of an empirical theory is to provide a general description of phenomena in terms that are not immediately observable in the phenomena themselves. This often requires a new vocabulary that is precisely defined. The test of an empirical theory is that it predicts events in the real world, unlike doctrinal theories that entail normative prescriptions of case outcomes.

201. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

202. *Id.*



and, by redescribing this concept, Hand's formula makes it more determinate. Indeed, if we assume that burdens, probabilities, and harms could be precisely calculated, the Learned Hand formula would yield a determinate result in every case. This possibility, however, is more theoretical than real. The test is useful in some cases, but not all.<sup>203</sup> Where it is useful, however, it is very useful—it gives the jury a way to think about the negligence determination.

2. *Evaluating Doctrinal Theories.* The question of evaluation is crucial for abductive, doctrinal theories. Such theories do not rest on the judicial authority of courts. Rather they become important only because people opt to use them. Obviously, this includes the courts. Indeed a doctrinal theory that is taken up by the courts becomes law itself. In addition, as Langdell's experience demonstrates, a doctrinal theory has a heuristic function that can be used for teaching, even if the theory has not previously been utilized by the courts. In thinking about law, each of us decides how much reliance we will place upon available theories, and therefore it is important to have an answer to the question: What makes a good doctrinal theory? Under what circumstances, is one justified in using the theory to structure one's own knowledge of law?

The first requirement for a doctrinal theory is already obvious from the discussion in the last section. A doctrinal theory should not do violence to our intuitions about the right results in individual cases. Accepting a doctrinal theory that produces a radical change in our patterns of legal decision making is the worst kind of formalism. It substitutes logical elegance for the legitimate concerns of the legal system and those who enter it seeking justice. No matter how persuasive a theory may be, the theory by itself is a poor reason for radical change. Furthermore, a teacher who uses such a theory will surely confuse students and give them an unrealistic understanding of the law. Therefore, at the very least, a doctrinal theory should comport with our intuitions about the decision of cases.

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203. For example, in those cases where the defendant has had a lapse of attention, it is difficult to estimate the cost of insuring that such lapses do not occur. One could have, for example, a back-up system but, in most cases, that would be too costly. On the other hand, if the precaution is simply that the defendant should pay attention, this does not seem to be best analyzed in terms of the cost of being attentive.

In thinking about the requirements for a doctrinal theory, it is useful to have an example. In torts, there has been a controversy over the rules that define the responsibility of land owners and occupiers to those who entered on their property. The common law created three categories with three separate levels of care as follows:<sup>204</sup>

	Definition	Duty of Care
Trespassers	One who enters the land without a privilege to do so	No duty with a few exceptions
Invitees	One who enters with permission	Duty to repair or warn of known dangers
Licensees	One who enters to do business with the owner	Duty to inspect

This doctrine was meant to capture our intuitions about responsibility in obvious ways. As time went on, the doctrine became less and less reliable. The relationships between a landowner and those who entered the land became more complex and, at the same time, more subject to variations. Furthermore, a rule that had permitted little or no concern for trespassers had become riddled with exceptions, as courts sorted through the vagaries of the trespass situation. As a result, the Supreme Court of California abolished the doctrine<sup>205</sup> and several other states

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204. For a fuller explanation of these categories and the corresponding levels of responsibility, see RESTATEMENT (SECOND) OF TORTS §§ 329-43 (1965).

205. *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (abolishing the distinctions between trespassers, invitees, and licensees.)

followed.<sup>206</sup> The California court explained its action by writing the following:

[I]t is apparent that the classifications of trespasser, licensee, and invitee, the immunities from liability predicated upon those classifications, and the exceptions to those immunities, often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land. Some of those factors, including the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications of trespasser, licensee and invitee and the existing rules conferring immunity.<sup>207</sup>

The result is that, in California and in many other states, the liability of a landowner is treated according to general negligence principles with special consideration paid to the above factors. Not every state, however, has joined California in this regard. Some states have retained the three way distinction for two main reasons. First, these states value the predictability and certainty that attaches to the common law rule; and, second, they are generally more conservative in defining the responsibility to trespassers and invitees.

This controversy, like the one Langdell faced, presents a particular problem. It is necessary for courts to strike a balance between justice in the individual case and the need to formulate the law in transparent and predictable ways. This balance cannot be fully achieved by rules alone. On the one hand, some courts have retained the traditional rules. They end up denying recovery in meritorious cases or inventing exceptions and sub-rules that avoid that result. Either way, it is a losing strategy. If they adopt the first, the law loses legitimacy because of its apparent unfairness. If they adopt the second, the rules become so riddled with exceptions that they lose their predictive function, undermining the rule of law. On the other hand, courts that abolished the common law distinctions had a different

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206. See, e.g., *Heins v. Webster County*, 552 N.W.2d 51 (Neb. 1996); *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973).

207. *Rowland*, 443 P.2d at 567.

problem. They were free to decide cases in intuitively appropriate ways, but, at the same time, lost the advantages of a predictable and clear legal rule. Thus, with respect to this issue, courts are at an impasse. Neither the addition of sub-rules nor the elimination of rigid categories is an adequate strategy in the face of a situation where the real world is far more complex than the legal analysis that purports to describe it. It would take an abductive doctrinal theory such as Langdell's to resolve this impasse. What is needed is a redescription of the area that mirrors the complexity of real world variations, and can serve as a context for the application of reformulated rules.

Understanding this function of doctrinal theories is important to articulating criteria for their evaluation. As a pragmatist, I believe that issues of evaluation and justification must relate to the usefulness of a theory and that this, in turn, requires us to be clear about our goals. I have suggested that the goal of doctrinal theories should be to improve legal decision making by formulating a more complex analysis of legal phenomena. If I am right, then a theory's usefulness in this regard is an important criterion for evaluating it.

#### CONCLUSION

The above description of Langdell's work makes it apparent that he made at least two contributions to American law besides his well known contributions to legal education. The first is that he articulated a doctrinal theory of contract law that accounted for the difficulties of contracting at a distance. Secondly, and more importantly, he provided a model for doctrinal theories. By studying this model, I believe we have shed some light on the notion of legal doctrine. Legal doctrines do not fulfill their synthesizing function simply by conjoining pre-existing legal rules. Nor do they invent legal rules. Rather, they redescribe a particular legal area in order to provide a clearer context in which legal rules can operate. As a result, there are two requirements for determining the value of a doctrinal theory. The first is its ability to mirror intuitions about the just resolution of legal cases. The second is its ability to provide simplicity and clarity to a particular area of law. Specifically, does it describe the landscape in such a way that the use of a few rules will result in relatively determinate outcomes. When these tests are applied, we can

see that Langdell's doctrine was a success because it met these requirements.

There is also the larger question: what have we learned about our own doctrinal theorizing? There is no doubt but what this kind of analysis is a regular part of our legal routine. Sometimes we make a list of rules; sometimes we look for cases whose facts are like our own. Inevitably, however, we do more. We try to construct a richer story that will identify the details that justify a particular legal treatment. We do this not because it is the only thing we could do; nor because it is the thing that lawyers have always done. We do it because, beginning with Langdell, this is how lawyers are taught to think. With the complexities of modern life, it is unlikely that we will ever come up with a theory that is as neat and tidy as Langdell's; but, by our training and by the nature of things, we will always be partial theorists. This is the reality, but it is a reality in search of a justification. We have seen that, in Langdell's case, the attempt to justify his theory encounters some difficulties. Even so, the practice of doctrinal theorizing has a certain amount of pragmatic efficiency. It organizes cases in such a way that they form a more coherent whole; and such coherence aids understanding and communication. On the other hand, we should be careful not to claim too much. A compelling doctrinal justification may seem like it should be binding on all, but ultimately it must stand or fall on the willingness of lawyers and especially courts to accommodate its use.