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JUST THE FACTS:
THE FIELD CODE AND THE CASE METHOD

WILLIAM P. LAPIANA*

I.

The basic outlines of the story of the founding of New York Law School are a well known part of the history of American legal education. Angered by the abandonment of the "Dwight Method"¹ of legal education in favor of the Harvard case method,² the faculty of the Columbia Law School and many of its students withdrew en masse to the new institution. Less well known is the struggle to establish the new school as a totally independent institution; a story told for the first time in James Wooten's article appearing in this issue of the *New York Law School Law Review*.³ It is a story of conflict between government control and the desire to be let alone; between the desire to close legal education to a privileged few and to keep it open to all those who wished to train themselves for the bar in an academic setting. The school's triumph was a fittingly New York result—a shrewd application of political power in the service of opportunity.

In the longer run, the impulse behind the creation of New York Law School carried the day, despite efforts by case method law schools to raise requirements for admission to law school beyond the reach of the vast majority of New Yorkers, and to destroy night schools in the name of promulgating an exclusive and narrow vision of the profession. Schools such as New York Law School, with the cooperation of much of the bar

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1. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 29 n.2 (1983). Theodore Dwight, a Columbia University law professor, was the originator of the "Dwight Method," which consisted of teaching law through reading treatises and classroom recitation. *Id.*; see also *infra* notes 303-07 and accompanying text.

2. See STEVENS, *supra* note 1, at 52-55. Christopher Columbus Langdell, Dean of Harvard Law School from 1870 to 1895, introduced the case method as a new form of lawyer training, establishing what would become the blueprint for teaching at American law schools. The case method is based on the assumption that legal principles are best derived from appellate court opinions, the applicability of which is not bounded by state lines. Under Langdell's guidance, the case method consisted of analyzing appellate decisions in terms of doctrinal logic. The case method was considered the primary alternative to the "Dwight Method." *Id.*; see also *infra* notes 246-52 and accompanying text.

3. See James A. Wooten, *Law School Rights: The Establishment of New York Law School, 1891-1897*, 36 N.Y.L. SCH. L. REV. 337 (1991).

itself, firmly established their right to offer legal education to those excluded from more prestigious institutions.⁴ In the substance of what is taught, however, most American law schools have come to mirror the elite institutions of the late nineteenth and early twentieth centuries.⁵ The case method was firmly established as the dominant form of classroom instruction very early on.⁶ Indeed, even the founder of New York Law School, George Chase,⁷ believed that students should read "a moderate number of cases, to illustrate the practical application of the legal rules and principles" found in text books.⁸

The reasons for the triumph of the case method are several, and are related to both changing ideas of science and university education, as well as to changes in the practice of law itself. This latter relationship has never been thoroughly investigated. The perceived wisdom, in fact, has long denigrated the case method as a peculiar product of Christopher C. Langdell's bizarre personality.⁹ This view ignores the fact that Langdell practiced law for more than ten years in New York City in the 1850s and 1860s.¹⁰ His practice immersed him in one of the greatest changes wrought on the common law in the nineteenth century: the Field Code of Civil Procedure.¹¹ The centennial of New York Law School is a fitting

4. See STEVENS, *supra* note 1, at 24-25.

5. For an interesting discussion of the different approaches to teaching law and the future of legal education in American law schools, see Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945 (1991).

6. See STEVENS, *supra* note 1, at 26-27.

7. Prior to the founding of New York Law School, George Chase was a professor of law at Columbia Law School. For an account of the events that led to Chase's resignation from Columbia, see *Must the Law School Go*, N.Y. TIMES, Mar. 4, 1891, at 8.

8. George Chase, *A Comparison of the Use of Treatises and the Use of Case-Books in the Study of Law*, 3 AM. L. SCH. REV. 81, 83 (1912). Chase also published a torts casebook entitled *Leading Cases upon the Law of Torts*.

9. The *locus classicus* of this view is the work of Jerome Frank. See, e.g., Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1303 (1947) (calling Langdell "a brilliant neurotic" and asserting that "[h]is pedagogic theory reflected the man"); Jerome Frank, *Why Not a Clinical Lawyers-School?*, 81 U. PA. L. REV. 907, 907 (1933) (stating that Langdell's case method of legal instruction "may be said, indeed, to be the expression of that man's peculiar temperament"). A notable exception to this strain of commentary is an excellent article by Anthony Chase. See Anthony Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived as Clinical Instruction in Law*, 5 NOVA L.J. 323, 342 (1981) (stating that Langdell's primary aim was "the development of systematic and comprehensive, university-based professional education").

10. Langdell's experience in practice is often forgotten. In a 1927 report, the Yale Law School faculty, for example, asserted that Langdell had never practiced law. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 109 (1986).

11. For an in-depth analysis of the Field Code, see *infra* notes 85-108 and

time to try to recapture this relationship between New York State and the development of legal education.

This article elucidates this relationship by first describing the centrality of the common law writ system to legal education before the Civil War. It then presents the coming of the Field Code, and shows its two-fold effect on legal practice. First, the Code made the facts of cases of primary importance. Second, and somewhat ironically, the courts' treatment of the Code reinforced the regime of the common law forms of action, giving impetus to the kind of legal science Langdell practiced—the search in decided cases for the principles that governed the granting of relief in the courts. Finally, this article links the explosion of law reporting, first in New York and then nationwide, with the practical usefulness of the case method as it came to dominate legal education.

II.

Formal legal education in the antebellum period was based on the reigning idea of legal science that accommodated law to the generally held conception of science as an inductive process designed to analyze facts, extract broad principles, and thus elucidate the mind of the Creator.¹² Legal education, like all higher education, trained the Christian gentleman to live properly in the world. At its heart, legal argument involved applying a system of broad ordered principles to the specific problems that led to arguments before the courts.¹³

Mastery of the science of ordered principles, however, was not all that the lawyer needed. Getting into court involved a thorough knowledge of another aspect of legal science, the science of common law pleading and procedure that governed the daily practice of the law. Whatever untutored simplicity may have marked the administration of the common law in the American colonies in the seventeenth and early eighteenth centuries, by the mid-1700s growing numbers of lawyers were applying an increasingly sophisticated system of pleading—or at least one more closely approximating that of the mother country—in their daily practice.¹⁴

accompanying text.

12. For a detailed discussion of the inductive and the deductive theories of legal science, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6-24 (1983).

13. See William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771, 771-78 (1986).

14. For some explanation of this early practice, see DAVID T. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692*, at 58-62 (1979) (finding the simplicity of land litigation procedure in Essex County the result of "a sophisticated adaptation of the common law"), and Bruce H. Mann, *Rationality, Legal*

An impression of the effect of these changes can be gleaned from an examination of William Wyche's *Treatise on the Practice of the Supreme Court of Judicature of the State of New-York in Civil Actions*, published in 1794.¹⁵ For more than three hundred pages, Wyche expounds the ins and outs of carrying on a civil trial in the young state. Although actual practice may not have replicated Wyche's description, his work indicates that aspiration had reached a high level. Even at the lowest levels of the colonial legal system, proper procedure seems to have been honored, if perhaps not always practiced. For example, in the mid-eighteenth century a popular manual for Justices of the Peace, *Conductor Generalis*, included explanations of eleven common law actions.¹⁶ This sort of material was not included in the English models on which this and similar colonial manuals were based.¹⁷ The latest student of this literature finds in this fact a conscious attempt to preserve common law forms "[i]n the absence of a fully developed legal system and the general availability of law books."¹⁸ These changes did not go unnoticed, and the post-revolutionary generation held their immediate ancestors' accomplishments in the field of procedure in high esteem.

Addressing the bar of Worcester County, Massachusetts, in 1829, Joseph Willard praised the members of the pre-revolutionary bar for their technical competence that improved upon the English models: "Consider the clear and concise forms of declarations [the opening pleading in a suit at law], and of special pleading, in which all the English redundancy is, with singular boldness, at once cut off . . ."¹⁹ Of course, what Willard saw as admirable terseness might have been regarded by some of his heroes' contemporaries as the result of insufficient knowledge.²⁰

Change, and Community in Connecticut, 1690-1760, 14 LAW & SOC'Y REV. 187, 201, 207-12 (1980) (implying that the simplicity of the procedure used in debt cases in early eighteenth-century Connecticut was, in part, the product of the small scale of economic life and a resulting lack of interpersonal relations based solely or primarily on the debtor-creditor relationship).

15. WILLIAM WYCHE, *TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW-YORK IN CIVIL ACTIONS* (New York, T.&J. Swords 1794).

16. See John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 263-65 (1985).

17. *Id.*

18. *Id.* at 267-68.

19. Joseph Willard, *An Address to the Members of the Bar of Worcester County, Massachusetts* 79 (Oct. 2, 1829) (transcript available in Columbia Law School Library).

20. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 69-88 (1975).

Writing in 1840 of Massachusetts law from the late seventeenth century to the Revolution, Emory Washburn found that “[t]owards the latter part of the period of which I have been speaking, the forms of pleading and practice became generally as correct as they have ever since been.”²¹ Washburn also testified to the accomplishments of the pre-revolutionary generation in the realm of pleading: “Those who are familiar with the forms of legal proceedings in Massachusetts will recal [sic] the great number of precedents that are now in use, that were originally drawn by leading members of the bar before the revolution.”²² Modern scholarship agrees with the implications of Washburn’s assessment of his professional ancestors. For example, Herbert Johnson has written that

[c]ivil practice in New York in the last decade of the colonial period was fairly close to the English pattern, both in common law and equity courts To properly plead a case and bring the matter to issue in any of the above courts required a thorough knowledge of procedure, which then, as now, was drawn from a variety of court rules and statutes.²³

After an exhaustive study of the surviving Massachusetts court records, William Nelson similarly concluded that “[e]xcept in actions to try title to land, the common law forms of action were in full vigor in the prerevolutionary period.”²⁴

Why this should be so probably is not susceptible to simple explanation. The expanding commercial life of the colonies both increased legal business and brought practitioners into more frequent contact with English ways of doing things.²⁵ A general desire to mimic English ways seems to have appeared in many aspects of colonial life after the mid-1700s and certainly had its effect on the legal profession.²⁶ The desire to be members of a truly learned profession led many lawyers to organize bar associations and formal study groups and to attack pettifoggers and

21. EMORY WASHBURN, *SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS* 190 (Boston, Little & Brown 1840).

22. *Id.* at 196.

23. HERBERT A. JOHNSON, *Civil Procedure in John Jay's New York*, in *ESSAYS ON NEW YORK COLONIAL LEGAL HISTORY* 159, 169-70 (1981).

24. NELSON, *supra* note 20, at 72.

25. *See* Mann, *supra* note 14, at 207-08.

26. *See* John M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth Century Massachusetts*, in *COLONIAL AMERICA: ESSAYS ON POLITICS AND SOCIAL DEVELOPMENT* 415 (Stanley N. Katz ed., 1971).

other unlearned practitioners.²⁷ At the early state bar of Maryland, in fact, a young Roger Taney found that the highest praise was reserved for masters of the art of pleading. "In that day," he wrote,

strict and nice technical pleading was the pride of the bar, and I might almost say of the Court. And every disputed suit was a trail of skill in pleading between the counsel, and a victory achieved in that mode was much more valued than one obtained on the merits of the case.²⁸

Practicality and fashion marched hand in hand, leading a parade of colonial lawyers to a closer examination of English precedents of pleading and of substantive law as well.²⁹

Whatever the reasons for the increased importance of pleading and the traditional forms of action, the effect of the change on the student of law was marked. John Adams studied Roman law to impress established lawyers whose patronage he needed,³⁰ and certainly won the aid of at least one of them, Jeremiah Gridley.³¹ Adams lost his first case, however, because he was unable to properly draw the necessary pleading.³² Unable to find a precedent, Adams did his best with what was

27. See, e.g., GERARD W. GAWALT, *THE PROMISE OF POWER: THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840*, at 7-30 (1979) (discussing the emergence of the legal profession in Massachusetts and the trained lawyers' effort to elevate their status by organizing bar associations and devising regular programs of legal study in colonial America). The young John Adams, who saw himself as a model of the well-trained professional, made one of his first projects, upon setting up practice in Braintree, Massachusetts, an attack on the pettifoggers in the vicinity who lacked the qualifications to properly practice. See 1 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 44-45, 64-65 (L.H. Butterfield ed., 1964) [hereinafter *AUTOBIOGRAPHY OF JOHN ADAMS*]. One of these "pretenders," however, did best Adams in his first case. See *infra* note 32 and accompanying text. For an interesting discussion of Adams's view of the virtues of elitism, see Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning and Legal Elitism*, in *LAW IN COLONIAL MASSACHUSETTS, 1630-1800*, at 359, 376-81 (Daniel R. Coquillette et al. eds., 1984).

28. SAMUEL TYLER, *MEMOIR OF ROGER BROOKE TANEY* 61 (photo. reprint 1970) (1872).

29. See Joseph H. Smith, *New Light on the Doctrine of Judicial Precedent in Early America, 1607-1776*, in *LEGAL THOUGHT IN THE UNITED STATES UNDER CONTEMPORARY PRESSURES* 9 (John N. Hazard & Wencelas J. Wagner eds., 1970) (finding a vigorous doctrine of precedent in colonial America and the widespread use of English cases to resolve colonial questions, at least when no colonial statutes could be found on point).

30. See *AUTOBIOGRAPHY OF JOHN ADAMS*, *supra* note 27, at 44-45.

31. Jeremiah Gridley was one of the leading lawyers in Boston at this time. See *id.* at 45 n.4.

32. L. Kinvin Wroth & Hiller B. Zobel, *Editorial Note on the Case of Field v.*

at hand. His resolution in the face of this disaster illustrates the amount of effort needed to master the system: "Let me never undertake to draw a Writt, without sufficient Time to examine, and digest in my mind all the Doubts, Queries, Objections that may arise."³³

Students in the early national period had an easier time than the young Adams had resolving doubts, queries, and objections about the proper form of pleadings. *Nisi prius* books that organized legal principles under procedural headings became available, as did printed books of precedents (model pleadings).³⁴ Not only did such works provide models for the practice of law, they also were important pedagogical tools, providing an organizing scheme for the student confronted with the complexities of Sir Edward Coke³⁵ and the English abridgments that were forced to serve in the absence of extensive American reports.³⁶ Daniel Webster's account

Lambert, in *THE EARLIEST DIARY OF JOHN ADAMS* 82, 86-89 (L.H. Butterfield ed., 1966).

33. *AUTOBIOGRAPHY OF JOHN ADAMS*, *supra* note 27, at 65. For a discussion of *Field v. Lambert* and the difficulties with the pleading, see *id.* at 48-50, and Wroth & Zobel, *supra* note 32, at 82-89. Adams's civilian learning was not without practical use. See Coquillette, *supra* note 27, at 382-95.

34. See DAVID HOFFMAN, *A COURSE OF LEGAL STUDY 372-73* (Philadelphia, Thomas, Cowperthwait 1846). Hoffman's definition of the *nisi prius* treatise indicates its usefulness to the student:

It deals principally with the forms of actions,—the pleadings and evidence appropriate to each,—the modes of trial,—the proceedings of practice,—and finally, with every manner relating to the trial of issues of fact and of law, and the removal of points to the superior courts, for final adjudication.

Id. at 372. Hoffman lists seven examples of the genre that were "wholly unknown to the *bibliotheca legum*, prior to the year 1760." *Id.* at 372-73.

35. Sir Edward Coke was a seventeenth-century English jurist and legal theorist who has been referred to as the oracle of the common law. See FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM* 63 (1940). Coke wrote extensively on the common law and some of his best-known works include his Reports (of cases) and the Institutes. See STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND AMERICAN HISTORY: CASES AND MATERIALS* 10 n.1 (1980).

36. See DANIEL WEBSTER, *Account and Report*, in 1 *THE PAPERS OF DANIEL WEBSTER* 6 (Alfred S. Konefsky & Andrew J. King eds., 1982). Apparently these aids had not reached Maryland in 1796, the year the young Roger Brooke Taney began to read law in the office of Jeremiah Townley Chase, one of the judges of the Maryland General Court. In his memoir, Taney stated his belief that studying in the office of a judge rather than of a practicing lawyer was on the whole disadvantageous principally because he never was required to draw pleadings and had to take all his knowledge of them from books which themselves were not very useful:

The want of this practical knowledge and experience was a serious inconvenience to me. And for some time after I commenced practice, I did not venture to draw the most ordinary form of a declaration or plea without a precedent before me; and if the cause of action required a declaration varying in any degree from the

of his discovery of one of the most popular *nisi prius* volumes represents the probable experience of many students:

I read Coke[’s] Littleton^[37] through, without understanding a quarter of it. Happening to take up Espinasse’s Law of Nisi Prius,^[38] I found I could understand it, & arguing that the object of reading was to understand what was written, I laid down the venerable Coke *et alios similes reverendos*,^[39] & kept company for a time with Mr. Espinasse, & other [of] the most plain, easy & intelligible writers. A boy of twenty, with no previous knowledge on such subjects, cannot understand Coke. It is folly to set him upon such an author. There are propositions in Coke, so abstract, & distinctions so nice, & doctrines embracing so many conditions, & qualifications, that it requires an effort, not only of a mature mind, but of a mind both strong and mature to understand him. Why disgust & discourage a boy, by telling him that he must break into his profession, thro [sic] such a wall as this? I really often despaired. . . . Mr. Espinasse, however, helped me out of this, in the way I have mentioned; & I have always felt greatly obliged to him.⁴⁰

United States Supreme Court Justice Joseph Story, too, was driven to distraction by the

dry and technical principles, the dark and mysterious elements of the feudal system, the subtle refinements and intricacies of the middle ages of the Common Law, and the repulsive and almost

ordinary money counts, or the defence required a special plea, I found it necessary to examine the principles of pleading which applied to it, and endeavored to find a precedent for a case of precisely that character; nor was it so easy, in that day, for an inexperienced young lawyer to satisfy himself upon a question of special pleading. Chitty had not made his appearance, and you were obliged to look for the rule in Comyn’s Digest, or Bacon’s Abridgment, or Viner’s Abridgment, and the cases to which they referred

TYLER, *supra* note 28, at 60-61.

37. Webster is referring to Coke’s famous treatise on English law, EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (photo. reprint 1979) (1628).

38. Isaac Espinasse published a series of digests on the legal rules for trials at *nisi prius*, first printed in 1790.

39. And other similarly revered [writers].

40. WEBSTER, *supra* note 36, at 6-7.

unintelligible forms of processes and pleadings, for the most part wrapped up in black-letter, or in dusty folios.⁴¹

The obscurities of Coke on Littleton made him weep.⁴² He found pleading, however, to be refreshing, and having once mastered it, "it became for several years afterward my favorite pursuit."⁴³

The fruit of this enthusiasm was Story's first published work, *A Selection of Pleadings in Civil Actions*, published in January 1805.⁴⁴ The book was no mere compilation, but the result of diligent search in the English books and the records of the Massachusetts courts, and examination of the manuscript collections of some of the leading members of the Massachusetts bar. The author provided numerous citations to authorities and principles illuminating use of a particular form, thereby, he hoped, increasing the book's usefulness to students.⁴⁵ Apparently the work fulfilled its purpose, for it remained a prime reference at least until the time of Story's death forty years later.⁴⁶

More telling evidence of its influence comes from a remarkably hostile review that appeared in a Boston magazine soon after the book's publication.⁴⁷ An anonymous reviewer derided the book as a mere report of knowledge that any student who has read Blackstone should be presumed to possess.⁴⁸ The only effect of the book would be pernicious, convincing the uneducated that, having read it, they knew more than they truly did.⁴⁹

41. THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 19 (William W. Story ed., Boston, Little & Brown 1852).

42. *Id.* at 20.

43. *Id.* For a defense of the importance of studying Coke, see HOFFMAN, *supra* note 34, at 215-31.

44. JOSEPH STORY, A SELECTION OF PLEADINGS IN CIVIL ACTIONS, SUBSEQUENT TO THE DECLARATION, WITH OCCASIONAL ANNOTATIONS ON THE LAW OF PLEADING (R.H. Helmholz & Bernard D. Reams eds., 1980) (1805).

45. *See id.* at iv.

46. 1 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 112 (Boston, Little & Brown 1851).

47. *See Review of Story's Pleadings*, 2 MONTHLY ANTHOLOGY & BOSTON REV. 484 (1805), quoted in JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 23-26 (1971). It was suggested that a motive for such a caustic review was an awareness of the impact that simplifying the pleadings would have on the legal profession, as well as a desire to forestall the inevitable democratization of the profession that would result. *See MCCLELLAN, supra*, at 24.

48. *See MCCLELLAN, supra* note 47, at 23-26.

49. *See id.* at 24.

The appetite for works such as Story's, however, was undiminished by such slights. Joseph Chitty's famous treatise on pleading and its accompanying collection of model forms went through eight American editions from 1809 to 1840.⁵⁰ James Gould's treatise on pleading, taken from his lectures at the law school in Litchfield, Connecticut, was published in 1832, again in 1836, and was republished several times after his death in 1838.⁵¹ This literary activity was accompanied by a chorus of praise from the articulate in the profession, especially those involved in legal education. They lauded the "science" of pleading and the structure provided by the forms of action as the key to understanding the common law, as an example of the highest attainments of logic, and even as something of aesthetic appeal.⁵²

United States Supreme Court Justice James Wilson⁵³ told his auditors in Philadelphia that the existence of abuses of the system of pleading, which caused delay and frustrated justice, did not lessen the glories of the subject:

The history of a suit at law, from its commencement, through all the different steps of its progress, to its conclusion, presents an object very interesting to a mind sensible to the beauty of strict and accurate arrangement. The dispositions of the drama are not made with more exactness and art. Everything is done by the proper persons, at the proper time, in the proper place, in the proper order, and in the proper form.⁵⁴

For Gould, whose law teaching had more practical effect than Wilson's, pleading was not only a thing of great logical beauty, it was also "the most important *single* title in the law" because it summed up in itself all of the common law.⁵⁵

50. See Jenni Parrish, *Law Books and Legal Publishing in America, 1760-1840*, 72 LAW LIBR. J. 385, 385-86 (1979).

51. See JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS at xi (Franklin F. Heard ed., 5th ed. 1887) (Albany, William Gould, Jr., & Co. 1832); Parrish, *supra* note 50, at 401.

52. See GOULD, *supra* note 51, at xii.

53. James Wilson was one of the original U.S. Supreme Court Justices, and was also a signer of both the Declaration of Independence and the Constitution. See JAMES WILSON, *Of the Study of Law in the United States*, in 1 THE WORKS OF JAMES WILSON 2, 2-19 (Robert G. McCloskey ed., 1967).

54. *Id.* at 95-96.

55. GOULD, *supra* note 51, at xii.

This pre-eminence it owes, not solely to the intrinsic value of its own exact and logical principles, but also, and in no small degree, to the fact, that the principles of pleading are necessarily and closely *interwoven*, both in theory and practice, *with those of every other title of the law*. I say, "necessarily" interwoven, because even the most simple of judicial remedies, which the law affords, and without which it would be, practically, a dead letter, cannot be obtained, without the aid of *pleading*.⁵⁶

In the best scientific fashion, Gould claimed to present pleading not as "a compilation of *positive rules*"; but as a system of *consistent and rational principles*."⁵⁷

David Hoffman told the readers of his course of legal study much the same thing, quoting the praise offered by leading members of the English bar. He summed it up quite well: "[The system of pleading is] a most ingenious, beautiful and wonderful system;—a system entitled, when well comprehended, honestly practiced, and reduced to its real elements, to rank with the sciences most worthy of being studied."⁵⁸

In 1832, Daniel Mayes treated his entering law class at the University of Transylvania in Kentucky to a demonstration of the rigorously logical nature of pleading and its perfect fitness to the task of isolating a single issue for decision.⁵⁹ Three years later, Benjamin Butler wrote a plan for legal instruction by the University of the City of New York, at the request of the trustees of the University.⁶⁰ He suggested that students first be instructed in the practicalities of procedure rather than in the mysteries of principles.⁶¹ Butler believed that a thorough proficiency in the adjective⁶² law was the key to understanding substantive rules.⁶³

56. *Id.*

57. *Id.*

58. HOFFMAN, *supra* note 34, at 352.

59. See Daniel Mayes, *An Address to the Students of Law in Transylvania University Delivered at the Beginning of the Session for 1835*, at 14-17 (1835) (transcript available in Columbia Law School Library).

60. At the time of this request, Butler was Attorney General of the United States. He later founded the law school at New York University. See Julius J. Marke, *Introduction to BENJAMIN F. BUTLER, PLAN FOR THE ORGANIZATION OF A LAW FACULTY, IN THE UNIVERSITY OF THE CITY OF NEW YORK* at v, viii (photo. reprint 1956) (1835). The current New York University was known as the University of the City of New York at that time. *Id.* at v.

61. See *id.* at 17-18.

62. See *id.* at x.

63. See *id.* at 17-18.

Our forms of proceeding, though generally prolix, and often encumbered by needless technicalities, are yet intimately connected with the principles of the Law. And as a general rule, he who best understands the nature and design of the instruments which the Law employs, will not only be most expert in the business of his profession, but be best qualified to look above the mere form, and to lay hold of and appropriate to their true uses, the higher parts of his profession.⁶⁴

With the establishment of the school in the following year, David Graham was appointed Professor of Practice. In his inaugural address, he too stated that the rules of procedure were intimately connected with the substantive rules of law.⁶⁵ He found that the principles of pleading themselves, like those substantive principles, were based "not upon abstract or arbitrary regulations, but upon the unalterable foundations of inductive philosophy."⁶⁶

Other educators gave pleading an honored position in their educational plans. James Gould's emphasis on the subject at Litchfield has already been noted.⁶⁷ In the 1820s, Virginia was the site of an even more thoroughly practical experiment in training young men for the law. Chancellor Creed Taylor⁶⁸ began a law school in his home at Needham in 1821.⁶⁹ His method of instruction centered not around lectures but rather around a moot court in which all students would "practice" and receive intensive training in drafting papers that the instructor would then review.⁷⁰ Taylor planned to publish the records of these sessions in journal form. In the preface to the first volume he stated his goal:

Should I live to complete four volumes of the journal of the *law-school* of from three hundred to three hundred and fifty pages each, there will not be an order in the common course of

64. *Id.* at 18.

65. See David Graham, Jr., *The Practice of the Law, As Illustrated in the Study of Pleading and Practice*, in AN INAUGURAL ADDRESS DELIVERED BY THE PROFESSORS OF LAW IN THE UNIVERSITY OF THE CITY OF NEW-YORK AT THE OPENING OF THE LAW SCHOOL OF THAT INSTITUTION 51, 64 (New York, E.B. Clayton 1838).

66. *Id.*

67. See *supra* notes 55-57 and accompanying text.

68. Prior to his appointment as Chancellor of the Virginia High Court of Chancery in 1806, Taylor served in the House of Delegates in 1788 and in the Virginia Senate from 1798 to 1805. W. HAMILTON BRYSON, LEGAL EDUCATION IN VIRGINIA 1779-1979: A BIOGRAPHICAL APPROACH 589 (1982).

69. *Id.* at 30.

70. *Id.* at 31.

proceedings, which a court can be called upon to make, but a precedent of it will be found in one of the volumes: and so, as to all the usual pleadings in the courts of law or equity: for there will not be in either a useful precedent omitted.⁷¹

Taylor advised his students not to ignore the science of the law—the study of “the law of nature and nations: civil law: admiralty law: mercantile law:” as well as criminal law and reports of the American and English courts.⁷² He applauded the efforts “to bring to the noble profession of the law to something like a correct system of pleading, and that very meritorious and distinguished class of gentlemen, the clerks of our courts, to a uniform method of entry, and of making out complete records.”⁷³ Producing competent working men of the profession, however, was challenge enough for Chancellor Taylor.

Some hint of how instruction in law through the study of pleading operated is given by the suggestions for legal study with which William Wirt favored his young kinsman Francis Gilmer in a letter. Wirt instructed Gilmer to work his way through the headings in Bacon’s *Abridgment*, paying attention first to the related pleadings.⁷⁴

For example, the first head in Bacon is “abatement.” . . . The course which we propose is, first, to see what Blackstone says on that subject throughout, which you will easily do by the aid of his index. Consult Tucker’s Blackstone,^[75] with the editor’s notes, to see the changes superinduced by our state law. You will thus have gotten the chart of the coast, at least in outline, and know where [sic] you are; next Chitty,—in his first volume you will see his learning on the pleas of abatement. In his second, you will see the forms of the plea itself, which you must be able to draw before you lay him down.⁷⁶

71. 1 CREED TAYLOR, *JOURNAL OF THE LAW-SCHOOL* at vii (Richmond, Cochran 1822). Although Taylor lived until 1836, no further volumes of the *Journal* were published. For further information on the school and Taylor, see BRYSON, *supra* note 68, at 29-33, 589-95.

72. TAYLOR, *supra* note 71, at 12.

73. *Id.* at vii.

74. See 1 JOHN P. KENNEDY, *MEMOIRS OF THE LIFE OF WILLIAM WIRT* 362-63 (photo. reprint 1973) (1849). Wirt is referring to Matthew Bacon’s *New Abridgment of the Laws of England*, first published in 1730.

75. St. George Tucker edited the first American edition of Blackstone’s *Commentaries* in 1803.

76. KENNEDY, *supra* note 74, at 362.

Only then should the student read the cases referred to by Bacon, followed by subsequent English and leading American cases.⁷⁷ Pleading came first; it provided the structure.

It is not surprising to find judicial approval of the science of pleading. As Chief Justice of the New York Supreme Court of Judicature, James Kent ventilated the commonplace in his opinion in *Bayard v. Malcolm*,⁷⁸ in 1806:

General rules will sometimes appear harsh and rigorous, in their application to particular cases; but I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought, consequently, to be very cautiously touched by the hand of innovation.⁷⁹

The similarity between Kent's comments and the praise heaped on the system by theorists and teachers is evident. Many such statements by other judges could, no doubt, be produced. One comment on the subject is clearly worth noting, however, because of its source. Fifty years after Kent's opinion in *Bayard*, Justice Robert C. Grier of the United States Supreme Court produced a remarkable defense of the traditional system of pleading:

This system, matured by the wisdom of the ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts.⁸⁰

77. *Id.*

78. 1 Johns. 453 (1806).

79. *Id.* at 470-71.

80. *McFaul v. Ramsey*, 61 U.S. (20 How.) 523, 525 (1857).

Grier's outcry was provoked by the growing movement to abolish common law pleading and the accompanying forms of action in favor of codes of pleading, many modeled on the first code, that of New York, adopted in 1848.⁸¹ The Justice's assertion that the forms of action and the pleadings connected with them were rooted in the nature of things, and beyond legislative alteration, is striking evidence of the extent to which common law pleading penetrated the antebellum legal mind and reinforced its understanding of the law itself.⁸²

Despite the enormous investment, both practical and emotional, in the existing system of procedure, it did not rule unchallenged. In Massachusetts, a gradual process of erosion of formality paved the way for statutory change in 1836 and 1851.⁸³ Overt calls for reform could be found in the pages of that organ of scientific legalism, the *American Jurist*.⁸⁴ In the latter 1840s, truly revolutionary change occurred.

81. The New York Code of Civil Procedure is discussed in detail, *infra* notes 85-108 and accompanying text.

82. At the conclusion of his article on the changes in procedure in debt collection cases in Connecticut, Bruce Mann suggests a good reason for the attachment on the part of lawyers to the forms of law: "Lawyers function best when they have a scheme of conceptual pigeonholes to classify the situations they encounter. While not a return to the terrible rigor of form pleading, increased technicality of pleading represented, from a lawyer's perspective, an internal simplification that allowed them to categorize things more precisely." Mann, *supra* note 14, at 213. William Nelson argues that although the weaknesses of the system were evident early, it persisted because "it provided lawyers with a conceptual framework for analyzing an otherwise amorphous body of legal rules." NELSON, *supra* note 20, at 87.

For other U.S. Supreme Court cases evidencing impatience with attempts to reform common law procedure, see *Farni v. Tesson*, 66 U.S. (1 Black) 309 (1861); *Green v. Custard*, 64 U.S. (23 How.) 484 (1859); *Bennet v. Butterworth*, 52 U.S. (11 How.) 669 (1850); *Randon v. Toby*, 52 U.S. (11 How.) 493 (1850).

The Supreme Court dealt with these reformed state procedures because of the diversity jurisdiction of the federal courts. Cases that would otherwise be litigated in the state courts can be brought in federal court if the parties are citizens of different states (and if certain other requirements are met). Until the passage of the Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196 (the Conformity Act), which required procedure in diversity cases brought on the law side of the federal courts to conform "as near as may be" to the state procedure that would have governed had the case been brought in state court, the choice of procedure was governed by the Process Acts of 1789, ch. 21, § 2, 1 Stat. 93; of 1792, ch. 36, § 2, 1 Stat. 276; and of 1828, ch. 68, § 1, 4 Stat. 278. See ROBERT W. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 57-60 (1952). Generally speaking, these Acts required that the federal court apply the state procedure that obtained at the time the Process Act became applicable to the state. The effect was to "freeze" state procedure as of that date. See Charles E. Clark & James W. Moore, *A New Federal Civil Procedure, I. The Background*, 44 *YALE L.J.* 387, 400-01 (1937).

83. See NELSON, *supra* note 20, at 69-88.

84. See, e.g., *Art. III—Codification, and Reform of the Law—No. 1*, 14 *AM. JURIST*

In 1845, the year Joseph Story died, voters in the State of New York approved the calling of that state's third constitutional convention.⁸⁵ The document that emerged from the deliberations was approved by voters on November 3, 1846, by a better than two-to-one margin.⁸⁶ The new constitution drastically reorganized the judicial system of the state. Separate equity courts were abolished and jurisdiction in both law and equity was vested in a single supreme court.⁸⁷ The Court for the Correction of Errors, composed of the judges of the old state supreme court, the Chancellor, and the Senate of the state, was abolished. In its place the constitution created a new court of appeals.⁸⁸ All judicial offices became elective.⁸⁹ Finally, the constitution of 1846 contained a provision that had a great impact on what went on before the popularly elected judges in the newly reorganized courts.⁹⁰ The legislature was required to appoint three commissioners to simplify the law of pleading and procedure.⁹¹

Commissioners were duly appointed in April of 1847, and a new Code of Procedure was enacted on April 12, 1848, which became effective on July 1.⁹² The code was re-enacted on April 11, 1849, with amendments.⁹³ Amended again in 1851⁹⁴ and 1852,⁹⁵ the Code

280, 281 (1835) (stating that "evil results from the necessity of conforming to an uncertain rule, and from the delay and expense of ascertaining that law which ought to have been his guide").

85. See Robert L. Fowler, *Constitutional and Related Aspects from 1801 to the Constitution of 1894*, in 1 HISTORY OF THE BENCH AND BAR OF NEW YORK 123, 155 (David McAdam et al. eds., New York, N.Y. Hist. Co. 1897).

86. *Id.* at 158.

87. FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932, at 19 (1985).

88. *Id.*

89. *Id.* at 35.

90. See N.Y. CONST. art. VI, § 24 (1846), reprinted in 1847 N.Y. Laws 401.

91. See An Act for the Appointment of Commissioners, as Required by the Seventeenth Section, of Article First, and the Twenty-Fourth Section, of Article Sixth, of the Constitution, ch. 59, § 8, 1847 N.Y. Laws 67; see also Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 17, 32 (Alison Reppy ed., 1949).

92. See An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 391, 1848 N.Y. Laws 497 [hereinafter 1848 Code of Procedure]; see also Reppy, *supra* note 91, at 34 (discussing the adoption of this Act).

93. See An Act to Amend the Act Entitled "An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State," ch. 438, 1849 N.Y. Laws 613 [hereinafter 1849 Code of Procedure]; see also Reppy, *supra* note 91, at 34 (discussing the adoption of this Act).

94. See An Act to Amend the Code of Procedure, ch. 479, 1851 N.Y. Laws 876.

governed the practice of the New York courts until it was repealed in 1877.⁹⁶

Both the unification of law and equity in the 1846 constitution and the procedural Code itself were part of a broad and varied movement for legal reform in the decades preceding the Civil War. Although the name "codification movement" is often used as an all-purpose term in discussions of legal reform in this period, its currency should not be allowed to suggest the existence of a unified and coherent "movement." Codification meant different things to those who identified themselves as its proponents. Some advocates were determined enemies of the common law who saw in its English roots its independence of the legislature and the power it gave to judges, something contrary to everything the Revolution was believed to have accomplished.⁹⁷ For others, including Joseph Story, codification meant the reduction to statutory form of those parts of the common law that were certain enough to be cogently and clearly stated.⁹⁸ The goals of these diverse advocates ranged from the creation of several volumes of revised statutes, to the abolition of the common law and the reduction of all law to statutes brief enough to be contained in a book so small as to allow every citizen to carry it about, phrased in language so simple as to lead to the abolition of the legal profession.⁹⁹

95. See An Act to Amend Certain Sections of the Code of Procedure, ch. 392, 1852 N.Y. Laws 651.

96. Reppy, *supra* note 91, at 34-35.

97. *Id.* at 19-21.

98. See *supra* notes 41-52 and accompanying text.

99. See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 5, 23-29, 158-67 (1981). So brief a summary, of course, belies the complexity of the codification movement. Indeed, in some ways it is misleading to speak of a movement; so involved with other questions was the idea of reducing all or some law to statutes. In the late eighteenth and early nineteenth centuries, hostility to the common law was part of a negative attitude toward England and all things English that was associated with the emerging Republican party. This split between Francophiles and Anglophiles carried into the nineteenth century when the Code Napoleon became the model for at least some advocates of codification.

The issue is also part of that gradual democratization of politics beginning in the 1820s, which was expressed in the growth of political parties, a spate of constitution making, and such particular reforms as the election of judges. Finally, reorganization of the law was an important part of more local issues. In New York, for instance, any attempt to systematize the law of land tenures and any suggestion to change court organization would have to take account of the furious battles over rural tenancy in the Hudson valley. The discussion here concentrates on what the procedural changes made by the Field Code meant for those who had to work with them rather than with the battle to enact and preserve them. To that extent, the following discussion treats the changes made as part of

The 1848 Code of Procedure, usually called the Field Code after its chief proponent, David Dudley Field, cannot be characterized simply as conservative or radical reform.¹⁰⁰ The changes it wrought were changes in how lawyers and judges conducted the business of the courts. It was not the sort of reform designed to dramatically reduce to laymen's terms the administration of justice. Yet, within the professional world of judges and lawyers it did bring about a far reaching, if gradual, transformation in how some New York legal professionals thought about law. Alterations in the language used to bring complaints before the courts eventually led to new ways of understanding the law itself. Christopher Langdell grew to professional maturity in this new world. His thought reflects it, and his work on contracts shows an attempt to understand a field of law in terms made useful by the transformation of New York jurisprudence in the decades before the Civil War.¹⁰¹

It is an understatement to call David Dudley Field the chief proponent of the procedural Code that came to bear his name. Starting in the 1830s, Field was a persistent advocate of legal reform.¹⁰² He did not rest with the passage of the Code of Procedure. Until his death, in 1894, Field remained perhaps the most prominent advocate of codification of law in the American legal profession, both procedural and substantive, domestic and international.¹⁰³ He was also one of the most prominent practitioners in the city of New York, famous or notorious, depending on the observer's point of view, for representing some of the most flamboyant characters of the age, including Jay Gould¹⁰⁴ and Boss Tweed.¹⁰⁵ He

a legal world that seems to have no connection to what goes on outside the courtroom—or, for that matter, outside judges' heads. Clearly, it is only part of the story, but, just as clearly, it is a part worth telling.

100. For more background regarding the Field Code, see Stephen N. Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 313-327 (1988).

101. See GRANT GILMORE, *THE DEATH OF A CONTRACT* 35-44 (1974) (discussing Langdell's view of using objective tests in ascertaining a "meeting of the minds" in contract formation cases); Grey, *supra* note 12, at 24-32 (outlining Langdell's analysis of the consideration doctrine and other principles of contract law). Langdell published his now-famous book, *A Selection of Cases on the Law of Contracts*, in 1871.

102. See Reppy, *supra* note 91, at 31.

103. See *id.* at 17-18.

104. Jay Gould was a nineteenth-century industrialist who at one time controlled half the railroad systems in the Southwest, New York City's elevated rail lines, and the Western Union Telegraph Co. In 1869, Gould's scheming to corner the gold market caused the "Black Friday" panic. Gould eventually lost control of his railroad monopoly through questionable stock manipulations in 1872. See GUSTAVUS MYERS, *THE HISTORY OF TAMMANY HALL* 266-67 (1901).

105. William Marcy Tweed was a nineteenth-century American politician and leader

was nothing if not controversial and persistent. Field was also, at least in his first great battle, successful. He began that battle in the late 1830s. His arguments for the changes adopted in the 1846 constitution and the Code of Procedure that followed were straightforward. The separation of legal and equitable jurisdiction in two different courts and the continued use of traditional common law and equitable procedures in those courts was wasteful.¹⁰⁶ He sounded what was a standard call of reformers in the nineteenth century common law world—a dispute that can be settled in the courts should be settled in one action, initiated by pleadings that told as simply as possible what happened, brought before a single court capable of giving all the relief appropriate.¹⁰⁷ The triumph of this sort of reform in the Anglo-American legal world has become so complete by the late twentieth century that it is difficult to appreciate the impact of what Field proposed and the vigor with which it was opposed.¹⁰⁸ Insight into both can be gained by a brief examination of a case Field argued soon after the enactment of the new Code.

*Alger v. Scoville*¹⁰⁹ was argued before the General Term of the New York Supreme Court in 1851. Alger was a creditor of the Dutchess County Iron Company, which had gone into bankruptcy and had assigned its property to Daniel S. Clapp as trustee for the payment of the company's debts.¹¹⁰ Scoville had guaranteed a portion of that debt.¹¹¹ Clapp and Scoville were defendants, as were the stockholders of the defunct company.¹¹² Since the defendants were entitled to whatever was left after the company's debts were paid, their interests were adverse to Alger's claim. Alger requested the payment of his debt (a demand based on his contract with the company and Scoville), the removal of Clapp, and

of New York's notorious Tammany Hall political machine. As "Boss Tweed," he controlled nominations and patronage in New York City politics. Tweed and his cronies, including Jay Gould, defrauded New York City of at least thirty million dollars in kickback schemes. Eventually, Tweed was removed from power and died in prison. See WARREN MOSCOW, *THE LAST OF THE BIG-TIME BOSSES* 12-13 (1971).

106. See Reppy, *supra* note 91, at 31-32.

107. See *id.* at 30-31.

108. For a telling of the story through the adoption of the Federal Rules of Civil Procedure that criticizes some of the ways in which these aims have been realized, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914-1002 (1987).

109. 6 How. Pr. 131 (1851).

110. *Id.* at 132-33.

111. *Id.* at 136.

112. *Id.* at 132.

the appointment of a receiver to manage the remaining assets of the company.¹¹³

To Field, this trial must have seemed to showcase the superiority of the new Code. First, he was able to take advantage of the Code's liberal provisions for the joinder of actions.¹¹⁴ Traditional common law procedure had long forbidden, at least in theory, the joining in one suit of different causes of action.¹¹⁵ The Code abolished the old forms of action in favor of a single "civil action."¹¹⁶ Section 167 allowed the joinder in one suit of all causes of action falling within one of seven broad categories.¹¹⁷ In Field's view, Alger had but one cause of action, the debt owed him by the company, and everything relating to that debt could and must be resolved in this one proceeding.¹¹⁸ Second, under the old procedure, complex rules limited the joinder of parties—the persons who could be brought into a single suit and thus be bound by the determination therein.¹¹⁹ The Code allowed the joining of everyone without whom the

113. *Id.* at 137-38.

114. See Mitchell G. Williams, *Pleading Reform in Nineteenth Century America: The Joinder of Actions at Common Law and Under the Code*, 6 J. LEGAL HIST. 299, 313 (1985).

115. For a thorough discussion of the nineteenth-century practice of joinder and the theory of joinder of actions in common law procedure, see *id.* at 299-311.

116. See 1848 Code of Procedure § 118, 1848 N.Y. Laws at 521. In the 1849 enactment, this provision became § 140, reading in part: "All forms of pleading heretofore existing, inconsistent with the provisions of this act, are abolished . . ." 1849 Code of Procedure § 140, 1849 N.Y. Laws at 645.

117. 1849 Code of Procedure § 167, 1849 N.Y. Laws at 649, stated:

The plaintiff may unite several causes of action in the same complaint, where they all arise out of,

1. Contract, express or implied; or,
 2. Injuries with or without force, to the person; or,
 3. Injuries with or without force, to property; or,
 4. Injuries to character; or,
 5. Claims to recover real property, with or without damages, for withholding thereof, and the rent and profits of the same; or,
 6. Claims to recover personal property, with or without damages, for the withholding thereof; or,
 7. Claims against a trustee by virtue of a contract or by operation of law.
- But the causes of action, so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

Id. For a discussion of the changes in the Field Code's provisions on joinder of actions, see Williams, *supra* note 114, at 313-17.

118. See *Alger*, 6 How. Pr. at 137.

119. See, e.g., 1 JOSEPH CHITTY, TREATISE ON THE PARTIES TO ACTIONS, THE FORMS

final judgment could not be complete, thus limiting the multiplication of suits.¹²⁰ Alger had sued all those whose economic interest would lead them to oppose the payment of his debt.¹²¹ Finally, actions against trustees were the province of equity. The Code effected the abolition of the distinction between law and equity in the 1846 constitution by creating the single civil action.¹²² No longer would a plaintiff in Alger's situation have to go to two different courts to obtain total relief.¹²³ Surely this case presented an excellent illustration of what the new system could accomplish for the more efficient administration of justice.

Unfortunately, this particular court was not at all convinced. In a scathing opinion, Justice Seward Barculo evinced total hostility to the changes brought about by the Code.¹²⁴ He analyzed the joinder rules of section 167 in terms of the abolished forms of action, and severely limited the possibilities for expeditious disposal of disputes.¹²⁵ Barculo supported his reading of the joinder provisions by noting that on the contract matter (that is, the existence of the debt and Scoville's guarantee) the parties were entitled to a jury trial, but the portion of the suit relating to the removal of Clapp as trustee would be tried by the court.¹²⁶ The Code dealt with just such a situation by allowing the judge to order a jury trial of the matter otherwise triable to the court.¹²⁷ Barculo interpreted that provision out of existence and indulged in a belittling attack on the jury system that Field and his fellow revisers held in high regard.¹²⁸ Juries are fit to decide only simple issues.¹²⁹ Complex matters cannot be

OF ACTIONS, AND ON PLEADING 1-86 (Philadelphia, H.C. Carey & I. Lea eds., 4th Am. ed. 1825).

120. See 1849 Code of Procedure §§ 117-20, 122, 1849 N.Y. Laws at 639-40.

121. See *Alger*, 6 How. Pr. at 137-38.

122. See *supra* note 87 and accompanying text.

123. Under this scenario, even if Alger won his action at law with a judgment in his favor on the debt, Clapp was in control of the remaining assets of the company. If Clapp was improperly favoring the stockholders over creditors, as Alger claimed he was, Alger's recovery would be nugatory. Yet action against Clapp would require a separate suit in the equity court. Under the new system, all causes of action could be addressed at once.

124. See *Alger*, 6 How. Pr. at 139-44.

125. See *id.* at 139-42.

126. See *id.* at 142-43. To this extent, the Code preserved the distinction between law and equity. Because the constitutional guarantee to trial by jury was created when law and equity were distinct systems, the question involved in this case has arisen frequently as the division between law and equity has diminished. See FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 347-89 (2d ed. 1977).

127. 1849 Code of Procedure § 209, 1849 N.Y. Laws at 536.

128. See *Alger*, 6 How. Pr. at 139-44; Subrin, *supra* note 100, at 333-34.

129. *Alger*, 6 How. Pr. at 142.

resolved by hoping for total agreement among twelve men.¹³⁰ Barculo stated that “[c]ommon sense and the nature of things” tell us that the question of the fitness of a trustee and his possible removal cannot be tried to a jury.¹³¹ He concluded with a criticism of the Code that could only be construed by Field as a deliberate insult.

It is in truth greatly to be regretted, that those who assumed the responsibility of devising a remedy for the insufficiencies of the former system, did not more fully understand and appreciate the true cause and nature of the evils to be remedied; which arose mainly from a want of sufficient judicial force to dispose of the rapidly increasing business of a growing state and commercial people. But in this age of progress, it not unfrequently happens, that alteration is mistaken for reformation, and the public, feeling the necessity of some improvement, is too often contented with a mere *change*; not distinguishing, at first, between the benefits of a solid reform and the crude innovation of conceited pretension.¹³²

Justice Barculo’s treatment of the Code led Field to exclaim that his own view of the matter was that intended by the legislature.¹³³ Barculo replied that the legislature meant exactly what it said and nothing else.¹³⁴ According to Barculo’s memorialist, the following colloquy then took place: “‘Well,’ replied the counsel, ‘I know the codifiers meant so.’ ‘Ah!’ responded the judge, ‘very likely! They seem to have *meant* one thing and *said* another very often, if your argument is good.’”¹³⁵ Before the preparation of the Code of Procedure, Seward Barculo’s “predilections were ultra democratic and progressive.”¹³⁶ What was it about the Code

130. *Id.*

131. *Id.* at 143.

132. *Id.* at 144.

133. See John Thompson, *Judge Barculo*, 20 Barb. app. at 661, 669 (1856).

134. See *id.*

135. *Id.* at 669; see also Benjamin D. Silliman, *Personal Reminiscences of Sixty Years at the New York Bar*, in HISTORY OF THE BENCH AND BAR OF NEW YORK, *supra* note 85, at 226, 239-40. The asperity of this exchange may be characteristic of the times. In 1897, an aged Benjamin D. Silliman looked back sixty years and found that relationships among lawyers in antebellum New York had been more formal and less courteous: “Sixty years ago there was in the bearing of lawyers toward one another, perhaps somewhat more than at this time, of the punctilio generally imputed to the days of dueling.” *Id.* Two of the judges then sitting in New York City had been wounded in duels and he could think of at least three members of the bar who had killed their adversaries. See *id.* at 240.

136. Thompson, *supra* note 133, at 668.

that "had the effect of extirpating from Judge Barculo's mind the last remains of a *radical and reforming spirit*?"¹³⁷ Barculo was a legal scientist, a skilled jurist who coupled a thorough knowledge of the science of law with the skills of an accomplished advocate.¹³⁸ Mastering the intricacies of practice before the New York courts was no easy task. The sudden and total change wrought by the Code surely threatened many accomplished lawyers with professional obsolescence. Barculo may indeed have believed that the Code was "a reckless effort at change" that left "the ark of the law, venerable and sacred, profaned by unholy fingers, and its time-honored principles and practices swept away."¹³⁹

An even more direct expression of professional distress came from another Justice of the New York Supreme Court, George Gould, who in 1860 produced a new edition of his father James Gould's treatise on pleading with notes "adapted to the New York Code of Procedure."¹⁴⁰ In his preface, the younger Gould poured forth his frustration with the democratic process that resulted in the destruction of the old and familiar:

When a profession, distinguished for its learning, is called upon to surrender its natural prerogative of explaining its own terms, and understanding its own rules;—and to throw the accumulated treasures of its knowledge,—the lore of centuries,—into the crucible of a *popular assembly*; there to be *reduced*, and adulterated, till there should come forth a compound intended to make "every man his own" lawyer; there cannot be expected to result *any system*:—The intention of the whole undertaking is to *break down*, not build up.¹⁴¹

From a century's perspective, it is tempting to see in such language the real fear of loss, of both economic advantage and social status.

Whatever their material motives may have been, Barculo and other judges couched their opposition to the Code in purely intellectual terms. Some of the criticism clearly recognized that the forms of action had provided the essential framework for understanding the common law. In

137. *Id.*; see also DONALD B. COLE, MARTIN VAN BUREN AND THE AMERICAN POLITICAL SYSTEM 408-10 (1984). Barculo was first appointed to judicial office in 1845, by Governor Silas Wright, under the constitution of 1822. Wright was considered a radical in his day, although he was not sympathetic to the anti-renters. In the same year that he appointed Barculo to the Dutchess County court, he declared Delaware County to be in a state of rebellion and called out troops to quell the anti-rent disturbances. See *id.*

138. Thompson, *supra* note 133, at 668.

139. *Id.*

140. GOULD, *supra* note 51, at vii-ix.

141. *Id.* at viii.

an 1851 opinion, Justice Samuel Selden of the New York Supreme Court neatly linked the Baconian nature¹⁴² of legal science, the forms of action, traditional pleading, and the fear of obsolescence:

Classification, arrangement, is a vital principle in every science; and especially in that of the law, which consists of such a multitude of abstract rules, is it indispensable to its clear comprehension and just application. That important branch of the common law which relates to civil remedies, has from the origin of the science been arranged under heads corresponding with the divisions of actions. Under this arrangement, books have been written, indexes and digests compiled, and the legal knowledge of every lawyer is stored in his memory in the same order. He can not search for a principle either in his books, or in his own mind, without having this division in view.¹⁴³

In fact, so necessary to comprehension were the old procedures that some judges found it beyond the power of the legislature to change them. In 1850, Justice John W. Edmonds of the New York Supreme Court stoutly asserted that the "principles of pleading are left untouched" by the Code and insisted on testing the sufficiency of a complaint by rules that were used under the traditional system.¹⁴⁴ Justice Barculo took an extreme rhetorical position, maintaining that "[e]very person who has studied and understands the law as a science, knows, that there is *substance* in the distinction between actions," and accused the Code of "meddling with a subject not understood."¹⁴⁵ Therefore, it "has come into collision with a 'higher law,'—the law of nature—which it cannot overcome."¹⁴⁶

Although other judges, perfectly willing to accept the possibility of a totally new system, took a far more sympathetic view of the changes wrought by the Code,¹⁴⁷ opposition triumphed at the highest levels. In

142. Sir Francis Bacon, English philosopher and statesman, proposed that inductive logic is the logic of scientific discovery. Natural philosophy—the Baconian nature—is the observation of particular events from which principles and laws are induced. See LaPiana, *supra* note 13, at 774-78.

143. *Rochester City Bank v. Suydom*, 5 How. Pr. 216, 218 (1851).

144. *Dullner v. Gibson*, 3 Code Rep. 153, 154 (1850).

145. *Leroy v. Marshall*, 8 How. Pr. 373, 376 (1853).

146. *Id.*; see also *Wooden v. Waffle*, 6 How. Pr. 145, 150 (1851) (stating, with regard to the system of common law pleading, that "[n]ature had made some laws, and these it is difficult to repeal").

147. See, e.g., *Getty v. Hudson River R.R.*, 6 How. Pr. 269 (1851) (deciding that both equitable and legal relief may be prayed for in the same complaint); *Williams v.*

1860, Justice Selden wrote an opinion for the New York Court of Appeals in which he maintained that "there are intrinsic differences between [actions] which no law can abolish."¹⁴⁸ George van Santvoord, the author of a leading treatise on New York code pleading, conceded that the principles behind the old forms of action remained intact.¹⁴⁹

In part, this was a victory for professional learning and prestige at the expense of simplicity and the convenience of clients. Such a result is evident in the battles over the constitutionally mandated abolition of the distinction between equitable and legal jurisdiction. Despite the advantages of disposing of a dispute in one action, some judges persisted in asserting that the difference between law and equity was inherent in nature and insurmountable. These views often went hand in hand, as they did for Barculo, with an unfavorable view of the capacities of the jury.¹⁵⁰

Similar attitudes were not limited to New York lawyers. With the exception of a brief period in the eighteenth century, Pennsylvania never had separate equity courts.¹⁵¹ Consequently, the commonwealth enjoyed a rather sophisticated practice of providing equitable relief under common

Hayes, 5 How. Pr. 470 (1851) (holding that immaterial facts should be stricken from pleadings, leaving only the facts essential to the cause of action); Millilin v. Cary, 5 How. Pr. 272 (1850) (finding that a complaint requesting injunctive relief, although traditionally an action at equity, must conform to the Code); Glenny v. Hitchins, 4 How. Pr. 98 (1849) (concluding that, under the Code, a demurrer that fails to specify the grounds for an objection may be disregarded).

148. Goulet v. Asseler, 22 N.Y. 225, 228 (1860).

149. See GEORGE VAN SANTVOORD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS UNDER THE NEW YORK CODE OF PROCEDURE 2 (Nathaniel C. Moak ed., Albany, John Parsons 1873). This edition preserves van Santvoord's original text, with Moak's additions in brackets. *Id.* at iv. Citations are to the pagination of this edition; the original pagination is preserved in the margins.

150. See, e.g., Alger v. Scoville, 6 How Pr. 131 (1851), discussed *supra* notes 109-39 and accompanying text; see also Wooden v. Waffle, 6 How. Pr. 145 (1851) (finding that under the Code, unlike the common law, an equity pleading is not limited to facts essential to the cause of action, but limited to facts that have a bearing on the case other than establishing another fact in the controversy); Knowles v. Gee, 4 How. Pr. 317 (1850) (determining that under the Code, as under the common law, a pleading must contain only facts that are essential to the cause of action and not mere evidence of the facts); Shaw v. Jayne, 4 How. Pr. 119 (1849) (stating that under the Code, as under the common law, a pleading shall contain only the facts necessary to reach a decision on the cause of action, and any additional information shall be stricken from the pleadings). See generally Williams, *supra* note 114, at 306. Williams notes that "the primary justification for the rules of misjoinder became the jury." *Id.* He takes a somewhat more sympathetic view of Barculo's opinion in *Alger*, finding that it properly reflected shortcomings in the Code, but concludes that the New York courts took a "legalistic" view of the causes of action that severely limited the effects of the Code's "reforms." *Id.* at 318-24.

151. See WILLIAM H. LOYD, THE EARLY COURTS OF PENNSYLVANIA 191-95 (1910).

law forms. Problems existed however, because not all equitable remedies were available.¹⁵² Yet, starting in the 1820s, prominent, self-consciously scientific practitioners confidently maintained that it was time for them to enjoy a fully developed and separate equity practice, which would mean the introduction of precisely those complexities that New York was struggling to abolish.¹⁵³ Pennsylvania's combined system was not without articulate defenders, yet the almost complacent tone of the calls for "reform" highlights the close relationship between procedural science and the self-image of status-conscious practitioners.¹⁵⁴

III.

As revealing of attitudes towards professionalism as the struggle over the implementation of the Field Code was, its outcome helped transform ideas of what legal science was all about. The forms of action had provided the framework for the organization of the principles of legal science.¹⁵⁵ Because the resulting schema was intimately related to the

152. See *id.* at 159-211.

153. See *id.* at 208-10.

154. See, e.g., *id.* at 159-211 (discussing the tension between the courts of law and the courts of equity); Horace Binney, *Eulogium on Chief Justice Tilghman*, 16 Serg. & Rawle 437, 446-49 (1827) (describing the efforts of Pennsylvania's chief justice to save the state's court system from the incorporation of law and equity); Sydney G. Fisher, *The Administration of Equity Through Common Law Forms*, 1 LAW Q. REV. 455, 463-65 (1885) (discussing the impossibility of eliminating the courts of equity); see also WILLIAM H. RAWLE, EQUITY IN PENNSYLVANIA: A LECTURE DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA 54-55, 68 (Philadelphia, Kay & Brother 1868) (stating that colonial judges and lawyers in Pennsylvania were incapable of distinguishing the difference between law and equity).

Pennsylvania lawyers agitating for the creation of separate equity courts may have had in mind their reputation in the eyes of their brethren in other states. In *Rensselaer Glass Factory v. Reid*, 5 Cow. 587 (1825), a New York state senator in his role as judge of the Court of Errors described a Pennsylvania action that combined both legal and equitable features as being "to us, and according to our ideas of law, a perfect monster," and as a result of "the courts of common law in that State being obliged to strain their jurisdiction to cover such cases, from there being no Court of Chancery established there." *Id.* at 630. The product of such a system was not a trustworthy precedent, a conclusion that seems to isolate Pennsylvania in the American legal community. See generally Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, 5 PERSP. AM. HIST. 257, 257-326 (1971) (discussing Pennsylvania's longing for a separation between law and equity, and for formal equity procedure). But cf. ANTHONY LAUSSAT, JR., AN ESSAY ON EQUITY IN PENNSYLVANIA 79 (Philadelphia, Robert Desilver 1826) (advocating that Pennsylvania's system of special pleading avoids the "dilatatoriness" of the forms of equity).

155. See *supra* notes 114-23 and accompanying text.

actual practice of law, practice and theory were well integrated. To some degree, all lawyers could be part of the professional culture, no matter how uninvolved they had been with the creation of scientific systems of commercial or maritime insurance law.¹⁵⁶ The Field Code smashed that world, first in the State of New York and later elsewhere, as code pleading spread.¹⁵⁷ Yet, whatever David Dudley Field hoped the changes would accomplish, the New York courts managed to limit the effect of the Code to the abolition of the forms of action as verbal formulas only, not as legal concepts.¹⁵⁸ Since the stock allegations and fictions of the forms no longer meant anything, however, lawyers and courts were forced to articulate clearly the legal principles that lay behind concepts like trover,¹⁵⁹ replevin,¹⁶⁰ assumpsit,¹⁶¹ and debt.

The description of the new system given in one of the first treatises on New York code pleading explains the change quite succinctly. George van Santvoord, author of *A Treatise on the Principles of Pleading in Civil Actions Under the New York Code of Procedure*,¹⁶² was a successful lawyer in Troy, near Albany, who, after the passage of the Code quickly became a leading authority on its meaning. Van Santvoord noted in his work, first published in 1852, that “[i]n order to frame a pleading correctly under the new system, not only the rules of pleading, properly speaking, but the legal principles involved in the action, and upon which the relief depends, must be thoroughly understood.”¹⁶³ For example, the traditional form used for the action of trover alleged that *A* was possessed of property that he lost and that *B* found.¹⁶⁴ It further alleged that although requested to return it, *B* retained the property and converted

156. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); LaPiana, *supra* note 13, at 792-830.

157. See generally CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 23-31 (2d ed. 1947) (detailing the adoption of code pleading in the United States and some of its benefits).

158. See *supra* notes 124-49 and accompanying text.

159. Trover is a remedy for wrongful appropriation of goods or chattels of another. See BLACK'S LAW DICTIONARY 1508 (6th ed. 1990).

160. Replevin is an action whereby the owner or one entitled to goods or chattels may recover them from another who has wrongfully taken or detained such goods or chattels. See *id.* at 1299.

161. Assumpsit is a promise that one person assumes or undertakes to do some act or pay something to another. See *id.* at 122.

162. VAN SANTVOORD, *supra* note 149.

163. *Id.* at 165.

164. See *id.* at 3.

it to his own use.¹⁶⁵ These allegations, however, were not necessarily true.

No request was, perhaps, ever made, and no loss or finding was necessary to be proved, and yet the pleading was theoretically good; and the plaintiff was allowed to show any state of facts to prove that the defendant had converted, or sold, or destroyed, or was exercising unlawful dominion over the property.¹⁶⁶

Such a disparity between the statements of the pleading and the plaintiff's grievance was not tolerated under the Code, which required that the plaintiff plead only the facts constituting the cause of action.¹⁶⁷ The result of this requirement to plead facts was clear:

In what cases, therefore, it may be asked, is a demand necessary to be alleged in an action which would have been formerly trover, or an action to recover personal property? This question, often a nice and difficult question of law, it will be seen, must be first satisfactorily solved before the pleading can be correctly drawn; for no general form of pleading can meet every variety of case, particularly where it may be desirable to verify it by the oath of the party.¹⁶⁸

165. *See id.*

166. *Id.*

167. *See id.*

168. *Id.* at 4. As originally enacted, § 120 of the Code required the complaint, the pleading that began the plaintiff's suit, to be "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." *Id.* at 161. In the 1851 amendment of the Code, the definition of the complaint is found in subdivision two of § 142: "A plain and concise statement of the facts constituting a cause of action without unnecessary repetition." *Id.* at 162. Van Santvoord maintained that the consensus of authority held the two provisions to have the same substantive meaning. *See id.* The latter formulation does seem to be more sparing of professional sensibilities. Some, however, would not be reconciled. Charles O'Connor was a prominent New York practitioner, the length of whose career resembles Field's. His opposition to the Code of Procedure may have begun in his opposition suggesting "pride and pique" to the judiciary provisions of the 1846 constitution. *See BERGAN, supra* note 87, at 28.

In 1870, South Carolina adopted the New York Code of Procedure. Two attorneys in Columbia wrote to O'Connor asking him to suggest books that they might acquire to help them understand pleading and practice under the Code. O'Connor's answer was an extended criticism of the Code and of "its sole author" David Dudley Field. O'Connor singled out for special criticism the requirement that only facts be pleaded. It is clear from his description of the kind of pleading resulting from that requirement that all science had been destroyed.

A similar result obtained when the common counts, the traditional method of dealing with contract actions, were considered.¹⁶⁹ The various promises and requests for payment or performance involved in the actions of *indebitatus assumpsit*,¹⁷⁰ *quantum meruit*,¹⁷¹ *quantum valebant*,¹⁷² and the account stated “were scarcely anything more than mere legal fictions.”¹⁷³ Both implied and express promises were stated positively, with the implied promise proved by showing the facts from which the law implied a promise.¹⁷⁴ Under the Code, however, implied requests or promises could not be pleaded.¹⁷⁵ “The facts raising the implication, and they alone, should be stated, because they alone are to be proved.”¹⁷⁶

Now, according to my conception, it requires somebody much more wise or more subtle than myself, or any special pleader I have ever been acquainted with, to define or find out what it is that should be stated in a regular pleading drawn in compliance with this requisite of the Code. I am not aware that anyone has ever attempted to do it. The common practice in this state is to tell your story precisely as your client tells it to you, just as any old woman in trouble for the first time would narrate her grievances, and to annex by way of schedules, respectively marked A, B, C, &c., copies of any papers or documents that you may imagine may help your case. This is most emphatically a fair description of all the pleadings which come from the office of the chief codifier himself [Field].

Letter from Charles O'Connor to Pope & Haskell (Mar. 14, 1870) (published in COLUM. S.C. GUARDIAN, Mar. 14, 1870), reprinted in 1 ALB. L.J. 302, 303 (1870). For a modern view of the matter, describing O'Connor's view as a “legalistic” interpretation of the Code, see CLARK, *supra* note 157, at 129-30. Clark states that “the view most nearly approaching the Code ideal and affording the most practically convenient results” is one that sees the statement of facts required by the Code as limited to what “a lay onlooker” would see as “a single occurrence or affair, without particular reference to the resulting legal right or rights.” *Id.* at 130. For further discussion of the role of facts in the Field Code, see Subrin, *supra* note 100, at 328-31.

169. For a discussion on the common counts—actions for debts or accounts due—see CLARK, *supra* note 157, at 287-93.

170. *Indebitatus assumpsit* is a form of action that alleges a debt is due from the defendant and then states that the defendant promised to pay the obligation. See BLACK'S LAW DICTIONARY, *supra* note 159, at 768.

171. *Quantum meruit* is an equitable doctrine, based on the premise that no one who benefits by the labor or materials of another should be unjustly enriched. In such circumstances, the law will imply a promise to pay a reasonable amount for services and goods provided, even absent a specific contract. See *id.* at 1243.

172. *Quantum valebant* is a cause of action for damages founded on the promise by a defendant to pay a plaintiff the reasonable value of goods sold and delivered. See *id.* at 1244.

173. VAN SANTVOORD, *supra* note 149, at 197-99.

174. See *id.* at 197-98.

175. See *id.* at 197-99.

176. *Id.* at 199.

The successful practitioner could no longer depend on a book of form pleadings. "Under the Code," van Santvoord wrote, "precedents are, in general, to be invented, and cannot in all cases be prepared beforehand for use. The pleader is required to understand the legal principles on which his action is based, the evidence necessary to support it, the general rules of pleading, and make his forms for himself."¹⁷⁷

In the past, research might have been limited to a search of precedents such as those collected in Chitty or in Story's first work, with perhaps a reference to digests such as Nathan Dane's,¹⁷⁸ to find statements of general principles. Under the Code, however, the careful lawyer had to concentrate on a close reading of earlier cases to find a narrower sort of precedent—one in which the facts resembled the case at hand. Somehow, the lawyer had to find the legal essence of the actions represented by these earlier cases and express it in his complaint. The premium put on a specific scrutiny of previous cases is shown by the additions made by Nathaniel Moak to the revised edition of van Santvoord's treatise, published in 1873. Almost all the additional material is a recitation of the facts of individual cases, culminating in a new chapter, "Complaint in Particular Cases"—two hundred pages of short synopses of cases grouped by broad subjects, such as "illegal contract," "infants," "mistake," and even "milk," the latter of which reads in full:

An action for fraudulently adulterating milk may be brought in the name of the owner of a cheese-manufactory and its patrons, where the cheese is to be divided in proportion to the quantity of milk furnished by each; and so by the treasurer of such association.¹⁷⁹

It is unlikely that a legal world dominated by the organizational framework provided by the forms of action would have found room for a classification such as "milk."

The tendency to emphasize the particulars of previous cases, in an effort to identify exact principles applicable to the case at hand, was promoted by the sort of pleading required of a defendant in response to a plaintiff's statement of the facts giving rise to his cause of action. The

177. *Id.* at 5.

178. Nathan Dane was a Revolutionary War-era lawyer and statesman who was a delegate to the Continental Congress in 1785. In 1823, Dane published the first comprehensive work on American law, entitled *General Abridgement and Digest of American Law*. Dane established a chair at Harvard Law School—the Dane professorship—a position subsequently held by Christopher Langdell. See CAMBRIDGE BIOGRAPHICAL DICTIONARY 383 (Cambridge Univ. Press ed., 1990).

179. VAN SANTVOORD, *supra* note 149, at 376.

Code required the defendant's answer to contain a denial of the plaintiff's allegations that he wished to controvert, and a statement of any new matter constituting a defense.¹⁸⁰ This provision had the effect of abolishing the old learning on the general issue, which was specific to each form of action and denied all the plaintiff's allegations, and on the special pleading, which involved "the allegation of *special* or *new* matter, as distinguished from a direct *denial* of matter previously alleged on the opposite side."¹⁸¹ The complications arising from the relationship between these two aspects of answering a plaintiff's suit were legion:

A mingling of logic and illogic, not untinged by tricklings of medieval scholasticism, appears throughout the whole discipline. It has yielded the special traverse with its enigmatic negation, the plea to the further maintenance of the action, the plea *puis darrein continuance*; has elaborated the learning of profert and oyer, of color, of protestation, of duplicity, of anticipation, of departure, of new assignment, of repleader, of aider, and other like positive and negative phases of enginery; has, in short, constructed an arcanum of forensic statement penetrable only by the initiate.¹⁸²

The learning that grew up around the Code might be regarded, and properly so, as equally arcane. First, the legislature changed its mind three times on the possibility of allowing a "general denial," finally resolving the question in the affirmative in 1852, thereby destroying the formulae of the general issue of common law pleading.¹⁸³ Second, deciding what the general denial did deny was no easy task, complicating in turn the determination of what had to be specifically denied.¹⁸⁴ Once again, as with the question of what the plaintiff had to put in his complaint in order to get into court, writing an answer that would withstand judicial scrutiny became an inquiry devoted to the careful teasing out from prior cases of

180. See 1848 Code of Procedure § 149, 1848 N.Y. Laws at 522.

181. GOULD, *supra* note 51, § 18, at 10; CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 247-49 (Cincinnati, Anderson 1897); NELSON, *supra* note 20, at 72-73.

182. MILLAR, *supra* note 82, at 34; see also 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 305-06 (photo. reprint 1966) (Oxford, Clarendon 1765) (noting that "the science of special pleading [has] been frequently perverted to the purposes of chicane and delay").

183. See HEPBURN, *supra* note 181, §§ 289-90, at 252, § 291, at 253.

184. See the elaborate discussion of this issue in VAN SANTVOORD, *supra* note 149, at 510-47.

the exact factual elements necessary to sustain the action and thus possible to deny, either generally or specifically.

A similar development occurred in England as a result of the first attempts to thoroughly reform common law pleading in the mother country. Adopting the suggestions of the *Second Report of the Common Law Procedure Commissioners*, issued in 1820, the judges of the English courts promulgated new rules of pleading in the Hilary Term of 1834, from which they take their name.¹⁸⁵ These rules abolished the general issue and required special pleading.¹⁸⁶ In an article written more than sixty years ago for the *Cambridge Law Journal*, W.S. Holdsworth suggested that this change had a significant effect on substantive law.¹⁸⁷ Forced to come out from behind the convenient obfuscation of the formulaic general issue, lawyers and judges had to pay close attention to older precedents that carefully distinguished between the forms of action, giving better guidance as to what elements were necessary to sustain the action (and therefore that must be denied to defeat it) than "the looser reasoning, and almost pointed disregard for the differences between the forms of action which had characterized many of the eighteenth-century decisions," in at least some areas of substantive law.¹⁸⁸

The provisions of the New York Code governing defendant's answer were perceived as similar to the Rules of Hilary Term, at least by Judge Samuel L. Selden of the New York Court of Appeals. In *McKyring v. Bull*,¹⁸⁹ the leading case on the relationship between the general denial of the Code and the general issue of the old pleading, Selden both pointed out the analogous nature of the changes made in New York and Great Britain, and engaged in the sort of analysis that Holdsworth identified as one of the results of reform.¹⁹⁰ The plaintiff in *McKyring* alleged that he

185. See Hilary Term 1834, 3 & 4 Will. 4, ch. 42, § 1 (Eng.); see also W.S. Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 CAMBRIDGE L.J. 261, 270-78 (1923) (discussing the impact of the Hilary Rules on the development of substantive law); Alison Reppy, *The Hilary Rules and Their Effect on Negative and Affirmative Pleas Under Modern Codes and Practice Acts*, 6 N.Y.U. L. REV. 95 (1929) (detailing how the Hilary Rules restored the strict theory of pleading).

186. See Holdsworth, *supra* note 185, at 270.

187. See *id.* at 273-78.

188. *Id.* at 276. Holdsworth discusses: "(1) Developments in the doctrine of consideration; (2) the development of the distinction between trover and trespass *de bonis asportatis*; and (3) the scope of the modification of the rule *actio personalis [moritur cum persona]* [personal actions do not survive the death of the injured party]." *Id.* at 273; see also *id.* at 274-77 (illustrating the development in these three areas of substantive law).

189. 16 N.Y. 297 (1857).

190. See *id.* at 302-03, 306-07, 309; see also HEPBURN, *supra* note 181, § 292, at 254 (stating that the general denial is different from the general issue in that it permits a less

had done work for the defendant worth \$650 and that defendant still owed him \$134 of that amount.¹⁹¹ The defendant answered with a general denial of all the allegations in the complaint.¹⁹² At trial, the court did not allow the defendant to offer proof of payment or of partial payment in mitigation of damages because neither had been pleaded.¹⁹³

The case eventually made its way to the court of appeals for a decision on exactly what could be proved by a defendant whose only pleading was a general denial.¹⁹⁴ Selden's opinion for a divided court¹⁹⁵ rested completely on the nature of sound pleading as demonstrated by English experience. He concluded that sound pleading required that defendants be allowed to deny only facts, not legal conclusions.¹⁹⁶ In this case, the plaintiff's claim for \$134 as the balance due rested on a legal conclusion; the facts he alleged showed he was entitled to a greater amount.¹⁹⁷ A general denial puts the existence of the larger debt into question.¹⁹⁸ To allow the defendant to then offer evidence of payment—in technical terms, to allow him to offer evidence in confession and avoidance, admitting that he once owed something, but no longer—would unfairly surprise the plaintiff and set at naught the object of pleading, to inform each side of what the other hoped to prove.¹⁹⁹ The offer to prove partial payment met the same fate.²⁰⁰ Section 246 of the Code required the court to give judgment for a plaintiff whose sworn complaint based on a contract requesting money only is not answered by the defendant.²⁰¹ In addition, section 149 required the answer to include a statement of any new matter constituting a defense or

extensive range of testimony and has a less certain application in particular instances); Reppy, *supra* note 185, at 99 (asserting that Justice Selden, in *McKyring v. Bull*, attributed the different result in debt and assumpsit to the different phraseology in the two general issues, *nil debet* and *non assumpsit*).

191. *See McKyring*, 16 N.Y. at 297.

192. *Id.* at 303.

193. *Id.* at 298.

194. The court of appeals affirmed the trial court's decision with Judge Selden writing for the majority. *See id.* at 297.

195. One judge concurred in a separate opinion (not reported), three simply "concurred," one expressed no opinion at all, and two dissented without opinion. *See id.* at 309.

196. *See id.* at 303.

197. *Id.*

198. *Id.*

199. *See id.* at 297, 303-04.

200. *See id.* at 304.

201. *See id.* at 308.

counterclaim.²⁰² Selden found that these two sections, read together, require defendants to plead partial payment or lose the benefit of it.²⁰³

More significant than the result in *McKyring*, however, is the method of Selden's opinion. He began by noting that although the Code had "abrogated the common law system of pleading, with all its technical rules," the general denial is similar to the general issue.²⁰⁴ English decisions on the scope of the general issue would "throw much light on the question presented here."²⁰⁵ Selden then went into a detailed discussion of the differences between the *nil debet*, the general issue in actions of debt, and the plea *non assumpsit*, the general issue in assumpsit.²⁰⁶

Originally, according to Selden, the law recognized, and properly so, the fact that *nil debet* (does not owe) is in the present tense and that *non assumpsit* (never promised) is in the past, citing two seventeenth-century cases decided by Lord Chief Justice Holt.²⁰⁷ Under *non assumpsit*, therefore, no evidence could be offered that related to events after the promise, such as partial payment.²⁰⁸ This crucial distinction was lost sight of in a misguided attempt to sacrifice form for substance. Justifications were attempted, but they were based on an incorrect understanding of the nature of the action of assumpsit. These "errors" subverted the object of pleading by allowing the defendant to offer all sorts of evidence about events taking place after the making of the promise

202. *See id.* at 307.

203. *See id.* at 304-09. The close distinctions fostered by the sort of reasoning Selden used are illustrated by *Quin v. Lloyd*, 41 N.Y. 349 (1869). In *Quin*, the plaintiff's complaint stated that the defendant had hired him for \$15 a week and that defendant was indebted to him in a certain amount "[b]eing the balance remaining due, after sundry payments made by defendant to said Richard Quin." *Id.* at 350 (emphasis added). This statement offered no facts to show exactly how much the plaintiff was due, unlike the complaint in *McKyring*, which stated the total amount due to the plaintiff (\$650). Therefore, a general denial put into question the existence of the agreement, the number of weeks worked and the making of the "sundry payments" that reduced the amount owed. In *McKyring*, the amount claimed by the plaintiff (\$134) was itself a legal conclusion. *See id.* at 352-53.

204. *McKyring*, 16 N.Y. at 298.

205. *Id.* at 299.

206. *See id.* at 302-06.

207. *See id.* at 299. In the anonymous case 1 Salk. 278 (1690), Lord Holt stated "that; in debt for rent, *nil debet* pleaded the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words of which are in the *present tense*." *Id.* Again, in *Draper v. Glassop*, 1 Ld. Ray. 153 (1697), Holt stated that "[i]f the defendant pleads non assumpsit, he cannot give in evidence the statute of limitations, because the assumpsit goes to the *praetor* [past] tense." *Id.* at 153.

208. *See McKyring*, 16 N.Y. at 299-301.

or the creation of the debt without having to tell the plaintiff what he planned to do.²⁰⁹ The plaintiff was thus forced to do an unmanageable amount of preliminary work or take the chance of being caught unprepared, a situation a proper system of pleading should avoid.²¹⁰ The Rules of Hilary Term, however, corrected these mistakes by prohibiting introduction of evidence of payment or of defenses other than “never promised” or “never indebted” under the general issue in debt and assumpsit.²¹¹ The judge drew two conclusions from his “brief review” of the English experience:

The first is, that no argument in favor of allowing payment, or any other matter in confession and avoidance, to be given in evidence under a general denial, can be deduced from the former practice in that respect, as this practice has been abandoned in England, not only as productive of serious inconvenience, but as a violation of all sound rules of interpretation.

A second inference is that, in regard to pleading, it is indispensable to adhere to strict logical precision in the interpretation of language.²¹²

Selden concluded that to allow proof of subsequent events under the general denial would cause the very problem the English courts had corrected through the Hilary Rules, which embodied the same spirit that animated the Code: “It was evidently designed to require of parties, in all cases, a plain and distinct statement of the facts which they intend to prove. And any rule which would enable defendants, in a large class of cases to evade this requirement, would be inconsistent with this design.”²¹³

Selden’s discussion of the possibility of offering evidence of partial payment in mitigation of damages concluded that the evidence would have

209. *See id.*

210. *See id.*

211. *See id.* at 298-302; *see also* Reppy, *supra* note 185, at 98-110 (discussing the history of the Hilary Rules and generally supporting Selden’s view in *McKyring*).

212. *McKyring*, 16 N.Y. at 302.

213. *Id.* at 304-05; *see also* Reppy, *supra* note 185, at 96-98. Reppy agrees with Selden’s judgment that the Hilary Rules and the Code shared the same spirit, and argues that an understanding of the English experience will help illuminate American reform procedure, a position that Reppy shows is contrary to the received wisdom. *See id.* At least one contemporary court agreed with Selden: “These regulations [the Hilary Rules] restored the ancient rule, and placed the science of pleading upon its true principle. The framers of the New York Code, from which ours is mainly taken, would seem to have intended to accomplish the same result.” *Piercy v. Sabin*, 10 Cal. 22, 29-30 (1858).

to be allowed under the general denial because it could be offered under the Hilary Rules, due to the close correspondence between the Code and the English rules.²¹⁴ Such an interpretation, of course, violated the nature of pleading as fair notice. Realizing this, the English judges issued the Rule of Trinity Term, requiring that payment be pleaded rather than simply offered as evidence of mitigation under the general issue.²¹⁵ So similar in spirit were the Hilary Rules and the Code that the Rule of Trinity Term would have to be enacted in New York to avoid the unwanted result.²¹⁶ Fortunately, it was possible to construe the Code as requiring partial payment to be pleaded.²¹⁷ This being so, Selden concluded with the satisfied observation that the Code was actually better constructed than the English system.²¹⁸

Selden's argument illustrates Holdsworth's hypothesis. Seventeenth-century cases that properly maintained the distinctions between actions and pleas were the correct models. Subsequent corruption was cured by the Rules of Hilary Term, which had the same aim as the New York Code, although one has the impression that, on the whole, Selden preferred judges over the legislature as reformers of procedure.²¹⁹

The views of one judge, however, did not justify any generalization about the effect of the changes wrought by the Code of Procedure on substantive law. The Rules of Hilary Term, after all, did not abolish the forms of action; their effect on the study of principles underlying the forms came from changing the type of answer the defendant was required to give. The New York Code exacted far greater change and certainly could accommodate the removal from New York's jurisprudence of the distinctions Holdsworth saw being strengthened in England. Two points of view were represented in New York, as shown by a brief review of one of the substantive areas that Holdsworth examined.

Holdsworth used the history of the distinction between trover and trespass *de bonis asportatis* as an example of the changes he described.²²⁰ The former form of action lay for a conversion of one's

214. See *McKyring*, 16 N.Y. at 308-09.

215. The Rule of Trinity Term provided that "[p]ayment shall not in any case be allowed to be given in evidence *in reduction of damages* or debt, but shall be pleaded in bar." See *id.* at 305-06 (quoting 4 R. MEESON & W.N. WELSBY, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER AND EXCHEQUER CHAMBER 4 (J.I. Clark Hare & H.B. Wallace eds., Philadelphia, T. & J.W. Johnson 1852)).

216. See *id.* at 307-08.

217. See *id.*

218. See *id.* at 309.

219. See *id.* at 308-09.

220. See Holdsworth, *supra* note 185, at 273-76.

goods, the latter for an asportation.²²¹ Conversion means the taking of one's goods by another who uses the goods for himself.²²² Asportation is the simple taking away of the goods.²²³ An asportation could become a conversion if, for example, after the taking away, the aggrieved party demands the goods, and the demand was refused.²²⁴ Broadly put, trespass involves force; trover does not.²²⁵ The distinction between the two was blurred in eighteenth-century English cases, but was revived, according to Holdsworth, after the Hilary Rules.²²⁶ Although Holdsworth did not explain the exact connection between the rules and the substantive law, it seems to lie in Rule V(3): "In actions of trespass *de bonis asportatis*, the plea of not guilty [the general issue in trespass] shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein."²²⁷ This change was significant for maintaining the distinction between the two actions because the wrong in trespass was the forcible interference with the goods, and in trover it was the taking for oneself of what belonged to another. Ownership really did not matter for trespass, only possession did.²²⁸ As long as you had the goods, rightly or wrongly, the forcible taking from you was wrong. The plaintiff's title was unimportant and did not belong in the general issue.²²⁹

In New York, the relationship between the two forms of action revolved around the question of the defendant making an answer that challenged the plaintiff's property rights in the goods. Early New York cases seem to have maintained the distinction.²³⁰ Confusion crept in

221. *Id.* at 275-76.

222. *Id.* at 276.

223. *Id.*

224. *Id.* at 275-76.

225. *See id.*

226. *See id.*

227. 2 CHARLES CROMPTON & R. MESSON, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF EXCHEQUER AND EXCHEQUER CHAMBER 23 (J.I. Clark Hare & H.B. Wallace eds., Philadelphia, T. & J.W. Johnson 1852).

228. *See CLARK, supra* note 157, at 79-80.

229. *See Holdsworth, supra* note 185, at 274-76.

230. *See, e.g., Schermerhorn v. van Volkenburgh*, 11 Johns. 529 (1814) (holding that title in a third person can be shown under general issue in trover); *Demick v. Chapman*, 11 Johns. 132 (1814) (stating that ownership by plaintiff cannot be offered under a general issue in trespass *de bonis asportatis*); *see also Faulkner v. Brown*, 13 Wend. 63 (1834) (maintaining that an action in trover requires the plaintiff to have a general issue or special property right); *Aikin v. Buck*, 1 Wend. 466 (1828) (holding that the right to reduce property in actual possession is sufficient to entitle a party to bring an action in trespass *de bonis asportatis*); *Cook v. Howard*, 13 Johns. 276 (1816) (declaring that for an action in

through the 1850s.²³¹

In *Kissam v. Roberts*,²³² a case decided by the Superior Court of New York City in 1860, the distinctions were restated and reinforced in terms of the Code. The plaintiff's complaint charged that the defendant had wrongfully taken from him his goods and chattels, namely a schooner with its attendant tackle and other gear.²³³ The defendant answered by general denial.²³⁴ On trial below, the Court did not allow the defendant to give any evidence as to the plaintiff's lack of ownership of the schooner, as opposed to mere possession.²³⁵ The jury rendered a verdict for the plaintiff and judgment was entered for \$4,210, the value of the vessel plus interest.²³⁶

On appeal, defendant's counsel maintained that ownership of the vessel was a material issue under the Code and that evidence regarding it should have been admitted.²³⁷ Plaintiff's counsel maintained that the cause of action was trover and that under that cause of action a general denial precludes the defendant from offering evidence pertaining to title.²³⁸ Judge Murry Hoffman upheld the verdict for the plaintiff, but without approving plaintiff's counsel's interpretation of the applicable law.²³⁹ According to Judge Hoffman, "[t]he Code recognizes the principles of the old actions, though all the forms of pleading are abolished."²⁴⁰ The principles applicable in this case, however, were those of trespass *de bonis asportatis*, not trover.²⁴¹ Plaintiff's counsel was incorrect in maintaining that ownership was irrelevant in trover, in spite of the confusion found in some of the cases.²⁴² The two actions were distinct and the principles governing them were distinct as well.²⁴³

trespass *de bonis asportatis* it is improper for the defendant to show property in a stranger to excuse the trespass and justify the taking).

231. See *Kissam v. Roberts*, 6 Bos. 154, 161-63 (1860).

232. 6 Bos. at 154.

233. *Id.*

234. *Id.*

235. See *id.* at 155-56.

236. *Id.* at 154.

237. See *id.* at 154-57.

238. See *id.* at 158-59.

239. See *id.* at 160-65.

240. *Id.* at 160.

241. *Id.*

242. *Id.*

243. See *id.* at 157-64. Hoffman also found support in the Hilary Rules provision regarding trespass *de bonis asportatis*, discussed *supra* notes 220-29 and accompanying

Here, then, was a case in which the reforms of the Code led to a reexamination and reinforcement of old distinctions, similar to that which Holdsworth describes for England. The ultimate resolution of the issue, however, was in favor of a radical interpretation of the Code. In 1868, a superior court decision upheld a complaint, the allegations of which mingled elements of trespass and trover, although not without a strongly worded dissent that maintained the inviolable nature of the different forms of action, which the majority characterized as "that incubus upon the administration of substantial justice."²⁴⁴ The decision was later affirmed by the court of appeals without opinion.²⁴⁵

This history of controversy over the meaning of the Code of Procedure was a matter of daily professional life for Christopher Langdell and his partners. Langdell left New York having dealt on a daily basis with the need to understand the Code and therefore with the sort of research required to formulate proper pleadings. It is tempting to imagine Langdell agreeing with the conservative interpretation of the Code, seeing the principles of the forms of action still alive, and finding them best expressed in the older English cases Holdsworth described.

The research necessary to find these principles, the careful searching of past cases for particular circumstances that might provide analogies to the matter at hand and provide raw material from which to induce general principles, could also have been reinforced by Langdell's focus on cases as a law student.²⁴⁶ Because of poor eyesight, which was to fail completely at the height of his teaching career, Langdell had other students read to him. One of them was the future Episcopal Bishop of Fond du Lac, Wisconsin, Charles Grafton.

He used to get me to read aloud with him evenings, along with [George Otis] Shattuck, for I had the small accomplishment of reading well. He taught us how, from his point of view, to study law. He began with the cases of leading import. We had to read them, and then state the points to him. Then he made us read all the leading authorities on such cases, and so he pounded certain principles of law into us.²⁴⁷

text.

244. *Colton v. Jones*, 7 Rob. 164, 172 (1868).

245. See *Legal Intelligence*, 6 ALB. L.J. 166, 168 (1871) (listing all the decisions of the New York Court of Appeals from July 1, 1870 to June 21, 1872).

246. See Marcia Speziale, *Langdell's Concept of Law As Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 8-9 (1980).

247. 2 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 179 (1908).

In addition, Langdell's experience as Theophilus Parsons's research assistant may have contributed to his fascination with the case. During the latter part of his study at Harvard Law School, Langdell was the school's librarian. He also aided Parsons in writing his treatise on the law of contracts, first published in 1853.²⁴⁸ According to Parsons's preface to his work, his assistants undertook a specific task, dictated by his decision to exclude references to cases from his text.²⁴⁹ To discuss cases supporting his assertions in the body of his work, Parsons feared, would inevitably lead his readers to slight or even ignore cases opposing or modifying the principles in the text.²⁵⁰ The result would be unpleasant surprises, should they ever find themselves arguing in court a question involving those principles. He therefore relegated all discussion of cases to notes, some of which contained extensive quotation from and abstracts of cases that contradicted or modified the text. Langdell and his fellow assistants aided in preparing of the notes, and their work was certainly thorough:

More than six thousand cases are referred to in this volume; but from the beginning to the end of the book no case is cited because cited elsewhere, none merely on the authority of an index or digest, or of a marginal or head note, none without actual investigation of the case in its whole extent, and none without a subsequent and independent verification of the citation.²⁵¹

Langdell's understanding of the law of contracts was formed by the careful explication of decided cases. Under the direction of a respected teacher, he learned to look for the law in a rigorous dissection of judges' reasoning. When he came to practice at the bar of New York, that dissection turned out to be the essence of practice.

Langdell's vision of the case method involved more than the techniques of practice. To some degree, he believed that the principles he discovered through the examination of cases were the true essence of law. The triumph of his teaching method, however, was not as closely related to the legal science that lay behind it as it was to other factors, including the changing nature of the university and the social situation of the legal profession.²⁵² The relationship to the realities of practice, however, was

248. See 1 THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* at x (Boston, Little & Brown 1853).

249. See *id.* at viii.

250. See *id.*

251. *Id.* at x.

252. It seems that the case method actually contradicted at least one version of legal

just as important. In fact, it could be said that the case method came along at just the right time.

IV.

The spread of code pleading, with its emphasis on finding precedents factually similar to the case at hand, led naturally to the growth of law reporting. With the advent of the Field Code, the number of reporters of the decisions of the New York courts increased. Some were dedicated solely to opinions dealing with matters of pleading and procedure under the Code.²⁵³ Opinions of lower courts were now regularly being printed, not because they were binding authority, but because lawyers needed access to opinions in which the procedural effect of different fact patterns was considered. In 1866, one New York lawyer estimated that in the seventeen years of the Code's existence, the courts rendered some 4500 opinions interpreting its provisions.²⁵⁴ Soon there was a market for an annual digest of New York law, which attempted to classify and summarize these numerous reported cases.²⁵⁵ By 1882, one commentator observed that the volume of the New York digest for 1881 included cases

in two volumes of Abbott's New Cases, one of City Court Reports, two of Howard's Practice, three of the Supreme Court, five of the Court of Appeals, one of Civil Procedure Reports, one of New York Superior Court Reports, one of Surrogate Reports, besides the New York Daily Register, Monthly Law Bulletin, and Weekly Digest.²⁵⁶

science prevalent in the late nineteenth century. I have tried to describe some aspects of that legal science in William P. LaPiana, *The Legal Culture of the Formative Period in Sherman Act Jurisprudence*, 35 N.Y.L. SCH. L. REV. 827 (1990).

253. See, e.g., 1 BENJAMIN V. ABBOTT & AUSTIN ABBOTT, REPORTS OF PRACTICE CASES DETERMINED IN THE COURT OF THE STATE OF NEW-YORK: WITH A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD NEW-YORK REPORTS ISSUED DURING THE PERIOD COVERED BY THIS VOLUME (New York, Diossy 1866); 1 GEORGE D. MCCARTY, CIVIL PROCEDURE REPORTS CONTAINING CASES UNDER THE CODE OF CIVIL PROCEDURE AND THE GENERAL CIVIL PRACTICE OF THE STATE OF NEW YORK (New York, S.S. Peloubet 1882).

254. Charles P. Kirkland, Address to the Graduating Class of the Law School of Columbia College 10 (May 16, 1866) (transcript available in Columbia Law School Library).

255. See GOULD'S ANNUAL DIGEST OF NEW YORK REPORTS (1881).

256. J.L. High, *What Shall be Done with the Reports?*, 16 AM. L. REV. 429, 434 (1882).

He predicted that soon the law of other states would be in the same sorry mess.²⁵⁷

In fact, the nightmare had already become a reality. In 1879, John West published the first of his regional reporters, which, within a few years, made available to the profession every opinion of every court of last resort in the United States as well as the decisions of the federal courts.²⁵⁸ The nature of the enterprise was clearly dangerous in the eyes of some observers. The anonymous reviewer of the first bound volumes of the West system was aghast at their promiscuousness. Since every opinion was printed in full, "we have a bushel of chaff to every pint of grain."²⁵⁹ Two years later, another reviewer made much the same point: "[T]he volumes that are constantly falling from the press teem with reports of cases of no interest to the profession or to the public, and important only to the parties litigant."²⁶⁰ These concerns, quickened by the rapid growth of indiscriminate reporting, became a staple of discussion at the meetings of the American Bar Association in the mid-1880s. In 1884, John F. Dillon, prominent judge and railroad lawyer, gave the annual address before the ABA and, among other observations, noted that in 1881 there were over 3000 volumes of reports covering the courts of the various jurisdictions in the United States, and the number was growing at more than 100 a year.²⁶¹ He later invited the Association to consider the matter.²⁶² It was referred to committee and, largely through Dillon's urging, the Association adopted a resolution deprecating the uncontrolled use of precedent but urging that the publication of opinions in no way be limited by statute.²⁶³

The ABA resolution was a triumph of practicality over theory. Although Dillon and others believed there could be too much of a good thing when it came to reporting cases, coping with the tidal wave involved

257. See *id.* This profusion of precedents may have contributed to what one commentator saw as a growing lack of reverence for the doctrine of *stare decisis* among New York lawyers. See William Green, *Stare Decisis*, 14 AM. L. REV. 609, 627 (1880).

258. John B. West published his first reporter, *The Syllabi*, in St. Paul Minnesota. For a look at the origins and development of the West Reporter System, see Thomas A. Woxland, "Forever Associated with the Practice of Law": *The Early Years of the West Publishing Company*, 5 LEGAL REFERENCE SERVICES Q. 115 (1985).

259. *Recent Legal Literature*, 11 CENT. L.J. 339, 340 (1880) (reviewing West's *Northwestern Reporter* and *Federal Reporter*).

260. High, *supra* note 256, at 429.

261. See John F. Dillon, *Annual Address*, in AMERICAN BAR ASS'N, REPORT OF THE 7TH ANNUAL MEETING 203, 223-24 (1884).

262. See JOHN F. DILLON, THE LAWS AND JURISPRUDENCE IN ENGLAND AND AMERICA 267 (Leonard W. Levy ed., 1970) (1895).

263. See *id.* at 289-90; Dillon, *supra* note 261, at 223-24.

several strategies, discussion of which must await another day. For now, it is enough to realize that although lawyers complained about the multiplication of cases, they also asserted that practice without them was impossible.

In his address to the class of 1868 at Columbia Law School, Charles Tracy warned the graduates that searching all the reports to find a case on point was difficult work.²⁶⁴ It was effort well spent, however, because to be confronted with an unknown but relevant case meant disaster.²⁶⁵ In 1886, the editors of the *Central Law Journal* dismissed the assertion that the great number of reported cases was the cause of the problem:

It is idle now to talk of the practice of law at all, without the use of precedents, as indeed it would have been at any period within the life time of the common law; and access to the very latest decisions of the courts is an absolute necessity to a lawyer in active practice.²⁶⁶

In the same year, in an address before the Allegheny Bar Association, Harvey Henderson, a Pittsburgh lawyer, said pithily: "The necessity of consulting many books is the penalty a lawyer must pay for exercising his profession in this extraordinary age."²⁶⁷ There is also evidence that legal research was based on cases rather than principles. An anonymous review in the third volume of the *American Law Review* criticized the author of a treatise on the law of titles to real estate in New York for not citing cases by name but only by volume and page and for not including in his work a table of cases cited.²⁶⁸ The need for full citations and a table was dictated by the way lawyers work; experienced practitioners "habituate themselves in searching for a principle through the books to follow the track of a leading case," making a table of cases a necessity.²⁶⁹ In 1884, the editors of the same journal asked whether tables of cases "did not occupy the same economical place in legal literature as the hair on the end of a man's nose occupies in the human anatomy."²⁷⁰ The response: its

264. See Charles Tracy, *An Address Delivered Before the Graduating Class of the Law School of Columbia College 16-17 (May 13, 1868)* (transcript available in Columbia Law School Library).

265. See *id.*

266. *Case Law Again—Audi Alteram Partem*, 22 CENT. L.J. 577, 578-79 (1886).

267. Harvey Henderson, *The Origin and Utility of Case-Law*, 33 PITTSBURGH L.J. 301, 305 (1886).

268. See *Book Notices*, 3 AM. L. REV. 541, 543 (1869) (reviewing Gerard's *Title to Real Estate in the State of New York*).

269. *Id.*

270. The original editorial was entitled *Hair on the End of a Man's Nose*, 18 AM. L.

readers were unanimously in favor of a table of cases appearing in every treatise.²⁷¹ Their reasons were clearly summed up by Emlin McClain, head of the law department at the University of Iowa:

The secret of the whole matter is just this: the title of the case is a definite clue, having no dependence on the varying notions or whims of the different authors, while the heading and the sub-head under which the subject may be referred to in an index is a matter wholly indefinite and uncertain.²⁷²

The most overwhelming evidence of the profession's appetite for cases was the fate of John West's comprehensive reporters.²⁷³ As the editors of the *Central Law Journal* pointed out, the law of survival of the fittest would determine whether law books continued to be published or not.²⁷⁴ There certainly was competition. The *American Law Review* printed *A Symposium of Law Publishers* in 1889, in which James E. Briggs of Lawyers' Co-op strongly put the argument for the selective reporters that his organization published: "It had not occurred to us so forcibly until our experience drove us to study the problem, that so large a proportion of the decisions contained so little that was new as not to warrant even a bare publication of the opinion, to say nothing of full reports."²⁷⁵ That observation might have been true, and it was certainly true that, in Briggs's words,

[t]here is a generally felt and frequently expressed regret, on the part of bench and bar here and in England, for the unlimited production of law books, whether of reports or text-books, which, instead of simplifying and facilitating a knowledge of the present state of the law on any given question, complicate and embarrass it by the very quantity of matter presented for examination and reconciliation.²⁷⁶

REV. 129 (1884). The quotation is taken from the first of two subsequent editorials presenting readers' replies. See U.M. Rose, *Hair on the End of a Man's Nose*, 18 AM. L. REV. 314, 314 (1884).

271. See Rose, *supra* note 270, at 314-17.

272. Emlin McClain, *More Hair on the End of the Nose*, 18 AM. L. REV. 488, 489 (1884).

273. See *infra* notes 277-85 and accompanying text.

274. See *The Origin and Utility of Case-Law*, 22 CENT. L.J. 529, 530 (1886).

275. James E. Briggs, *A Symposium of Law Publishers*, 23 AM. L. REV. 407, 409 (1889).

276. *Id.* at 407.

West's enterprise prospered nevertheless. In his contribution to the publisher's symposium, West summarized the conditions that made him successful in a way that shows he separated the complaints about the profusion of cases from the profession's practice of research.²⁷⁷ First, he noted that few questions of law can be answered "by direct reference to the abstract principles of the law, as taught in the school, or laid down by the commentators."²⁷⁸ Constitutional and statutory provisions must be investigated and "the decisions of the courts bearing on the point must be found and compared, before the lawyer can say with any positiveness, 'thus the law is written.'²⁷⁹ Lawyers also consult treatises, not to find "[t]he opinions of a learned man, expert in legal lore,"²⁸⁰ but to find "the *case law* on the subject, as determined not alone in the local jurisdiction, but as shown in the decisions of the courts throughout the whole United States."²⁸¹ Before the West reporter system, the lawyer could never be certain that a nationwide search was complete. Official reports were slow, and unofficial reporting was haphazard. In the end, the lawyer "had to go into court uncertain whether he might not be met on the threshold by his opponent, with controlling precedents to which he had not had access, and of the existence of which he had not been made aware."²⁸² With the regional reporter system, these fears were assuaged. Critics called West's innovation the "[b]lanket [s]ystem" of reporting, he wrote, but he found that a compliment, not a criticism.²⁸³ "No policy of insurance is so satisfactory to the insured as the blanket policy; and that is the sort of policy we issue for the lawyer, seeking insurance against the loss of his case through ignorance of the law as set forth in the decisions of the highest courts."²⁸⁴

West gauged his market well. The success of his enterprise reveals how highly the profession valued access to all possible precedents. In spite of all rhetoric to the contrary, the basis of research and practice was the case. Supporters of the case method were certainly wise to portray their teaching technique as a means of giving the student tools that could be useful in practice, and they did not hesitate to do so. At Harvard, the collapse of the required curriculum was part of the transition to an emphasis on teaching technique rather than legal truth.²⁸⁵

277. See John B. West, *A Symposium of Law Publishers*, 23 AM. L. REV. 400 (1889).

278. *Id.* at 400.

279. *Id.*

280. *Id.* at 401.

281. *Id.*

282. *Id.* at 403.

283. *Id.* at 406.

284. *Id.* at 407.

285. See ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 308-

Recognition of the possibility for practical instruction through the analysis of cases was not limited to Harvard or even to advocates of the Harvard style of legal education. As early as 1870, a writer in *The Western Jurist* defended law schools against the charge of providing solely theoretical instruction by noting that "the most important result of a course of professional study . . . is not so much the amount actually learned, as the mental habit acquired."²⁸⁶ In 1875, William G. Hammond, then teaching law at Iowa, read a paper on legal education to the American Social Science Association. He considered several different teaching methods and asserted that each had its place.²⁸⁷ The study of cases, however, was the only way to directly train students in habits of thought useful to the practitioner.²⁸⁸ Through the study of cases the student learns "not only rules, but the sources from which rules proceed; and he insensibly acquires a habit of measuring the greater or less elasticity of each rule in connection with diverse states of fact, which is, perhaps, the best possible substitute for actual practice in ripening the legal judgment."²⁸⁹

Devotees of the Harvard system were more explicit in the advantages of the case method for teaching the student how to deal with the problems of practice. In 1893, the Columbia Law School *Circular*, a document surely acceptable to Dean William Keener, who had brought the case method to Columbia and who helped to set off the controversy that led to the founding of New York Law School, emphasized that what the student did in the classroom—discussing cases and analyzing the relevant and actual grounds of decision—was "practically . . . what he will be constantly doing as a lawyer."²⁹⁰ The *Columbia Law Times* saw matters the same way. The advent of the case method was an improvement, the editors believed, because "[t]he student now studies the law in the manner in which he will be called upon to investigate a case when he comes to active practice."²⁹¹ Emlin McClain, the Iowa law professor who found tables of cases useful because the case was the key to legal research, not

10, 380 (1921).

286. *Law Schools and Their Course of Study*, 4 W. JURIST 125, 131 (1870).

287. See William G. Hammond, *Legal Education and the Study of Jurisprudence in the West and North-West*, 8 J. SOC. SCI. 165, 173-76 (1876).

288. See *id.* at 175-76.

289. *Id.*

290. Frank S. Rice, *Methods of Instruction at American Law Schools. II. Columbia College in the City of New York*, 6 COLUM. L. TIMES 154, 165 (1893). The Columbia Law School *Circular* was an annual publication that reviewed notable events and achievements by its law students during the school year.

291. *Editorial*, 6 COLUM. L. TIMES 171, 171 (1893).

surprisingly found teaching through cases an important part of legal education. "Plunge him [the student]," McClain told the ABA in 1893, "into the midst of a difficulty and then let him help himself out, as a lawyer or a judge would, by means of an adjudicated case, and he at once recognizes the utility and discipline of case study."²⁹² Even Joel P. Bishop, who became a vociferous critic of Harvard's methods, was adamant about the need for every student to learn to critique cases.

The student should, therefore, read case after case; and make, as he goes on, his own abstracts of the points decided therein, cut down to the smallest possible dimensions, yet not so close as to pare off any thing which the case absolutely decides. There is no exercise more important than this; and it is especially one to be advantageously done by students in a class, under competent instruction; as, for example, in a law school.²⁹³

Comments like these indicate some belief that students should be taught to "think like lawyers." Thinking like a lawyer involved, in great part, close analysis of cases. The anonymous respondent to a highly critical review of Langdell's contracts casebook published in the *Southern Law Review*²⁹⁴ described the practice of the case method in just these terms. Class discussion was devoted to ascertaining "the precise point involved in each case, . . . what the court apprehended was the precise point," alternative grounds for decision, and the analogies that could be drawn from the courts' reasoning.²⁹⁵ This careful parsing of the case is at the heart of research in a common law system. It is necessary before any argument about which law should apply to a given fact situation can be made. As a Harvard student put it in 1893, under the case method the student "reads hundreds upon hundreds of cases, becomes familiar with the appearance of decisions, and, to some extent, with the practice of courts, and learns how to digest a long case quickly and accurately."²⁹⁶ So central to the entire enterprise was this analysis that Eugene

292. Emlin McClain, *The Best Method of Using Cases in Teaching Law*, in AMERICAN BAR ASS'N, REPORT OF THE 16TH ANNUAL MEETING 401, 406 (1893).

293. JOEL P. BISHOP, *THE FIRST BOOK OF THE LAW: EXPLAINING THE NATURE, SOURCES, BOOKS, AND PRACTICAL APPLICATIONS OF LEGAL SCIENCE, AND METHODS OF STUDY AND PRACTICE* 252 (Boston, Little & Brown 1868).

294. For the critical review, see *Langdell's Selected Cases on Contracts*, 5 S. L. REV. (n.s.) 853, 872-73 (1880) (book review).

295. *Langdell's Selected Cases on Contracts*, 6 S. L. REV. (n.s.) 414, 449 (1880) (response to book review).

296. Lloyd M. Garrison, *Methods of Instruction at American Law Schools. III. The Law School of Harvard University*, 6 COLUM. L. TIMES 193, 194 (1893).

Wambaugh, a member of the Harvard Law class of 1880 and at the time a member of the law faculty at the University of Iowa where he introduced the case method of instruction, wrote an entire treatise on *The Study of Cases*, the subtitle of which fairly describes its scope: *A Course of Instruction in Reading and Stating Reported Cases, Composing Head-Notes and Briefs, Criticizing and Comparing Authorities, and Compiling Digests*.²⁹⁷

Such learning was useful in the day-to-day practice of law. Austin Abbott taught law at the University of the City of New York (the ancestor of New York University) using a modified version of the case method that preserved a prominent place for the lecture.²⁹⁸ In his eyes, the great advantage of the case method was the dialogue between students and professor, which duplicated in the classroom what lawyers do in practice.²⁹⁹ When lawyers discuss a doubtful point of law they "get down four or five recent or leading cases and examine them together, and a colloquy ensues which brings out an analysis of each case," and in that way an agreement is reached "as to what the law is on the point."³⁰⁰ "This is," Abbott continued, "substantially the natural course with the Case system."³⁰¹ In a paper presented to the American Bar Association in 1894, William Keener summed up the practical advantages of the case method in terms that probably appealed to every practicing lawyer in his audience:

The student is required to analyze each case, to discriminate between the relevant and the irrelevant, between the actual and possible grounds of decision, and having thus considered the case, he is prepared and required to deal with it in its relation to other cases. In other words, the student is practically doing, under the guidance of the instructor, what he will be required to do, without guidance, as a lawyer.³⁰²

297. EUGENE WAMBAUGH, *THE STUDY OF CASES* (Boston, Little & Brown 1892). A second expanded edition was published in 1894 after Wambaugh had joined the Harvard faculty. For more on Wambaugh, see WARREN, *supra* note 247, at 448.

298. See the description of Abbott's teaching methods in Charles W. Thompson, *Methods of Instruction at American Law Schools. I. The University of the City of New York*, 6 COLUM. L. TIMES 135, 136 (1893).

299. See Austin Abbott, *Existing Questions of Legal Education*, in AMERICAN BAR ASS'N, REPORT OF THE 16TH ANNUAL MEETING 371, 386 (1893).

300. *Id.* at 386-87.

301. *Id.* at 387.

302. William Keener, *Inductive Method in Legal Education*, in AMERICAN BAR ASS'N, REPORT OF THE 17TH ANNUAL MEETING 473, 482 (1894).

With such training, a young lawyer could be a valuable addition to an established practice, whether or not he had a firm grasp of those somewhat diffuse principles that were so often asserted to be the heart of the common law.

In contrast, Theodore Dwight's advice to his students on preparing a case for argument, given in 1890, was quite different. "The first thing to be done," he advised, "is to master the leading principles applying to the case."³⁰³ Only then should the reports be consulted.³⁰⁴ Dwight's advice on what the lawyer should do with the reports was brief. The lawyer should first make sure that all the authorities that could be cited by his opponent were good law, determining whether they have been overruled or whether "they conflict with well established principles."³⁰⁵ The lawyer must decide whether a case has been restricted to its facts, or distinguished from a later case, or whether it consists of dictum, but Dwight gave no hint that he was concerned with teaching those techniques.³⁰⁶ For Dwight, legal education did not include intensive instruction in the analysis of cases.³⁰⁷ Instruction by the case method did, and presumably for that reason it was a better method of preparation for the actual practice of the law in a legal world swamped by reported cases. A pedagogical innovation based on ideas of what learning was about became an intensely practical tool for training members of the profession.

V.

The case method, therefore, was in part a practical response to changing conditions of practice. It is possible that the "Dwight method" of teaching primarily from treatises was destined for substantial modification in whatever institution it was applied. What then is the worth of the legacy of Dwight, his co-workers, and the old Columbia that New York Law School inherited? This article suggests that it is not principally opposition to the case method, an opposition that did not long endure. The true heritage of New York Law School is the belief that legal education is valuable for all those who wish to practice law in all its variety, be they devoted primarily to corporate litigation, business practice, personal injury and medical malpractice, service in government agencies or any of the numerous "law jobs" that exist in our complex society. Effective teaching,

303. Theodore W. Dwight, *Method of Preparing a Case for Argument*, 4 COLUM. L. TIMES 1, 1 (1890).

304. *Id.*

305. *Id.* at 4.

306. *See id.*

307. *See id.*

whatever method is used, benefits all those called to the bar. High standards are not methods of exclusion, but rather challenges to be met by diligent work and application to legal study.