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John Henry Schlegel

*University at Buffalo School of Law*

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## Langdell's *Auto-da-fé*

JOHN HENRY SCHLEGEL

As one who has suggested in print that Christopher Columbus Langdell was a loony,<sup>1</sup> I am singularly pleased that Bruce Kimball has so carefully demonstrated that Kit was a regular guy just trying to teach his classes and learn some law. But this observation seems to me to be not particularly relevant to the debate about Langdell that I have mostly watched, but occasionally commented on. I shall try to recreate that debate as best I can, to show where it stands, and so, to identify where an understanding of Langdell's teaching places us.

The question at issue for over twenty years now is what Langdell might have meant when he said that "law, considered as a science, consists of certain principles or doctrines,"<sup>2</sup> that "all the available materials" of legal science "are contained in printed books," and that "the library is . . . to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists."<sup>3</sup> To the post-Realist academic lawyer, Langdell's use of "science" seems to be a reference to scientific empiricism. Thus, the man seems to be confused, for the laboratory of an empirically based science of law would need to be focused, not in the library, but in the courts, legislatures, agencies, and law offices where the law in action is made. In such a world, a thoroughgoing empiricism would treat the cases that expound appellate court doctrine as the irreducible facts on the basis of which that doctrine, the explanatory apparatus of case law theory, would be tested for truth.

Grant Gilmore, a child of Realism, if ever there were one, who despised

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1. *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1994), 25.

2. *A Selection of Cases on the Law of Contracts*, 2d. ed. (Boston: Little, Brown, 1879), vii.

3. "Harvard Celebration Speeches," *Law Quarterly Review* 5 (1887): 124.

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**John Henry Schlegel** is Professor of Law, State University of New York at Buffalo.

both nineteenth- and twentieth-century formalisms, noticed that for Langdell “the doctrine tests the cases, not the other way around.”<sup>4</sup> Having identified what he took to be an elementary mistake in classification—treating as science an enterprise that was anything but empirical—Gilmore concluded that Langdell must have been an “essentially stupid man.”<sup>5</sup> Had Gilmore looked into the OED, he would have found that the earliest entry for the notion of science as an empirical inquiry into a world “out there” was from 1867, and thus, that usage in the late nineteenth century was not fixed in the way that he had assumed. But Gilmore never bothered to look in the OED and so a tempest came into being.

Tony Chase gave that tempest its first spin by accepting Langdell’s analogy to empirical science.<sup>6</sup> Chase emphasized Harvard President Charles W. Eliot’s role in justifying Langdell’s system, Eliot’s own background in chemistry, and his parallel defense of clinical instruction in the Harvard Medical School. For Chase it was not the library that was the law school laboratory, but the case-centered classroom. Marcia Speziale continued Chase’s emphasis on the roots of Langdell’s thought in the modern notion of science.<sup>7</sup> She focused on the relationship of the developing line of authority that Langdellian casebooks lovingly traced to Darwinian notions of evolution that were alive and lively in those years and so concluded that, for Langdell, law was “an applied empirical science that unfolds case by case.”<sup>8</sup>

Chase and Speziale attempted to make sense of Langdell’s statements by affirming his position as an adherent to modern notions of science. In contrast, Robert Stevens tried to explain Langdell’s ideas by asserting that the man had simply confused “science as an empirical and as a rational activity.”<sup>9</sup> Stevens attributed Langdell’s erroneous identification of legal science with the empirical to his incomplete understanding of the point Eliot offered in support of improved science education at Harvard—that a scientific education was a practical education. It is understandable that, at times when meaning is shifting, members of an older generation will confuse, even conflate, meanings. Therefore, Stevens’s assertion makes a certain amount of sense. But not enough to still the tempest.

4. *The Ages of American Law* (New Haven: Yale University Press 1977), 47.

5. *Ibid.*, 43.

6. “The Birth of the Modern Law School,” *American Journal of Legal History* 23 (1979): 329.

7. “Langdell’s Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Thought,” *Vermont Law Review* 5 (1980): 1.

8. *Ibid.*, 15.

9. *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 53, 54.

Stevens attempted to place Langdell between two worlds. Robert Gordon rejected the middle position and instead tried to fix Langdell's ideas firmly within the nineteenth-century notion of legal science, "the self-conscious attempt to make legal argument and decision-making into systematic activities that are regulated by a coherent theoretical structure."<sup>10</sup> For Gordon legal science was a Baconian enterprise of classification that had its origins in classical Roman law and could be traced through English juristic thought. Gordon identified three versions of legal science: a Whig-Federalist version, created in the early nineteenth century, that emphasized "elegance, public statesmanship, and Ciceronian virtue;"<sup>11</sup> a Liberal version, created by Langdell and others in the years after the Civil War, that emphasized law as "a set of barriers against coercive intrusion into zones of autonomous conduct;"<sup>12</sup> and a Progressive version, created by people like Brandeis and Pound in the early years of the new century, that emphasized the necessity of "dealing with concrete social and economic problems."<sup>13</sup> Thus, for Gordon, Langdell's invocation of legal science was not some "weird fantasy,"<sup>14</sup> but an echo of concepts of venerable lineage and continuing import.

Tom Grey worked out the details of what Gordon had called Liberal legal science.<sup>15</sup> He suggested that Langdell's understanding of that idea was simply a reflection of a developing orthodoxy whose concept of law was best seen in relationship to classic understandings of geometry as a set of axioms that were both derived from observation of the world and formed the basis for deductions about the world. Liberal legal science was thus a comprehensive, complete, formal system in which principles both were derived from precedents and were used to test those same precedents, a system that Howard Schweber has recently identified with the thought of the scientific Lazzaroni of the antebellum period.<sup>16</sup>

Bill LaPiana tried to bridge the gap between Chase and Speziale on the one hand and Gordon and Grey on the other.<sup>17</sup> Relying on the latter two

10. "Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920," in *Professions and Professional Ideologies in America*, ed. Gerald L. Geisen (Chapel Hill: University of North Carolina Press, 1983), 71, 82.

11. *Ibid.*, 87.

12. *Ibid.*, 90.

13. *Ibid.*, 94.

14. *Ibid.*, 82.

15. "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1983): 1.

16. "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education," paper presented at the Annual Meeting of the American Society for Legal History, October 1997.

17. *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994).

for his understanding of what legal science was, and on Chase for the insight that Langdell was trying to develop a practical education, LaPiana argued that Langdell “flew in the face of accepted wisdom when he made his students do legal science in the course of their studies rather than giving them the results of legal science as recorded in the treatises.”<sup>18</sup> In so doing, Langdell joined legal science with practical training in a marriage of “Logic and Experience,” the title of LaPiana’s book.

It is odd that by using the case law class to bridge the gap between explanations of Langdell’s ideas that rely on modern notions of science and those that rely on older notions, LaPiana left Grant Gilmore, who started it all, alone like a troll under the bridge. Though appropriately gruff for the role of the troll, Gilmore was one of the great case law teachers of the last half of this century. He understood this activity very well. For that reason alone it seems important that Gilmore’s observations about Langdell not be lost in the tempest that those observations created. So, I wish again to ask whether Langdell understood what he was doing. Was he an “essentially stupid man?”

I am not sure that Kimball’s impressive and convincing recreation of three of Langdell’s classes helps to answer this, the original, if mistaken, question. That Langdell changed his mind in class does not make him less of the formalist that Gilmore objected to. That Langdell believed that, by arguing that certain cases were wrongly decided, he was offering “heretical opinions” does not make him a heretic, for the Whig-Federalist notion of legal science allowed for wrongly decided cases and Liberal legal science only made that possibility clearer. Neither were even close to thoroughgoing case law positivisms.

Nor am I entirely convinced that Gilmore was wrong. Stevens is surely right that Langdell mixed together two different, though related, notions of science. As Schweber has shown, antebellum science was based on the idea of natural theology—that the truth of the Bible, in the form of scriptural principles, was to be found in nature and that the study of nature would demonstrate the truth of these principles.<sup>19</sup> The formal structure of Langdell’s science is much the same; the truth of doctrine, in the form of principles, was to be found in cases and the study of cases would demonstrate the truth of legal principles—that were then used to trim the cases themselves. This bit of prestidigitation was so well known to Langdell that he need not have been smart to figure it out, need not have understood what he was saying.

18. *Ibid.*, 26.

19. “The ‘Science’ of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education.”

And it does not seem to me that we should place much importance on the use of books of cases in class, for the creation of casebooks was explicitly justified by Langdell as a way to reduce the wear and tear on the law library.<sup>20</sup> Students had been reading the cases assigned for their next class in the library long before Langdell came to Harvard. Thus, what the “case method” did was to eliminate the lecture that earlier had preceded case discussion.<sup>21</sup> And even this “innovation” cannot have been that important to Langdell for, rather than retiring when his eyesight became so bad that he could no longer see his students to call on them, he simply shifted back to lecturing to them.<sup>22</sup>

Still, to my way of thinking, even though Langdell is unlikely to have understood what he was doing, his elimination of the lecture is the really important change that the case method made in legal instruction. It is this aspect of Langdell's system that the disputants in this tempest over the meaning of “legal science” seem to ignore. As Al Katz first observed, in shifting the monologue of justification that is the lecture to the dialogue that is the case class, Langdell succeeded in engaging each student in an enterprise that implicated that student into jointly derived understandings of the appropriateness of the rules of law. Langdell's was a time of great social upheaval, caused first by the Civil War and its aftermath, then by the dislocations in American life brought about by changes in technology and by waves of immigration, as well as by the development of the ability to aggregate larger amounts of capital than ever before through the manipulation of the corporate form. When the question of the appropriateness of the legal basis for social relations is daily on the surface of things, it is important that recruits to the profession be brought in believing in the rules. And what better way to do this, than to draw them into the process of formulating those rules, thus keeping their attention on the details of the law, while avoiding attention to the social arrangements in which they were applied.

Now, I do not mean to suggest that Langdell was a conscious conspirator with the Gilded Age elites, a running dog of capitalism, as it were. He was an essentially stupid man who felt quite honestly that he was working to elevate the profession by educating counselors, where others merely strove to educate lawyers. But his creation fit well with the existing ideol-

20. “Christopher C. Langdell, Annual Report on the Law School,” in *Annual Report of the President and Treasurer of Harvard College, 1890–91* (Cambridge: Harvard College, 1891): 104, 166.

21. *The Centennial History of the Harvard Law School, 1817–1917* (Cambridge: Harvard Law School, 1918), 36.

22. *Ibid.*

ogy of the bar that maintained that it exercised neutrally placed, professional judgment capable of mediating between capital and labor, industry and agriculture, this at a time when there was need for such professional judgment on the part of the capitalist industrial elites. Thus, Langdell was no heretic. Heretics do not have buildings named for them at Harvard; heretics usually burn at the stake.