

FORMALISM AND LEGAL REALISM

Preface to *Cases on the Law of Contracts*

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Although both Harvard's and Yale's law schools date from the 1820s, the study of law in those days was almost entirely done through apprenticeships with practicing lawyers. Admission to the law schools was easier than to the colleges, and neither school was able to establish its importance as an institution of legal education until Langdell arrived as Dean of Harvard in 1869. Determined to raise the law school's stature and improve legal education, he was forced to confront the question of how law can be taught other than through the normal method of working alongside an already established practitioner. The following selection is taken from the Preface to his original casebook on contracts. In it he describes why cases are necessary to the study of law and the nature of "legal science" itself.

I entered upon the duties of my present position, a year and a half ago, with a settled conviction that law could only be taught or learned effectively by means of cases in some form. I had entertained such an opinion ever since I knew any thing of the nature of law or of legal study; but it was chiefly through my experience as a learner that it was first formed, as well as subsequently strengthened and confirmed. . . .

Now, however, I was called upon to consider directly the subject of teaching, not theoretically but practically. . . . I was expected to take a large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned to me. . . . How could this . . . object be accomplished? Only one mode occurred to me which seemed to hold out any reasonable prospect of success; and that was, to make a series of cases, carefully selected from the books of reports, the subject alike of study and instruction. But here I was met by what seemed at first to be an insuperable practical difficulty, namely, the want of books; . . .

It was with a view to removing these obstacles, that I was first led to inquire into the

feasibility of preparing and publishing such a selection of cases as would be adapted to my purpose as a teacher. The most important element in that inquiry was the great and rapidly increasing number of reported cases in every department of law. In view of this fact, was there any satisfactory principle upon which such a selection could be made? It seemed to me that there was. Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases. . . . 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. The vast majority are useless and worse than useless for any purpose of systematic study. Moreover, the number of fundamental legal

doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. . . . It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of

any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

It is upon this principle that the present volume has been prepared. It begins the subject of Contracts, and embraces the important topics of Mutual Consent, Consideration, and Conditional Contracts. Though complete in itself, it is my expectation that it will be followed by other volumes upon the same plan.

REVIEW AND DISCUSSION QUESTIONS

1. On what basis does Langdell say he chose the cases for his book from among the many thousands that are "reported" (i.e., published)?

2. Describe Langdell's view of the nature of law. Does he think law is theoretically separable from sound moral principles?

3. Does he seem to think individual judges exercise discretion, and if so in what sense?

4. How does Langdell's position compare with Post's description of precedents and interpretation in Section 2? Would Post agree or disagree with Langdell? Explain.