

243. *Heaton v. Heaton*, 55 N.Y.S. 2d 154 (1945); *Rubardt v. Salzman*, 314 Ill. App. 189, 40 N.E. 2d 846 (1942). With regard to the creation of a trust see *Miller v. Nat'l Bank of Detroit*, 325 Mich. 395, 38 N.W. 2d 863 (1949).

244. *Lowry v. Kavanagh*, 322 Mich. 532, 34 N.W. 2d 60 (1949). Mrs. Sara Lowry was a defendant in the case, but this may not have been the result of her resistance to her husband's desire to end the partnership. *Giles Kavanagh*, Collector of Internal Revenue for the collection district of Michigan, was also named as defendant and the implication is that the Lowries may have viewed the state court action as an opportunity to relitigate the tax issue. Brief for Defendant-Appellee at 3-4, *Lowry v. Kavanagh*, 322 Mich. 532, 34 N.W. 2d 60 (1949).

245. *Gruneberg*, *supra* note 239; Mandell & Rubinroit, *Rescinding Trusts of Family Partnership Interests*, 26 TAXES 11 (1948); 46 MICH. L. REV. 1079 (1948).

246. *Gruneberg*, *supra* note 239, at 706 (1948).

247. *Melvoin*, *Family Partnership Which Has Not Been Recognized for U. S. Income Tax Purposes—What to Do With It*, 7 N.Y.U. INST. ON FED. TAX 27 (1949); Grund, *Unraveling a Partnership After the Tower Case*, 5 N.Y.U. INST. FED. TAX 829 (1947).

248. WITTE, *supra* note 5, at 132.

249. *Id.* at 133.

250. *Surrey*, *supra* note 2, at 1097.

251. WITTE, *supra* note 5, at 134.

252. S. Rep. No. 1013, 80th Cong., 2d Sess. 26 (1948).

253. Editorial, *Omaha Evening World-Herald*, June 19, 1947, at 8, col. 1.

254. *Bittker*, *supra* note 3, at 1413.

255. H. R. 3842, 80th Cong., 1st Sess., 93 Cong. Rec. 813 (1947).

256. The relevant portion of the Gearhart bill is as follows:

(o)(1) If husband and wife shall enter into a marital partnership agreement as hereinafter defined, income taxes of the spouses shall be levied and collected in accordance with the ownership of income as established by such agreement. . . .

(3) MARITAL PARTNERSHIP AGREEMENTS.—The term "marital partnership agreement" means any bona fide antenuptial or postnuptial agreement, valid under the applicable local law, between husband and wife, whereby it is provided that the gross income (as defined in section 22(a)) of both spouses, thereafter earned or acquired, shall be owned by the spouses in equal shares, subject to such provisions respecting managerial control over the common property as the parties may from time to time agree upon. Any such agreement, in order to be effective for the purposes of this subsection, shall be irrevocable, shall be terminated only by death, divorce or operation of law, and shall be filed for record in the deed or other appropriate records of the county where the parties reside at the time of making thereof. No such agreement shall be subject to modification or amendment except in respect of the provisions relating to managerial control. At the election of the spouses, any such agreement may be limited to all, not part, of the income thereafter acquired from any one or more of the following sources: (A) salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, not including capital gains; (B) interest, rent, dividends, including any and all income derived from the use of property or the lending, use or investment of money; (C) all capital gains as defined in section 117.

257. *Revenue Revisions, 1947-48* at 765.

258. *Surrey*, *supra* note 2.

259. See *supra* note 87.

David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision

STEPHEN N. SUBRIN

With current procedure under assault, this is a particularly important time to study the procedural rules and thought of David Dudley Field's era.¹ The present espousal of such devices as case management and alternative dispute resolution is both a sign of and a reaction to a procedural regime that is in question and in decline, if not in its death throes.² But before embarking on new procedural roads or recommitting ourselves to old paths, we need to reflect upon our procedural ancestry in some detail.

This historical approach should help dispel three different but connected misconceptions about civil procedure. First, procedure is usually discussed as if rules simply arrived, impelled by neither people nor ideology.³ Such disembodiment of law from its surroundings is unfortunate, because it obscures the real sociopolitical agendas that inevitably provoke and shape procedural reform. Second, the relationship of the two fundamental sets of rules in American civil procedure—the Field Code and the Federal Rules of Civil Procedure—has been mischaracterized, with the latter procedure erroneously viewed as an incremental and logical extension of the former.⁴ In fact, the Field Code was based on views of law and procedure that are sharply different from the assumptions behind the Federal Rules.⁵ Third, the Field Code and nineteenth-century procedural thought are looked upon as old-fashioned and needlessly formalistic relics with little or nothing to offer the current

Stephen N. Subrin is a professor at the Northeastern University School of Law.

procedural dialogue.⁶ Although the procedural solutions of a previous period cannot and should not be precisely copied, knowledge of them and their history helps introduce different modes of thought and emphasis into the dialogue. History also aids our recognition of the apparent intractability of recurrent themes and tensions.

Before examining Field and his Code, it is important to review the mythology that has clouded our vision. We have been misled about the relationship of the Field Code and the Federal Rules, both by outright assertion and by legend. Charles E. Clark, the primary author of the Federal Rules, although noting distinctions, concluded that "there can be no question but that . . . [the Federal Rules] represent a present-day interpretation and execution of what are at bottom the Field principles."⁷ Former Chief Justice Warren E. Burger wrote that "for much more than a century, there has been little fundamental change in the way our judicial systems operate" and that "[t]he development of the Federal Rules of Civil Procedure in the 1930s was important, but they were no more than a refinement of existing procedure."⁸

The traditional version of the Field Code-Federal Rules myth begins with the assertion that Field's goal was to permit all substantive law to be applied to the facts of each case. To this end, his Code provided the same procedural rules for all cases by merging law and equity and by substituting more general, simplified rules for the rigid common-law system.⁹ The myth then relates the thwarting of this goal by recalcitrant lawyers and judges who were resistant to change, and by the misguided New York legislature.¹⁰ In the last episode of the myth, the Rules Enabling Act of 1934 and the Federal Rules of Civil Procedure of 1938 provide the twentieth-century happy ending, largely eliminating the legislature as an obstructive drafter of procedural rules, reducing the remaining rigidities mistakenly left by Field, and making it clear to judges that they must not allow procedural restrictions to block substantive justice.¹¹ Then, the myth concludes, Field smiles from his grave. Roscoe Pound, who helped ignite the twentieth-century quest for uniform federal rules, made the connection that: "Much of what is now accepted as a matter of course in legal procedure could have been attained at least eighty years before the Federal Rules of 1938 if Field's Code of Civil Procedure had been developed and applied in its spirit instead of in the spirit of maintaining historical continuity."¹²

Like many legends, there is enough truth in the story to disguise the overriding distortions. Field's Code did meet resistance.¹³ Some of its characteristics anticipated the future in important respects.¹⁴ And it is not surprising that the advocates of the Federal Rules emphasized a continuity with Field; calling on the past is a means of reducing op-

position.¹⁵ But emphasizing the forward-looking aspects of Field's thought belies the essence of his procedural vision. Modern procedure, like contemporary law generally, embraces flexibility and discretion.¹⁶ The bedrocks of Field's thought and work are constancy in law and its application, predictability, and judicial fidelity to carefully defined rights and obligations.

It becomes obvious that the thought and assumptions behind the Field Code are profoundly different from those of the Federal Rules when one examines Field and his times. Part I of this article gives that history. Part II examines the Field Code in some detail, as well as its relationship to other codes that Field drafted, to show how the Code simultaneously diverged from and anticipated twentieth-century procedure. Part III provides a contemporary critique of Field's procedural views, while maintaining that they still have much to offer the current dialogue.

I. David Dudley Field and His Times

David Dudley Field's life spanned a century. He witnessed the transformation of an agrarian, maritime economy and culture into a highly complex, industrialized society. Field's values were formed in his youth and remained largely constant throughout his life: an unshakeable belief in the need for each person to compete and achieve through individual effort, with government's role primarily limited to protecting the fruits of one's labor. These values, as well as his personality and professional agenda, are all reflected in the codes he drafted. Field's nineteenth-century world and his codes are vastly different from the twentieth-century world and the Federal Rules of Charles Clark and the legal realists; it is ahistoric and untenable to argue that twentieth-century procedure is only a minor modernization of the Field Code.

A. *A Brief Biographical Sketch*

David Dudley Field was born in 1805 in Haddam, Connecticut, and died in 1894 in New York City. His father, also named David Dudley, was a Yale-educated Congregational minister. His mother's first name was Submit—which Field rarely did.¹⁷

From an early age, Field was fiercely competitive and individualistic. His nurse, who found it "hard to break his will," called him "a most determined fellow." His birthdays provoked intense self-appraisal and vows of future success. An entry in his commonplace book when he

turned twenty is typical: "If it please God to continue to me my life and health twenty years more, *my name shall be known*."¹⁸ Field's contemporaries found him combative and cantankerous (an assessment with which historians have agreed).¹⁹ He spent his life in heated argument with legal and political opponents.²⁰ Assessing his embattled life in 1873, Field wrote his brother Stephen: "It seemed as if every step I took was to be impeded by something laid across my path. I was opposed in everything. My life was a continual warfare."²¹

The Fields, whose ancestors were pilgrims, all had callings. When Field was thirteen, his father heeded "the call" to minister to those newer pilgrims who were braving the dangerous frontier in Western New York. The father left his young wife and six children for five months; while he was away, David Dudley, the eldest son, felt and acted responsible for the family.²² The Field children also strove to make their callings prosper. Field's youngest brother, Henry, was editor of a Presbyterian newspaper, *The Evangelist*, for forty-four years. Jonathan was a leader in the Massachusetts legislature and, emulating David Dudley, revised the state statutes. Matthew built the longest suspension bridge of his time, and Cyrus laid the first transatlantic cable. Stephen became a United States Supreme Court justice, and Emelia, Field's only sister, married a missionary who "was the first to introduce European education into the Turkish empire"; her son, David Brewer, joined his uncle on the Supreme Court.²³

Field admired the sturdiness and self-sufficiency of the farmers and seamen who chatted with him when he was a boy in Haddam. He believed that the country's strength and republican values rested in citizens "who are placed below wealth and above want, and whose labor and a little property have made hardy and independent." For Field, it was important to encourage and permit the strongest and the bravest, people like himself, his family, and his clients, to maximize their individual potential.²⁴ He wrote "guide posts" for his grandchildren, reminding them of "the elements of true manhood . . .," and bequeathing to them "as their best inheritance, the love of freedom, the spirit of independence. . . ."²⁵

Field's striving for individual independence was accompanied by equally intense desires to be left alone and to control his life. By most accounts, he was not likeable; a self-styled loner and misanthrope, he appears to have repelled others. An obituary in the *New York Daily Tribune* lauded "[t]he magnitude of the results of his labors," but did not spare his personality. "Mr. Field was not a popular man in any sense. He was even unpopular among the members of the bar. He had few personal qualities that appealed to the sympathies of the masses or

that attracted the affection of his legal brethren."²⁶ Nor was Field particularly obedient to authority. As a student, he was suspended by Williams College for alleged "rebellion or opposition to the faculty" and he refused to return.²⁷ His passion was to be able to live in a system of fixed rules that controlled effectively the power of others, particularly judges. It is not surprising that he wanted personal rewards and punishments to be based on manipulation of a fixed environment rather than on the personalities or the whims of outsiders.

Field admired the orderliness and logic of scientific thought. His favorite courses at Williams were science and mathematics, and he particularly liked astronomy.²⁸ At age twenty-eight, he wrote euphorically about the exactitude and passionlessness of mathematics, "a transcendent science [*sic*]:" "Its superiority over every other department of learning (and superiority I think it has) is to be ascribed, I fancy to the precision of its language. The pleasure which is derived from it has two sources—one, the certainty of its conclusions, the other, its applicability to the profoundest and sublimest speculations. . . . Perplexed by the contradictory opinions of the world, wearied and jaded after its searches after just knowledge in history and novels, the baffled understanding turns with delight to the simple truths of the mathematics. . . . Calmness and serenity settle upon the temper."²⁹

B. Field as a Lawyer

In 1825, Field's father gave him ten dollars and a Bible with which to begin his law apprenticeship in Albany, New York. Five months later he apprenticed in the New York City law office of Henry and Robert Sedgwick. The Sedgwicks were at the forefront of their profession and members of the most prominent family in Stockbridge, Massachusetts, where the Fields had moved when David Dudley was fourteen. After Robert Sedgwick died, Field, at age twenty-three, became Henry's partner. He then married his love of four years, Jane Lucinda Hopkins.³⁰

In 1836, his wife, youngest child, and a younger brother died. Field was devastated, particularly by the loss of his wife. "She is dead, my dearest, my loved, my adored, my incomparable, Lucinda, is dead. . . . She was so dear to me, so necessary to my happiness, that I can never be again what I was."³¹ In anguish, he left his law practice and travelled in Europe for over a year, including a prolonged stay in England.³²

After Field returned to America, he set up his own law office and was joined first by his brothers, Stephen and Jonathan, and later by his son, another David Dudley, and his nephew, David Brewer. His practice grew and during the 1840s he became a prosperous trial lawyer.³³ Field

later wrote in unpublished notes for an autobiography: "My practice was the largest and my income from it the most that any lawyer had at the New York Bar, and probably at any Bar in the country. How I was able to carry on this practice, and at the same time pursue my law reform, is a wonder to me now. I have been counsel in some of the most important litigations ever had in the country. . . ."³⁴ Although he had started out representing a broad range of clients, including the nonaffluent, he ended up concentrating on a smaller number of wealthier ones. In the late 1860s, he represented Jim Fisk and Jay Gould in their notorious struggle for control of the Erie Railroad; he also represented Boss Tweed.³⁵ Field strenuously and self-righteously argued that all citizens were entitled to the protection of the law, and that a lawyer's duty was to advise them and defend them within the limits of that law.³⁶

C. Field as a Codifier and Reformer

By 1839, Field had begun his campaign for reform of the judicial system and what would be his lifelong battle for codification of all law, both procedural and substantive.³⁷ New York had already engaged in a thorough codification of its law in the 1820s.³⁸ But the codifiers left equity and law as both separate courts and separate systems of jurisprudence and retained forms of action and portions of common-law pleading for the law courts.³⁹

In 1846, a new constitution in New York eliminated the court of chancery and created a court "having general jurisdiction in law and equity."⁴⁰ It also provided for the legislature to appoint a commission of three members to "revise, reform, simplify, and abridge the rules of practice, pleading, forms, and proceeding of the courts of record of this state, and to report thereon to the legislature."⁴¹

Field wanted to be appointed to this commission.⁴² He was apparently first considered too revolutionary and was not appointed until one of the original members resigned in 1847.⁴³ The constitution also provided for a separate commission to revise and codify the entire body of substantive law of the state, or as much of it as the commissioners found "practicable and expedient."⁴⁴ This second commission was initially unsuccessful in its enormous task and fell dormant until Field succeeded in having it resurrected in 1857.⁴⁵

By 1865, the second commission completed the substantive codes—political, civil, and criminal. Field was the dominant substantive code commissioner and drafted the bulk of the political and civil codes.⁴⁶

However, except for a greatly modified penal code, ratified in 1881, the substantive codes were never adopted in New York.⁴⁷

A partial procedural code, entitled *An Act to Simplify and Abridge the Practice and Pleading and Proceedings of the Courts of the State*, was enacted in 1848. Although Field wrote much of the original version of this partial code, the other two commissioners apparently contributed significantly. Field and his fellow commissioners seem to have been in general agreement on the principles underlying the new procedure, and all of them signed the report accompanying the partial code presented to the legislature.⁴⁸

Preliminary drafting of some provisions of the partial procedural code was accomplished before Field was appointed a commissioner. But Field's abilities and force of personality apparently caused the other two commissioners frequently to defer to him. We have a first-hand account of Field's aggressiveness from Arphaxed Loomis, one of the original commissioners:

On 13th January, 1848, the Commissioners met at Albany, and the next day commenced their work together as a board. Each one had prepared his own draft of the more important parts of the work on civil actions. The principles and leading features of the system were so well understood and agreed upon, that there was no essential difference in them, except in the arrangement and phraseology. . . . Mr Field presented a chapter and requested that it be taken up, as the basis for the Board to commence upon. His wishes were acceded to by his colleagues. . . .

. . . I believe that more of Mr. Fields' manuscripts than those of either of the other Commissioners were used as the basis of the action of the board from day to day. They were not taken, however, because they were recognized as better, or different, in scope or purpose, or expressed in more appropriate language, but because his arrangement was perhaps better systematized, and moreover his associates did not choose to differ from their colleague in a manner not essential to the object to be attained; as to that there was entire accord; the principles, purpose and extent of the reform had been discussed and agreed upon.⁴⁹

Perhaps this description, published in 1879, understates Field's contributions. It may well have rankled Loomis that this partial procedural code of 1848 became known as the Field Code.⁵⁰ The completed procedural code, presented to the New York legislature in 1850, was never adopted.⁵¹

Codification was neither a new topic in the country, nor new to Field when he entered the fray in 1839.⁵² His law colleague, Henry Sedgwick, had promoted the cause, and Field had previously read Edward Livingston's 1822 report on Louisiana codification and William Sampson's

well-known 1823 address inveighing against the common law.⁵³ The Sampson speech contained many of the themes that Field later pursued: the illogic of the common law and its roots in an undemocratic past; the need to permit litigants to tell their grievances in simple, nonlegalistic prose; and the importance of a written code so that citizens could know the law and judges be bound by it.⁵⁴ Moreover, Field's 1836 trip to Europe occurred at a time when procedural reform was widely discussed in European legal circles.⁵⁵

When Field apprenticed in New York, the common-law system was already eroded, and the common-law goal of confinement to a single, easily understood issue was no longer being fulfilled.⁵⁶ Field complained that the common law, and methods used to circumvent it, had produced a system that obscured facts and legal issues instead of clarifying them.⁵⁷ The separate courts for law and equity seemed wasteful; frequently, lawyers did not know which court to choose and often one case could not decide the whole dispute.⁵⁸ Like Bentham, Field and the other commissioners turned to statutes and rational thought in an attempt to weed out what to their thinking was needless technicality that prevented simple and inexpensive law application.⁵⁹ The twentieth-century Enabling Act and Federal Rules were, in part, products of similar desires to rid law and litigation of needless technicalities.⁶⁰

Field and the Field Code reflected the prevalent spirit of reform. Field was a member of the Democratic party and vigorously opposed the extension of slavery.⁶¹ He became a "barn-burner," considered the more radical wing of the party, before joining the Free Soilers and the Republican party. In a homegrown, handwritten monthly "Gazette," Field's children in 1842 perceptively put their father's reform efforts in context (although with disdain for consistent punctuation):

The spirit of reform is in every place; there is not a nook in the United States that it has not pervaded; the labourer with a family says 'reform the common schools', the merchant and the planter say, 'reform the tariff,' the lawyer [and "Mr. Field" is later given as the example in this category] 'reform the laws', the politician 'reform the government' the abolitionist 'reform the slave laws', the moralist 'reform intemperence', the citizen 'reform the police', and the fire district 'the farmer 'reform the taxes.' the ladies wish their legal privileges extended, and in short, the whole country is wanting reform. . . .⁶²

In one sense, the Field Code looks like a logical successor to the Jacksonian movement towards more democratic institutions. The simplified pleading, joinder of parties and theories, and merger of law and equity aspects of the Field Code, for examples, were an attempt to simplify procedure and to make litigation less costly and more efficient.⁶³

Field wanted law to be understandable and accessible to ordinary people.⁶⁴ He wrote with passion about the importance of equality in the nation's political structure. Field's view started with the compact of the Plymouth settlers: "Equality of rights, absolute equality, was thus the first principle upon which the new government rested."⁶⁵ One law professor has summarized progressive elements in Field and his work, concluding that Field worked for "scientific law reform, international peace, feminism, and abolition of slavery."⁶⁶

D. Field as an Advocate for the Wealthy and the Profession

There was also a more conservative and lawyer-protective superstructure to Field's ideology and achievements.⁶⁷ The American nineteenth-century codification movement was rooted in part in lay dissatisfaction with the complexity and technicality of law and antagonism to the legal profession.⁶⁸ Although it is difficult to appraise the number who had any interest in the topic, at least some lay people expressed a desire to control or eliminate the legal profession. Lawyers were seen as standing in the way of justice.⁶⁹ Field disagreed, and although he did argue that codification would make the law more accessible to all citizens, he neither thought nor argued that his codes would eliminate lawyers or permit lay people to represent themselves. Field stressed the importance of well-trained lawyers to represent clients and to lead the country.⁷⁰ He contended that the initiation and achievement of enlightened reforms required the select few of the bar, people like himself: "The average practicing lawyer is, and has always been against law reform. . . . Every law reform has, it is true, been brought about by lawyers because none but lawyers know how to bring it about, but this has been done, be it understood, by the small band of reformers against the host of obstructives."⁷¹

When Field returned to America in 1837, the country was in a deep economic panic that was followed by a lengthy depression; he was "embarrassed" by his own inability to repay a mortgage.⁷² There was public outcry for wealth redistribution.⁷³ In New York, for instance, tenant farmers acted in armed rebellion against the feudal-like landlords who owned and controlled much of the agriculture. In a widely publicized case, a country doctor, Smith Boughton (alias "Big Thunder"), and others, were prosecuted for robbery, conspiracy, assault, rioting, and manslaughter.⁷⁴ The threat to the existing order was real and immediate: "Violence, terrorism, mass protests, heated legislative debate, tar and featherings and midnight Indian raids characterized the Anti-Rent Movement, a farmers' rebellion in the 1840's. A state of insur-

rection and martial law was proclaimed, when all legal means failed to halt the revolt. Next to the American Revolution, the Anti-Rent Movement was the most wide-spread and devastating uprising in New York's history."⁷⁵

Field's first public call for law reform, written at the height of the anti-rent movement, was a December 1839 letter to Gulian C. Verplanck, a New York legislator. Field's position deflects attention from the public plea for fundamental social reform, to a more technical, professional agenda.⁷⁶ Consider the first three sentences of that letter:

Sir: The reform of our judicial system will be the most important question of the next session of the Legislature. There may be other questions, more popular in their nature, which will engross for the time more of the public attention; but there will be none whose real and permanent consequence is comparable to this, in its relation to the order, the peace, and the sound moral sentiment of society. It is of the nature of legal reform to be understood by a small class only. . . .⁷⁷

Field also made another argument: If we don't clean up our own house, the masses will do it for us.⁷⁸ In the last section of the Verplanck letter, Field noted:

If they who are the most competent for the work, or those who are most nearly connected with the present judicial establishment, and therefore most interested in preserving much of the present structure, do not undertake the work of reform, it will fall into less competent hands, or be done with an unsparing will, and without regard to the preservation of anything that we now have. The day of reform will come sooner or later, and, if it is put off by those who should lead it, it will hereafter push them aside or leave them behind.⁷⁹

Field's procedural reform activity was a response to the emotional message of those who sought fundamental change in the socioeconomic order. By using technical law reform as a means of addressing social unrest, Field, like legal reformers before and after him, was really saying that law, particularly procedure, is scientific, and therefore apolitical.⁸⁰ When castigated in the *Springfield Republican* for "his great share in prostituting the law" by representing "notorious scoundrels" such as Jim Fisk and Jay Gould, Field responded with an amoral view of the legal profession, stressing the formalistic aspects of lawyering.⁸¹ "It is lawful to advocate what it is lawful to do. . . . [T]he lawyer is responsible, not for his clients, not for their causes, but for the manner in which he conducts their causes. . . . You have ventured to arraign my professional conduct."⁸²

The professional side of Field's reform also included the concern for

individual fees. Prior to the Field Code, lawyers' fees for trial work in New York were regulated in the minutest detail.⁸³ Under the 1836 Revised Statutes, for example, an amount was prescribed for each type of motion, or argument, and another amount was added for each folio of paper produced. The losers in law suits paid the winners an amount meant to cover at least some of the opposing lawyers' fees.⁸⁴ During the 1830s and 1840s, evidently in response to unusually strong sentiment that lawyers' fees were too high, the New York legislature reduced the fees permitted in civil litigation. But some lawyers simply increased their motions and other trial activity, as well as their verbosity. More successful lawyers may have resented this trend, feeling that they were dealing with larger matters and did not have time to increase fees through *makework*.⁸⁵

In reviewing the events that led to the "New York system of Law Reform" and the 1846 New York Constitutional Convention, Field's co-commissioner, Arphaxed Loomis, focused upon the fee problem:

Its inception was first due to the abuse of the old common law and chancery system of making up bills of costs in litigation and in the collection of debts.

The fee bills of the Statutes intended to check and prevent extravagant charges were perverted and used to extend and multiply items. The draft of all papers was paid for by the folio of 72 words at a stated price, another price was allowed for engrossing and still another for each of any conceivable number of copies that might be necessary—the more prolix the more pay.⁸⁶

Moreover, the plethora of technical rules of pleading and practice forced careful lawyers to be verbose and repetitious to avoid technical pitfalls, thus justifying simultaneously both the prolixity and the fees. "A reform in the system of practice and pleading, requiring less strictness in legal language, allowing amendments easily when errors were not material to the real merits and fair trial, and the abolition of the system of paying according to the number of words used, was recognized as necessary by all those who had given the subject a fair consideration."⁸⁷ Accordingly, in 1842, Loomis, as chairman of the committee on the judiciary in the assembly, introduced bills simplifying pleading and practice and "prescribing costs in gross upon results, without regard to the length of papers or the numbers of copies." His bills did not pass.⁸⁸

In 1844, Field complained that "[t]hose who have the best practice are tasked almost beyond endurance . . . [and a] feverish restlessness and an overtaken mind are the present concomitants of a leading position in the profession."⁸⁹ Two years earlier, Field drafted, and a member of the assembly filed in his behalf, legislation that would permit

the lawyer and his client to agree on any fee they wanted; costs to the losing party would be "a percentage upon the amount of recovery, or in case of a judgment for the defendants, upon the amount sued for."⁹⁰ Field's letter accompanying this proposal contended that "injustice has been done to the great body of the profession. . . . They have seen constant efforts at reform, directed rather against their own emoluments than at the system. They were asked to cooperate in a plan, which they could not approve, of cutting off a part of their remuneration, without diminishing their labor. It was not often that a lawyer was overpaid for what he had to do. The true reform was to diminish the labor, and the compensation along with it."⁹¹

From the bar leadership's perspective, the Field Code killed three birds with one stone. It reduced the steps and the procedural technicality of a lawsuit, in fact making litigation simpler and presumably better. It attempted to improve relations with the public by showing that the profession had responded to complaints about the law's complexity, and had tried to reduce fees.⁹² Finally, although still regulating the amount of fee to be shifted to the losing party, the Field Code permitted lawyers and clients to make their own fee arrangements.⁹³ Lawyers such as Field could—and did—charge their rich clients what the traffic would bear.⁹⁴

In exploring the more conservative side of Field's agenda, it is important to note that Field's major work in the codification of New York law, from about 1840 to 1865, took place towards the end of the period during which the substantive law had already been largely transformed in America.⁹⁵ One might view these changes as some combination of facilitating the evolution to a modern commercial and industrial economy, and as protecting the interests of emerging "entrepreneurial and commercial groups" at the expense of the poor.⁹⁶ Regardless of one's view, substantive law changed in ways that did not easily fit forms of action that had their genesis in an English feudal society in which land was the primary vehicle of wealth and power.⁹⁷ In 1846, one lawyer observed that "[our] real law has undergone a complete modification; our commercial law is based on reason; but we are practicing in the 19th century, with all the formulas and fuss of the 17th."⁹⁸

Many of those who welcomed the new substantive law were eager to preserve it in its new form.⁹⁹ One method of doing so was through treatises; another method was codes.¹⁰⁰ Viewed in historical context, once the transformation of the law had already taken place, the Field procedural code was one additional link in the chain of a growing legal formalism that tried to make law static.¹⁰¹ It is difficult to sort out the extent to which Field was driven by his predilection for order and

rationality or by his desire to insulate from change the new substantive law that he and his "entrepreneurial and commercial" clients favored. It is clear, though, that Field believed that procedure played a major role in causing law to be applied as it was written, with a minimum of flexibility or judicial discretion. Predictability ranked high in Field's personal, legal, and procedural value scheme.¹⁰² In addition, it aided his clients.

Today legal flexibility and judicial discretion abound. The Federal Rules generate creative opportunities for both lawyers and judges.¹⁰³ The major American proponents of codification, however, desired to limit judicial freedom of action.¹⁰⁴ The remarks of Robert Rantoul, "a radical Massachusetts lawyer" and well-known codification advocate, are illustrative:

The law *should be* a positive and unbending text, otherwise the judge has an arbitrary power *or discretion*; and the discretion of a good man is often nothing better than caprice, as Lord Camden has very justly remarked, while the discretion of a bad man is an odious and irresponsible tyranny. . . .

Judge-made law is *ex post facto* law, and therefore unjust. An act is not forbidden by the statute law, but it becomes by judicial decision a crime. A contract is intended and supposed to be valid, but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power.¹⁰⁵

Flexibility was anathema to Field to the extent that judicial discretion permitted nonpredictable results or facilitated legal change:

It may be first observed, that flexibility, in its ordinary sense, is one of the worst qualities which a law can have, or rather that it is inconsistent with the idea of law. As the law is a rule of property and of conduct, it should be fixed. . . .

Now, to say that law is expansive, elastic, or accommodating, is as much as to say that it is no law at all. . . .

No Judge should have power to decide a cause without a rule to decide it by, else the suitor is subjected to his caprice.

[F]lexibility is uncertainty, and of course, inflexibility is certainty, which, so far from being a fault, is, to my way of thinking a merit of the highest value.¹⁰⁶

E. Field's Laissez-Faire Philosophy

Field's personal and professional philosophy coalesced around his passion to tie judges to concrete, definite rules. His beliefs contrast

sharply with some proponents of twentieth-century uniform federal rules who wanted to enlarge the power of both the federal judges and the federal government.¹⁰⁷ Particularly after the Civil War, rugged individualism, state rights, and laissez-faire economics were at the heart of Field's creed. Field took great pride in his arguments on behalf of individual citizens and against federal intervention and reconstruction in four landmark postbellum constitutional cases: *Cummings v. Missouri*, *Ex Parte Milligan*, *Ex Parte McCardle*, and *U. S. v. Cruikshank*.¹⁰⁸ In his view, government—and where possible, *state*, not federal government—should perform as few tasks as reasonably possible, so that individual freedom and property rights could be protected.¹⁰⁹

In 1879, Field explained his philosophy of government to the Young Men's Democratic Club in New York:

The province of the State is to protect rights, or, as it has been sometimes expressed, to keep the peace. We hold, as self-evident truths, that men have unalienable rights to life, liberty, and the pursuit of happiness, and that "to secure these rights governments are instituted among men." To spend money, to extract from the people, that it may be spent for other objects, is as contrary to the principle we profess as it is ruinous in consequences. It is not the business of government to take care of the people. The people must and will take care of themselves. This is the law of nature, which is the law of God.¹¹⁰

In 1888, Field published his *Theory of American Government*, a paper over which he had labored for years.¹¹¹ In it he argued that "The end of government is not the development of man's social nature, but the maintenance of his rights—the rights which God and nature gave him. . . . Government is a political machine, not a charitable institution."¹¹² "Self-help is the best lesson for the poor and rich alike to learn. No great character was ever yet found without it, and with it few there are who fall by the wayside." Equal rights, he wrote, meant equal opportunity and not equal achievement. "Equality of itself will not insure happiness. That is obtained by pursuit. It is not the province of government to promise happiness to anyone. That he must seek for himself. His right to the pursuit is defended by government." "The true end of government is to secure men's rights, not their fortunes or their pleasures."¹¹³

In the world of David Dudley Field, written codes created rights in two senses. One had a right to enforce those rights delineated explicitly in a written code—e.g., the right to keep what one had earned or inherited and a right to hold others to their agreements. But one also had rights of liberty or freedom—the right to be left alone. Here a written code was particularly useful; one could do whatever the code did not proscribe, and the proscriptions should be minimal. The First

Report of the Code Commission made the point: "There should be neither a generalization too vague, nor a particularity too minute, in the code of an enlightened and free people, whose intelligence demands that the law should be written, and brought within the knowledge of all, and whose liberty requires that no greater restraints be imposed upon their action than policy and necessity dictate."¹¹⁴

In 1887, Field became even more explicit: "According to our ideal of republican legislation, it [law] should be first of all intelligible, next equal, then effective to protect every person in the enjoyment of his natural rights, and that done should leave him alone, except only so far as his co-operation may be necessary in public undertakings needed for the whole body, but impossible to individual enterprise."¹¹⁵

Freedom of action was not only personally important to Field; it was vital to his entrepreneurial clients. When stockholders sued the Erie Railway Company, Gould, Fisk, and others for insider dealing and misuse of corporate funds, the first point in the demurrer of *Field and Shearman, Defendant's Solicitors*, emphasized that corporations and their officers could do what the law did not specifically forbid: "I. The bill states no cause of action, even in favor of the plaintiffs who are registered stockholders. 1. The acts which are complained of do not appear to be beyond the power of the corporation to do or ratify. . . . Whether such transactions were prudent, or even honest, is of no importance for the purpose of the present inquiry."¹¹⁶

That codification was related to laissez-faire ideology was not lost on the members of the 1846 New York convention who voted on codification and on two issues that would limit state intervention in the economy. One program, debt limitation, "would limit the power of financial interests in the legislature to give aid to favored private corporations. It would also limit further state-supported internal improvements, thus lessening the state government's economic influence and beginning a withdrawal of state regulation of the economy. Led by Barnburner Democrats, this was a key goal of liberals in the convention."¹¹⁷ Another critical issue at the convention was "[c]reating a general incorporation law that would allow incorporation without special legislative involvement or interference, . . . a prime goal of laissez-faire liberals at the convention. It would further lessen state regulations and influence over the economy."¹¹⁸ Voting behavior analysis shows a strong correlation between those who voted for codification, debt limitation, and general incorporation. They basically "drew their support from the same men."¹¹⁹

As the world changed around him, some elements of Field's laissez-faire philosophy made less sense and led to striking contradictions. For

example, between 1830 and 1860, an industrial state, with a new class of factory workers and, especially during panics and depressions, an underclass of the unemployed, emerged.¹²⁰ Despite Field's continued belief in the freedom of each individual to chart his or her own path, not all citizens would be able to plow their way into Jeffersonian independence.

Field opposed government intervention in principle, but he wanted the government to intervene on behalf of citizens to help enforce their contracts and protect their property and other rights. The personal freedom and sanctity of property that Field held dear required a government committed to securing those rights.¹²¹ Also, Field's representation of some individuals against the federal government in the landmark post-Civil War cases was to pit him against the interests of former slaves whose rights he had espoused. In *U.S. v. Cruikshank*, for instance, Field represented whites who had apparently murdered newly freed blacks in violation of enforcement acts designed to thwart Ku Klux Klan attempts to deny blacks the rights of free citizens.¹²²

But, again, it is not that Field and his codification efforts lacked public-spirited, progressive, or egalitarian features. Field directed much of his spare time and remarkable talent, without pay, to the admirable, if elusive, goals of predictability and efficiency in the application of law. Unlike the later advocates of the Enabling Act and the Federal Rules, he wanted laws enacted by an elected legislature, rather than rules promulgated by the appointed, life-tenured judges of the United States Supreme Court.¹²³ In both his thought and his work as a codifier, he concentrated on rights, individual freedom, and equality of opportunity. But Jeffersonian thought can easily be transposed into an ideology supporting the protection of property from governmental interference and into an economic status quo that leaves some citizens perpetually poor. Laissez-faire economics and a philosophy of individual freedom and equality of opportunity have essential elements in common. As Richard Hofstadter has suggested, an important ingredient of Jacksonian democratic thought was the desire to break the hold of privilege and monopoly over the economy and to enlarge economic opportunity for new groups. "What is demanded is only the classic bourgeois ideal, equality before the law, the restriction of government to equal opportunity of its citizens."¹²⁴ Field's passionate belief in liberty slid into Social Darwinism.

Robert Gordon's conclusion about codification is also helpful: the legal science of both mid-nineteenth-century codifiers, and of their opponents, who put their faith in treatises and common-law decisions, "represented a true synthesis of Jacksonian and Whig—radical and

orthodox—outlooks on the legal system because it enlisted legal formality to support the 'voluntary principle.' In other words, their legal science sought to establish a definite and consistent scheme of legal rules that would maximize the ability of each autonomous individual to act freely so long as he did not infringe the liberty of anyone else."¹²⁵ This freedom from interference became translated into discrete, carefully defined legal rights, cast in the form of causes of action.

II. Rights, Facts, and Causes of Action: Field's Quest for Predictability

A. *The Field Code: An Emphasis on Rights and Predictable Results*

The essence of the Federal Rules has been flexibility, expansiveness, and discretion.¹²⁶ Their elasticity and permissiveness were purposeful, a rebellion against what was perceived as the undue formalism of the Field Code.¹²⁷

The major goal of the Code was to expedite the predictable enforcement of discretely articulated rights. Unlike twentieth-century proceduralists, Field's goal was neither dispute resolution nor law reform. Rather, he and the other commissioners sought the faithful application of rules of law to the facts of each particular case.¹²⁸ Everywhere Field looked there were rights; the job of the courts was to vindicate them:

Ask the man who wonders that there are so many laws, to go with you to the neighboring prairie, and, standing in the door of the farmhouse, with corn-fields and pastures before you, explain to him the title by which the owner holds the land, how far his use is absolute, and how qualified by the rights of his neighbors, or the paramount rights of the State, the relative rights of the wife and husband, the person who shall succeed when the owner dies, the rights of the adjoining proprietors in the stream which runs through the pasture, the rights of the tenant who tills the meadow, what right the owner has in the shore of the lake, how far he may build into it and on what conditions, the relative rights of himself and the public in the highway before his house, the right which he has to a pew in the church, whose spire shines through the trees, and in the family vault where he expects in due time to be borne. . . .¹²⁹

"How are these rights to be enforced?" Field asks. "For the prosecution of criminals, as well as for judging between man and man, the State provides the machinery of tribunals and officers of justice, and a system of procedure, criminal and civil."¹³⁰ It is this machinery that separates us from barbarism: "Without it [legal science] there could be no civil-

ization and no order. Where there is no law, there can be no order, since order is but another name for regularity, or conformity to rule. Without order, society would relapse into barbarism."¹³¹

From an early age, it had been important to Field to seek order. We have seen his early attraction to mathematics, with its "superiority over every other department of learning. . . ." ¹³² He needed to categorize and classify; his journal, during the happy years before his wife died, reveals various attempts to place in some logical order the principal English writers, every type of published book, and all categories of legal knowledge.¹³³ Field was troubled by inexact language, and as a student he defended the accomplishments of science as opposed to literature.¹³⁴ In the small commonplace book he kept sporadically between 1824 and 1827, he mused that "[n]othing is so likely to mislead the understanding as analogies and metaphors."¹³⁵ The evils are disorder, confusion, and caprice. Judges must obey and apply known rules:

The science of the law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the Judge or upon his notions of what was just, our property and our lives would be at the mercy of a fluctuating judgment, or of caprice. The existence of a system of rules and conformity to them are the essential conditions of all free government, and of republican government above all others. The law is our only sovereign. We have enthroned it.¹³⁶

B. *The Cause of Action, Pleading, and Verification*

Field and the other members of the Commission on Practice and Pleading criticized common-law procedure, for obscuring both facts and law, thus hiding not only what happened but also the legal consequences. They also complained about inherent flaws in the procedure itself, such as the need to squeeze contemporary lawsuits into ancient forms of action (ten were still used in New York).¹³⁷ In their view, the tricks guileful practitioners used to escape common-law procedural constraints were as pernicious as the initial procedures.¹³⁸

The problem for Field and the other commissioners was to describe the "what happened" and the applicable law in a way that would eliminate the law-equity separation and the forms of action. "[F]acts constituting a cause of action" was the pleading requirement Field chose for the plaintiff's complaint.¹³⁹ It was natural for Field to be drawn to the word "facts" because that is how he viewed the universe: one should try to determine objective reality, just like a scientist.¹⁴⁰ On the theory (or law) side, Field could not use "form of action" for he wanted to

break out of the formulary system; also, the existing "forms of action" did not fit the variety and complexity of fact patterns that had been formerly adjudicated in the separate equity court. Field and the others used the term "cause of action" to try to describe those groupings of facts to which legal consequences attach.¹⁴¹ The term was not new; as Charles Clark later suggested, it had appeared in English reports at least as early as 1477.¹⁴²

Neither the Field Code nor the accompanying report provided a definition of "fact" or "cause of action." Commentators and courts have had difficulty interpreting each term.¹⁴³ But the commissioners' purpose in choosing the terms is clear: they thought that by forcing the litigants to tell exactly what happened without worrying about technical language and the requirements of common-law forms and procedure, or whether their action was legal or equitable, one unitary court could then, with the help of lawyers, apply the correct law.¹⁴⁴ "Cause of action" was their way of describing a right of citizens that could be enforced in court.¹⁴⁵

The cause of action thus became the essential litigation unit of the Field Code. Each cause of action had certain facts—what today we call "elements"—that had to be proven (in the sense of persuading the factfinder) in order to win. In the language of the Commission on Pleading and Practice, "[T]he facts give the right to relief. . . ." They proposed "that the plaintiff shall state his case according to the facts, and ask for such relief as he supposes himself entitled to; that the defendant shall by his answer point out his defence distinctly. This form of allegation and counter allegation will make the parties disclose the cause of action and defence, so that they may each come to trial prepared with the necessary proofs."¹⁴⁶

The Federal Rule counterpart, "claim showing that the pleader is entitled to relief," assiduously avoids the words "facts" and "cause of action," that proved so troublesome under the Code.¹⁴⁷ Like Field, the Federal Rule drafters were also trying to break out of what they perceived as the unworkable formalism of a previous procedural era.¹⁴⁸ But Field, in drastic contrast to his twentieth-century successors, did not eschew formalism. Field viewed formalism as a means of creating certainty or, alternatively, reducing discretion.¹⁴⁹ Although Field and the other commissioners, perhaps sensing the difficulty that so many have had trying to define "fact" and "cause of action," left those terms undefined, in most cases they persisted in trying to utilize defined legal categories and precise procedural steps. Field did not want procedure to get out of the way of substance, because he did not see procedure as an impediment. The effective enforcement of rights depended upon a carefully constructed procedure, with defined prescriptions and proscriptions. Pro-

cedural simplicity, for Field, meant that rights could and would be vindicated consistently, predictably, and correctly.¹⁵⁰

The Field Code complaint was to provide “[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.”¹⁵¹ The defendant could demur, raising a legal defense to the entire case, apparent from the complaint, such as an attack on jurisdiction or “that the complaint does not state facts sufficient to constitute a cause of action.”¹⁵² In contrast to the Federal Rules, it was not enough that the complaint, given a generous reading, permitted an inference that the plaintiff later might be able to prove that something occurred that might entitle the plaintiff to relief.¹⁵³ Alternatively, the defendant could answer, either denying each controverted allegation or denying “any knowledge thereof sufficient to form a belief,” and setting forth defenses.¹⁵⁴ If a defendant demurred and lost, he could only answer on the merits with permission.¹⁵⁵ Under the Federal Rules, of course, the defendant can challenge the complaint and, as a matter of right, defend along other lines.¹⁵⁶

The drafters of the Field Code thought it critical that the parties learn each side’s version of the facts through the pleadings. The commissioners complained that “[t]he system of pleading heretofore in use, has encouraged, if it has not absolutely required, fictitious statements, until men otherwise scrupulous, have lost sight of all limits of veracity in the character of their allegations in pleading.”¹⁵⁷ Under the Field Code, every pleading had to “be verified by the party, his agent or attorney, to the effect that he believes it to be true.”¹⁵⁸ The drafters explained: “It is designed to bring back to legal allegations, made in solemn form in writing, at least the same regard to truth, that prevails between members of society, in their daily communications to one another. It is not required of a party, that he state absolutely, that the matters pleaded are true, inasmuch as his knowledge may not extend to the whole case; but it is intended to put him upon his veracity, and to require him to state nothing, that he does not believe to be true.”¹⁵⁹ Matters not denied were to be taken as true.¹⁶⁰ “By this means the issue is narrowed down to the real matter in controversy between the parties, and all the facts in the case, about which, out of court, there is no real difference, are established on the trial, without the trouble and expense of calling witnesses.”¹⁶¹

Field repeatedly emphasized how critical the oath was to the entire reform. “Such verification strikes me as desirable, both as a means of preventing to a considerable extent groundless suits and groundless defenses, and of compelling the parties respectively to admit the un-

disputed facts.”¹⁶² In their Final Report in 1849, the commissioners took great pains to explain why the verification requirement was so important.

First. The Courts are, or should be, schools of morals . . . [w]hensoever, therefore, they sanction, connive at, or open the door to untruths, they falsify their own professions, and become the corrupters rather than the teachers of mankind.

Second. Men should be protected, as far as possible, against false charges. . . . [I]t is the highest duty of society to protect every member of it in the enjoyment of his rights. What sort of protection does it afford, if it allows these rights to be assailed by every adventurer, even though he furnishes not only no security against his misconduct and no proofs of his charge, but no test of his sincerity, not so much even as his affidavit or belief in it?

Third. Lawsuits are a disadvantage to society at large. They require a large array of public officers. They require the attendance of citizens, either as jurors or as witnesses, to the detriment of their own affairs. It seems consequently most fit that a check, at least as great as this, should be interposed to the prosecution of frivolous or fictitious law suits.

Fourth. If the party not be confined in his pleading to what he believes, no adequate reform in pleading can ever be effected. . . .¹⁶³

Forty-five years after the Federal Rules of Civil Procedure became law, the Supreme Court has begun to return to the oath as an attempt to gain some of the goals of the Field verification.¹⁶⁴

Field Code pleadings were designed to get to “the real charge” and “the real defense.”¹⁶⁵ “The disputed facts will be sifted from the undisputed, and the parties will go to trial knowing what they have to answer.” The defendant’s answer will “disclose the whole of his defense, because he will not be allowed to prove anything which the answer does not contain. He will not be perplexed with questions of double pleading, nor shackled by ancient technical rules.”¹⁶⁶ Although the court might allow amendments “in furtherance of justice,” this could only be done “whenever the amendment shall not change substantially the cause of action or defense”—a limitation that does not appear in the Federal Rules.¹⁶⁷ Although there could be a variance in what a party alleged and proved, if it did not prejudice the other side, a total “failure of proof” occurred if “the allegation of the cause of action or defence . . . is unproved . . . in its entire scope and meaning.”¹⁶⁸ The Federal Rules are much more permissive.¹⁶⁹ Moreover, the limitations on joinder of causes of action and of parties made the Code amendment provisions considerably more restrictive than they first appear.

C. Joinder

The Field Code joinder provisions are, by comparison to the Federal Rules, confining and limiting.¹⁷⁰ Under the Code, plaintiffs could be joined only if they had “an interest in the subject of the action, and in obtaining the relief demanded,” and defendants if they had “an interest in the controversy, adverse to the plaintiff.”¹⁷¹ These provisions were interpreted narrowly by the courts.¹⁷² Other joinder rules caused further restriction. Regardless of the number of parties, causes of action were joinable only if they belonged to one of a group of classes of cases, and the “causes of action . . . must equally affect all the parties to the action. . . .”¹⁷³ The categories were very restrictive and greatly resembled previous common law forms of action.¹⁷⁴ In 1852, a category was added that covered causes “arising out of the same transaction or transactions connected with the same subject of action,” but many courts construed this category narrowly.¹⁷⁵ Under the Federal Rules, a party may join “as many claims, legal, equitable, or maritime, as he may have against an opposing party.”¹⁷⁶ There were no counterclaim provisions in the original Field Code; in 1852, when one was included, unlike the Federal Rules, it was not compulsory.¹⁷⁷ The initial Field Code did not contain provisions for the equitable joinder procedures of class action, interpleader, intervention, and impleader, although all but the latter had been added, in restrictive form compared to the Federal Rules, by 1851.¹⁷⁸

D. Discovery

Field wanted to reduce the amount of documentation.¹⁷⁹ Making equity trials like law trials, with testimony in open court, was a critical step in achieving the merger of law and equity.¹⁸⁰ The Field Code eliminated equitable bills of discovery, and interrogatories as part of the equitable bill.¹⁸¹ The Code commissioners explained that their motion and discovery provisions that replaced equitable discovery were “in harmony with the whole spirit of design [of the Code]; which is to get at the facts in a legal controversy by the shortest possible way.”¹⁸² They provided, by our current standards, extremely limited discovery. This narrow discovery was further reduced by many courts, which retained restrictions that equity had formerly placed on its discovery.¹⁸³ There were no interrogatory provisions in the Field Code. One side could request permission to inspect and copy “a paper” in the other’s possession or control “relating to the merits of the action, or the defence therein.”¹⁸⁴ Even then, unlike the comparable Federal Rules, the op-

posing side did not have to produce it, the only penalty being that the court could, if it wanted, on motion, “exclude the paper from being given in evidence.”¹⁸⁵

In contradistinction to the wide breadth of “Requests for Admission” permitted under Federal Rule 36, one party could exhibit to the other only a paper “and request an admission in writing of its genuineness.” Also, unlike the generous scope of discovery provision in the Federal Rules, the paper had to be “material.”¹⁸⁶ Unless the court later found there was good reason for the refusal, if the paper was finally proved or admitted, the nonadmitting side would have to pay for the cost of proof.¹⁸⁷ Unlike the broad array of oral depositions authorized by the Federal Rules, the only oral deposition permitted by the Field Code was of the opposing party. In contrast to the Federal Rules, the Code deposition was in lieu of calling the adverse party at the trial, and subject to “the same rules of examination” as at trial.¹⁸⁸ A pretrial deposition of the adverse party was to be before a judge, who would rule on evidence objections.¹⁸⁹

E. The Jury

The Field Code was jury empowering. Field feared the potential tyranny of unrestrained judges. He wanted law to be made by legislators and not by judges. Two years before he became a member of the Commission of Practice and Pleadings, Field wrote that “our experience has made us regard it as a first principle, that every common law judge, whether in the highest courts or the lowest, should sit at trials with juries; a principle which I would extend to equity judges also.”¹⁹⁰ The commissioners spoke of the jury as one of “[o]ur most valued institutions” and seemed to mean it.¹⁹¹ The Field Code extended the right to jury trial beyond the state constitutional protection of “in all cases in which it has been heretofore used” to “whenever, in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact.”¹⁹² This included some cases that had previously been nonjury equity cases.¹⁹³ In contrast to Federal Rule 38, one did not have to claim a jury; a party was automatically entitled to it. It could be waived only by failing to appear at trial, written consent, or “oral consent in open court, entered in the minutes.”¹⁹⁴ The judge decides the type of verdict that the jury can render under the Federal Rules.¹⁹⁵ Under Code provisions, in jury cases, the choice of verdict (general or special) was up to the jury.¹⁹⁶ There was no directed verdict provision in the Code.¹⁹⁷

The commissioners did not look at the jury as inconvenient or in-

efficient. In fact, the codifiers explained at length how juries had demonstrated already that they could handle cases with multiple parties and multiple issues.¹⁹⁸ In comparing jury trials to those in equity, the commissioners contended that “[t]he rapid examination which takes place on common law trials before juries, leads to the truth, as surely as the slower process of other trials.”¹⁹⁹ The commissioners wrote that under New York’s “elective judiciary” system, they thought parties would more frequently waive their right to jury trials.²⁰⁰ Apparently they perceived that elected judges, like juries, represented the people at large and would be more trusted than appointed judges.²⁰¹

F. *Field’s Other Codes: A Contrary Vision of Facts*

For Field, the Code of Procedure was the prelude to a series of codes that would cover almost all law.²⁰² In the 1858 and 1865 reports that accompanied the draft Civil Code that was not adopted in New York, there is a repeated set of themes. The laws of rights and obligations, what Field called “substantive” as opposed to “remedial” or “procedural,” should be written in clear, simple language, laying out what citizens are required to do and forbidden to do. Written rules should enable citizens easily to find, know, and follow the law, in order to protect their rights. Lawyers should be able to find the law in one, limited set of volumes, in order to advise clients with reasonable certainty; judges should apply the law as written.²⁰³ Field and the other commissioners for the various codes had no naive view that all cases could be anticipated by precise rules, or that there would never be judicial interpretation.²⁰⁴ But they did want the rules to be precise enough so that they could be followed in most cases, and broad enough so that they would cover most cases.²⁰⁵

The Code commissioners defended their massive codification in a final report: “If the law is a thing to be obeyed, it is a thing to be known; and, if it is to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it. If a written constitution is desirable, so are written laws.” “The will of the people is the supreme law,” and it is “fitly expressed” in “their written laws.”²⁰⁶ In their “Introduction to the Completed Civil Code,” the commissioners insisted “[a]s the law is a rule of property and of conduct, it should be fixed.”²⁰⁷ The commissioners attempted to systematically spell out the law, with topics and subtopics, definitions, and rules. Not all of the rights and obligations in the Code are precise, concrete, and clear. Imprecise tests, such as the modern favorite—“reasonable”—abound,²⁰⁸ but there is still an earnest attempt to reduce the law to

relatively brief and definite rules that can be applied without much fuss to most situations.²⁰⁹

The primary goals of Field and the other commissioners were predictability and constancy. They wanted citizens to be able to count on known rights and obligations. One’s right translated into a cause of action upon which he or she could recover. In this legal world, the law defined the facts that trigger legal consequences. The factfinder is to find out what happened, usually reduced to a handful of facts or elements, and then the written law is to be applied to those facts.²¹⁰

Three New York commissioners, again including Field, submitted a Draft Code of Evidence in 1887, which consistently stresses the finding of specific facts²¹¹ and defines “judicial evidence” as “the means, sanctioned by law, of ascertaining in a judicial proceeding, questions of fact.”²¹² The Evidence Code meshes with the Code of Procedure and the Civil Code. The Field Code required the plaintiff to plead “the facts constituting a cause of action” and the Civil Code laid out facts in varying circumstances that give rise to rights and obligations. The Evidence Code “is a collection of general rules . . . : For declaring how [facts] may be proved.”²¹³

Although facts, in the sense of finding out what happened, are also critical to both the spirit and letter of the Federal Rules, the emphasis is dramatically different in the Field Code. Field’s goal was to constrict the case to a handful of facts; the more concrete, the better. If the plaintiff proved facts that added up to the alleged cause of action, the plaintiff would win. That Field’s view would later be called “mechanical jurisprudence” would have pleased him.²¹⁴ This was the man who as a legal apprentice had asked hopefully whether “political problems” and “problems in the other sciences which are not called exact admit” of “mathematical precision?”²¹⁵

Proponents of the Federal Rules were at once more bullish about facts and more skeptical. They wanted the court to survey the entire story, to consider any fact that might conceivably turn the result. In the words of Alexander Holtzoff, a Federal Rules enthusiast, “all available data must be laid before the tribunal trying the case in order to enable it to do justice.”²¹⁶ Federal Rule advocates rebelled against Field’s attempts, through procedural line-drawing, to limit the scope of the controversy, particularly at the pleading stage, and to limit the freedom of action of lawyers and judges.²¹⁷ From their point of view, in order for the twentieth-century lawsuit to compete favorably with arbitration and the administrative tribunal, courts should be permitted to make their own more flexible procedural rules. Also, litigation should be expanded to take cognizance of a wide range of data, without needless

attention to formalities.²¹⁸ If courts were to review and control the broad-ranging activity of new government agencies and officials, it did not make sense to limit their legal horizons by the formalistic “facts constituting a cause of action.”²¹⁹ The legal realists, many of whom actively supported the *Federal Rules movement*, believed it was always important to accumulate as much factual data as possible to assist in solving social problems.²²⁰

The proponents of the Federal Rules, who talked about law as a “science” as much as did Field, drafted in the shadow of Einstein’s theory of relativity, rather than Newton’s certainty. Charles Clark, like Field, was fond of mathematics as an undergraduate,²²¹ but he became attracted to the notion, most forceably advanced by Walter Wheeler Cook, that the difference between facts, evidence, ultimate facts, and law was in degree only. Clark concluded that to try to pinpoint facts through pleading was doomed to failure.²²² Searching out facts was vital to the legal realists; but for some of them, especially Jerome Frank, “fact skepticism” accompanied the search. From this viewpoint, “facts” frequently happened too fast to be accurately observed. Memories failed. Self-interest obscured. Parties and their lawyers purposely hid and distorted reality. Factfinders, particularly jurors, were incapable, under the best of circumstances, of discovering what really occurred and were also easily misled.²²³ For some, like Clark, the solution was not to limit facts, theories, or elements of a cause of action but, rather, to open up the litigation process. The judge should be permitted and encouraged to exercise a great deal of inherent discretion that realistically could never be curbed.²²⁴ The core of Field’s code was a predictable system of known, enforceable rights, with as little interference with individual freedom of action as possible and with limited governmental interference. Twentieth-century fact skepticism and judicial empowerment were the antithesis of this codification.

G. Equity

Throughout his well-known lectures, *Equity Also The Forms of Action at Common Law*, Maitland underscored the dramatic distinctions between two divergent, but complementary, modes of legal discourse.²²⁵ As Maitland and other historians have explained, by the sixteenth century, “common law” or “law” courts, procedure, and jurisprudence reflected quite a different legal consciousness from “equity” courts, procedure, and jurisprudence. The first suggested a more confining, rigid and predictable system; the latter a more wide-open and discretionary one. Equity’s tendency was to invite more parties and issues to

each litigation, to grant the judge more authority to consider larger amounts of information, and to legitimize the modification of legal rules and the introduction of moral principles.²²⁶

In another article, I have demonstrated how the Federal Rules of Civil Procedure adopt the conceptual framework and procedure of equity.²²⁷ Field and the other Code commissioners also placed the genesis of their product in equity.²²⁸ In fact, as we have seen, by requiring pleadings that state facts rather than the ritualistic language of forms of action, by permitting some expanded joinder and discovery, and by authorizing the judge to give appropriate relief, they moved in the direction of equity procedure. However, it is also true—and more important to understanding the danger of what Maitland calls “anarchy” when equity stands alone²²⁹—that the commissioners took most seriously flaws they perceived in equity. They used the merger of law and equity as much as an occasion for conforming equity to common-law procedure as the reverse.

Prior to the calling of the 1846 New York Constitutional Convention, there were frequent complaints about the expense, delay, and unwieldiness of equity cases.²³⁰ In 1846, Field wrote about the “magnitude of . . . [chancery’s] abuses.”²³¹ In his recital of the events leading up to the constitutional convention, Loomis followed his criticism of the technicalities and abuses associated with law courts by noting the “wearisome delays for which . . . [the court of chancery] had become notorious” and calling it “that dilatory and expensive tribunal.”²³² Field and the other commissioners quoted an “eminent legal member” of the constitutional convention on the “unnecessary forms” and “extreme prolixity” of equity practice.²³³

The commissioners wanted a simpler and less expensive procedure; they did not perceive of flexibility or discretion as virtues. Field, who had relied extensively on injunctions in his representation of Fisk, Gould, Tweed, and similar clients, still found distasteful the discretion and unpredictability inherent in the judicial power to grant injunctive relief.²³⁴ In a bitterly contested case in 1857, he complained to the judge that there were “far too many injunctions for a free people,” and that “[t]he time would come . . . [when such injunctions] would not be allowed to issue at all.”²³⁵

In his 1847 essay, *What Shall Be Done with the Practice of the Courts?*, Field explained the ways that equity would have to adopt law procedure in order to make merger possible. He first explained that the new constitution directed that “testimony . . . be taken in like manner in both classes of cases; [and] abolishes the offices of Master and Examiner in Chancery, hitherto important parts of our equity system. . . . Im-

portant modifications of the equity practice are thus indispensable, in order to adapt it to the new mode of taking testimony."²³⁶ He then ridiculed several equity practices. He suggested that the equitable bill should be shortened. The long delays in pleadings and in masters' reports and chancellors' decisions should be reduced. Whenever possible, testimony should be given orally in open court and not by filing documents, as was customary in equity.²³⁷

In their 1848 report, the commissioners went even further. They explained how the jury trial would be appropriate for what were previously equity cases; and, though they talked about the importance of broad joinder, as in equity, they drafted limited joinder provisions.²³⁸ In sum, when one looks at the hallmarks of equity practice at the time, the New York constitution, Field, the commissioners, and the Field Code, in combination, leaned as much, or more, toward the view of common law procedure as to equity.²³⁹

It was more obvious to those closer to David Dudley Field's times that his Code was confining and formalistic and that Field was deeply tied to common-law procedural thought. Charles M. Hepburn asserted in 1897 that "certainty" was the chief end of the Field Code.²⁴⁰ Roscoe Pound lamented in 1910 that code reformers "had their eyes chiefly on practice at law and in consequence made rules at many points which proved awkward of application to equity proceedings."²⁴¹

III. Field's Rights-Oriented Outlook Today

From a twentieth-century perspective, Field's focus on rights that are to be vindicated through causes of action poses problems. But this focus also yields opportunities. Addressing first the difficulties, let us begin with the origin of Field's rights. Field apparently finds the rights in nature for he speaks of "self-evident truths," "inalienable rights," and "rights which God and nature gave."²⁴² But to legal realists and other critics of natural-law thinking, Field's view obscures reality. When one argues for the protection of a specific right, he or she is actually making a value judgment about what interests are important. This judgment is colored by one's own needs and worldview; thus, the word "right" is a verbal construct stating a conclusion about what society (or some person or group in society) wants to protect.²⁴³ For the legal realists, it is circular to say that a right becomes vindicated through a cause of action. It is not a right unless it is vindicated.

Also, as critics of Field have justifiably suggested, the Field Code resulted in ridiculous amounts of time and money wasted in the futile

attempt to distinguish among facts, ultimate facts, evidence, and law.²⁴⁴ The legal realists were skeptical about whether facts that are important in determining legal results can be accurately ascertained.²⁴⁵ They, as well as some thinkers associated with the current critical legal studies movement, also stress the indeterminacy of the legal doctrine to be applied in any particular situation.²⁴⁶ Such critics also tend to be skeptical about whether most citizens know their rights, or have access to a lawyer, or have the resources to sustain a litigation.²⁴⁷ These factors also make it more accurate for the term "right" to be used only as a conclusion, a label to be applied only *after* a potential right has in fact been vindicated. And even then, the value of the real right is the ideal or paper right discounted by the costs of its vindication.²⁴⁸

Moreover, in much contemporary litigation the terms "fact," "right," and "cause of action" are not very helpful in deciding the individual rights issues that modern courts confront. A citizen may have a right to equal public education or a humane mental health facility, but the mere pronouncement of the existence of that right provides little aid to courts in deciding whether the right has been violated and how to provide a remedy. The types of facts that must be determined in these and other contemporary cases are not the tidy, concrete, discrete facts that Field had in mind. This factual and doctrinal complexity is, perhaps, why legislatures and courts have moved away from the precise-sounding rules Field used to define his rights and the procedures to vindicate them.²⁴⁹

The duality of Field's philosophic framework may also be troublesome. He finds his rights in nature, but his lifework is statutory codification.²⁵⁰ In his reliance on both natural law and positivism Field straddles different schools of jurisprudence. It is unclear whether Field's natural rights retain independent vitality after codification. In his world, can one make a winning argument based on a general natural right, such as the right to "life" or "liberty," absent statutory language specifically covering the circumstance? If natural rights atrophy upon codification, then what does it mean to have natural rights? If natural rights, whether or not they appear in a constitution, permit a litigant to create new specific rights to meet new circumstances, then how can citizens rely on code provisions?²⁵¹

This potential failure of predictability in Field's rights theory (a serious problem given the centrality of constancy to Field's jurisprudence) is heightened by a dilemma that is apparently inherent in rights-based jurisprudence.²⁵² One person's right often detracts from another's. A major issue for nineteenth-century (as well as twentieth-century) courts, was whose right prevails in a world where rights frequently conflict. A

natural rights theory provides little guidance on whether an up-stream abutter who dams water is responsible to the deprived lower-stream abutter; each abutter presents a potential right.²⁵³

The legal realists also questioned Field's views on the relationship of predictability and rules. In Field's world, predictability is more likely to be achieved with relatively inflexible rules and precise definitions, and by curbing judicial discretion. Field did understand that some unpredictability was unavoidable; a statute could not cover all situations and judges, on occasion, would have to analogize or make new law.²⁵⁴ However, Karl Llewellyn and others attacked the basic premise. For them, more certainty could be achieved by broader terms, such as "business custom," and by permitting judges to decide on the "fair or wise outcome," based on their "situation sense" and on a broad array of undefined variables that inevitably change from case to case.²⁵⁵ Requiring judges to predicate decisions on seemingly fixed terms and concepts may result in judicial fact skewing or the creation of artificial doctrines and distinctions to disguise the application of a more general "good faith" or "reasonableness" test.²⁵⁶

There is also a political dimension to the current assault on rights thinking. One group of critics, who tend to be more conservative, fault judges for creating new rights that, such critics argue, are neither rooted in the constitution nor legislation.²⁵⁷ Some critics to the left also find rights thinking objectionable. In addition to the indeterminacy claim of the legal realists,²⁵⁸ they contend that rights thinking tends to legitimize an unfair distribution of wealth and power in society, while lulling citizens into the false perception that they have been fairly treated and have rights that matter.²⁵⁹ Finally, critics at different points on the political spectrum contend that the very concept of "rights," at least as presently constituted, is inherently individualistic and competitive in ways that prevent more collaborative and cooperative societal solutions. Each citizen, a rough summary of the argument goes, rests on private rights, fighting other citizens, rather than seeking more sharing, collective, and satisfying solutions.²⁶⁰

Notwithstanding these criticisms, Field's philosophy of rights propelled a view of procedure that may still have validity. If one grants that some rights (or expectancies) should be articulated and vindicated in a rational, desirable society—putting aside who should decide what rights there are and the principles which should establish their priority when they clash—Field's procedural views and methods challenge much of twentieth century and Federal Rules procedural thought in powerful ways. Seeking to identify conduct or events that will have a legal consequence, and trying to fashion a process that ensures the consequence

occurs, is not an irrational place to begin. Hessel Yntema's aphorism comes to mind: "legal phenomena are in some degree predictable. If it be not so, are not lawyers consummate charletans!"²⁶¹ At a minimum, Field reminds us of a goal for law and procedure that has become largely lost in the current emphasis on litigation as a means of dispute resolution rather than rights vindication. It is difficult to see how to accomplish the protection of rights (putting aside for the moment the circularity criticism) unless one tries to be as clear as possible about what set of circumstances will have what consequences.²⁶²

Once adopting a view of society that expresses law in terms of "facts" and "consequences," a proceduralist might well concentrate on how best to achieve a high degree of expectancy protection (what are the facts, so a consequence can attach) consistent with other values in the society.²⁶³ Field's method, as we have seen, was threefold: first, a substantive law that states facts and their consequences as clearly as possible; second, a law of evidence that concentrates on how to prove the relevant facts; and third, a procedure that forces the litigants to spell out the facts that support a cause of action or defense. The Field Code concentrated on reducing the disputed facts through admissions and denials under oath in the pleadings, limited joinder of theories (within the same type of right), limited joinder of parties, and "discovery" limited to relevant facts.²⁶⁴ These were all means of confining the controversy, focusing on the right to be enforced, and vindicating the right. In Field's world, the goal was to reduce the number of variables, not expand them. More theories and parties make it more difficult to focus on the specific right and remedy at issue and much more difficult to predict results.

At least some commentators on the current indeterminacy of American law acknowledge that legal doctrine can be made more determinate.²⁶⁵ Legal doctrine is a portion of the overall institutional and ideological context that renders legal decisions somewhat predictable.²⁶⁶ This is not an insignificant concession by those who emphasize indeterminacy in the role legal doctrine, despite its contradictions, currently plays in helping make the result of legal processes somewhat predictable.

Field hoped to use formal legal doctrine to limit government and to define individual rights with which the government would not interfere. But formalism can also be utilized to expand the obligations of government. Rights to adequate food, clothing, medical care, and shelter can be carefully defined. Similarly we can delineate procedures (including procedures for dissemination of information about the entitlement to the entitled, and access to lawyers) to deliver those rights.²⁶⁷

Procedure, of course, is but one piece of the larger culture; civil procedure, such as the Field Code and the Federal Rules, responds to

causes, and is a part of a larger socio-political universe.²⁶⁸ The current reliance on equity for a procedural model is at least as much a reflection of other forces in American society as it is a cause.²⁶⁹ Procedure, standing alone, cannot solve societal problems. But still, by insisting upon specific procedures that will make it likely that a pre-defined right will be vindicated, citizens can test the extent to which their society, through government, is hypocritical or honest in talking about the values it espouses. Procedural doctrine, when less amorphous than that supplied by the Federal Rules, can force the resolution—for better or for ill—of the substantive incoherence and contradiction.²⁷⁰ Those who seek actual results should ask how the procedure, in interacting with a described right, in fact facilitates or hinders the delivery of the right.²⁷¹

Field was correct in not treating procedure as secondary to substance. It is likely that rules, both substantive and procedural, for determining the eligibility for, and the amount of, such benefits as social security or food stamps, or for determining the duty to pay taxes, and how much, in fact yield a significant degree of both doctrinal determinacy (in the sense of doctrine being a major determinant of the result), and predictability. For good reason, politicians and reformers of all stripes argue over the precise doctrine that regulates social benefits and taxes.

It is true that a right should not be considered a right distinct from its means of vindication, and Field did often talk about rights in the abstract. This is perhaps a conceptual flaw that made his thinking, in some measure, circular. Maybe he should have reserved the term “cause of action” or used some other term, such as “inchoate right,” to describe an expectancy waiting to be vindicated. But it would be ironic to criticize Field for circuitry with respect to rights and vindication. Field consistently tried to increase the odds of rights-vindication and of the predictable application of law.²⁷²

The basic legal realist criticism of firm rules and precise definitions is counterintuitive. Normally when one wants an act performed or not performed he or she tells the other person, if possible, exactly what behavior is desired.²⁷³ Specificity is usually sought in criminal and tax law, where a high degree of compliance is the goal. Also, even if on occasion a substantive rule will require a more amorphous standard, this does not explain why a procedure to vindicate the substantive law should lack definitional and confining features. One can have a “reasonableness” standard and still require plaintiffs in negligence cases to plead the unreasonable acts or omissions, or to explain why, in their case, they are unable to be more specific.

Charles Clark argued that since line-drawing causes unproductive arguments over the lines, the reformer should try to reduce the use of

lines and definitions.²⁷⁴ This view is flawed on three counts. First, no lines or vague lines also cause arguments, albeit arguments which proceed with less clarity about the subject of the argument. Second, if expectancies cannot be defined, it is hard to see how society can effectively provide them. Third, that one cannot provide perfect predictability by line drawing—an imperfection of which Field was very much aware—does not mandate the elimination of the lines.²⁷⁵ In chiding “so-called ‘realistic jurisprudence’ ” for its “nihilistic theory,” John Dickinson mused in 1941 that lawyers—“except possibly a minute academic minority”—have always understood that there must be some discretion and choice in the “process of decision.”

[But] it has at the same time also been understood that where an organ of government with the power and duty to decide, recognizes that in its decision it must take certain rules into account, its discretion is guided and controlled in a way that it would not be, and the resulting decision is a different decision from what it would be, if those rules were not recognized as authoritative and as, therefore, essential ingredients in the decisional process. . . . [C]ertainty which law produces is never more than a relative certainty,—indeed, some statutory rules are so vaguely expressed as to give little or no assurance how they will be applied. . . . Certainty, however, like other human values need not [be] regarded as valueless merely because it is imperfectly achieved.²⁷⁶

Felix Cohen, a brilliant and subtle legal realist, also warned against rejecting certainty as a judicial goal. In criticizing Jerome Frank’s *Law and the Modern Mind*, Cohen warned that “[u]ncertainty, as [Frank] asserts is adventure, but adventure is hunger and thirst and heart-ache and death. Civilization rests upon a vast, intricate complex of expectations and properties, and only the predictable behavior of the bodies to which society has entrusted its collectivized physical force can put iron into the scaffolding of hopes and reliances. Even from the standpoint of ‘justice in the particular case,’ uniformity is the only practical guarantee against the tyrannical exercise of prejudice. . . .”²⁷⁷

This article is not an appropriate place to debate the question that has engaged constitutional scholars and others of whether courts have exceeded their legitimate power by creating new rights.²⁷⁸ It does seem to me, though, as it did to Field, that legislation will by its very nature frequently require judicial interpretation;²⁷⁹ the same is surely true with respect to enforcing constitutional rights, given the generality of the language, breadth of subjects covered, and evolving conditions the constitution is called upon to govern.²⁸⁰

That law, whether through rights thinking or any other approach, adds a sense of legitimacy to the order contained in that law seems

undoubtedly true, although the indeterminacy argument made by some critics may be at odds with their legitimation theme.²⁸¹ If doctrine has little effect on legal results, than how does it legitimate anything, unless, perhaps, by perpetuating the myth that there is a rule of law that works?²⁸² But if the rule of law is largely illusory, if legal rules cannot or do not play an important role in helping determine legal results, then it is difficult to see how progressive change can come through legal change. To believe that progressive change cannot come through legal change in a democracy is, perhaps, a self-defeating critical stance, for it seems to mean that citizens cannot, through votes, legislation, and claims to legal entitlements, improve their destiny.²⁸³

It may be simplistic to see rights thinking as inevitably bound up with a highly competitive, uncooperative, anticomunal view of society. As Professor Martha Minow has recently demonstrated, the very act of defining and delivering rights both requires and helps define a community and the individual's interdependency with that community.²⁸⁴ Moreover, to help build a society in which most of us would want to live, and particularly if the society is to nurture and fulfill both values of interdependence and individual human dignity, requires each individual to have at least a minimal amount of economic security, personal freedom, and political power. It is difficult to see how to accomplish this without defining the legal entitlements and freedoms of each citizen—or rights.²⁸⁵ Indeed, those least able to protect themselves in a society are probably both most in need of rights that can be enforced through the state,²⁸⁶ and have the most to benefit from a language of rights that contains aspirations that can ultimately lead to the creation and vindication of new rights.²⁸⁷

Today courts do attempt to resolve disputes as to which "rights" analysis may not be as helpful as in the traditional suit between two private parties. But even in the case of newer rights and law suits against large institutions, it may be useful for judges to think in terms of the specific right involved, its elements, the nature of proof, and the specific remedy. Failure to do so in the discrimination area has probably undercut the force of the law.²⁸⁸

Field's procedural thinking may have other virtues that modern procedure has tended to overlook. By his concentration on the jury, he may have facilitated a more focused system, while at the same time involving the community in the important process of trying to help deliver rights to citizens and trying to resolve disputes. To argue a case to lay people encourages the lawyer to reduce the case to its essentials, and to explain it in simple language. If the modern attack on Field's thinking is that a right is not a right until vindicated, then Field might

respond that legislators, being more directly responsive to the problem than judges, should enact the procedural rules to vindicate rights. The legal realist attack on law as predominantly indeterminate makes it particularly difficult to understand why the judges, in whom legal realists such as Jerome Frank and Charles Clark had so much faith, are more equipped to handle dispute resolution (Field would say "rights-vindication") than lay people.

Definition, line-drawing, and a smaller litigation package may make it easier for lawyers to predict on what issues a case will turn and easier for courts to be more lucid and straightforward in explaining their decisions—both of which may make litigation less necessary or less expensive for clients. It is unclear whether flexible and expansive procedural rules contribute to appellate opinions that do not provide reasonably precise and clear guidelines for future cases; perhaps multiple issues and an emphasis on judicial discretion in procedure all contribute to the imprecision and uncertainty that pervade contemporary substantive law.²⁸⁹

A more demanding procedural system, such as Field's, may also push equity to return to its traditional roles of adjusting legal rules that do not work well, providing a moral force, and shaping new substantive law. When the entire procedural system is grounded in discretion, equity is deprived of a distinctive role. Discretion reacting to discretion tends towards chaos.²⁹⁰

Field's approach did not produce perfect solutions in his lifetime, nor would it now. But it is clear that Field's concentration on rights, facts, and causes of action resulted from a procedural philosophy markedly different from the one that has dominated this century. Today, individual citizens often find themselves aligned against and reliant upon the government and other powerful institutions. In such a world, even conceding that perfect certainty is unattainable, Field's dedication to fulfilling preannounced expectancies for each citizen has enduring worth.

NOTES

This article will be a portion of a book that I am writing on the history and ideology of the Rules Enabling Act and the Federal Rules of Civil Procedure.

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1. See, e.g., THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Levin & R. Wheeler eds. 1979) [hereinafter cited as THE POUND CONFERENCE], esp. on costs and delay (e.g., Burger, 31, 35; Kirkham, 209-20), losses of privacy (e.g. Rifkind, 51, 61); failure to discourage frivolous litigation or to confine and focus litigation (e.g. Rifkind, 53, 61; Kirkham, 213); failure to define rights and obligations in an intelligible way (e.g. Rifkind, 64; Giswold, 113; Kirkham, 213); Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 246, ns. 1, 2 (literature on discovery abuse) (1982) [hereinafter cited as Sherman & Kinnard]; G. McDOWELL, EQUITY AND THE CONSTITUTION 137, n. 1 (literature on judicial power and discretion) (1982) [hereinafter cited as McDOWELL]; J. WEINSTEIN REFORM OF COURT RULE-MAKING PROCEDURES (1977); Burbank, *The Rules Enabling Act*, 130 U. PA. L. REV. 1015, 1018-24 (1982) [hereinafter cited as Burbank]; Bok, *A Flawed System*, HARV. MAG. 38 (1983); Rosenberg, *The Federal Rules After Half A Century*, 36 ME. L. REV. 243 (1984); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 5-11, literature cited in ns. 1-37 (on litigiousness) (1983) [hereinafter cited as Galanter]. The Galanter article argues that most allegations of litigiousness are not supported by the evidence.

2. See, e.g., Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter cited as Resnik, *Managerial*]; Resnik, *Failing Faith*, 53 U. CHI. L. REV. 494 (1986) [hereinafter cited as Resnik, *Failing Faith*]; Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986) [hereinafter cited as Galanter, *Judge as Mediator*] (the entire issue is dedicated to alternative dispute resolution and the courts); S. GOLDBERG, E. GREEN, F. SANDER, DISPUTE RESOLUTION (1985) [hereinafter cited as GOLDBERG, GREEN, AND SANDER].

3. See, e.g., R. FIELD, B. KAPLAN, & K. CLAREMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE, at 18-20, 393-97 (5th ed. 1984); J. COUND, J. FRIEDENTHAL, A. MILLER, & J. SEXTON, CIVIL PROCEDURE CASES AND MATERIALS, at 425-29 (Field Code). (I have used this casebook to teach civil procedure for seventeen years. If there is a paragraph of serious history on the intellectual, social, economic, or political background of the Enabling Act or the Federal Rules of Civil Procedure [other than an occasional, general paragraph about the liberalizing effect of the rules in judicial opinions or in a note or question], I have yet to find it.) (4th ed. 1985) [hereinafter cited as COUND, ET AL.]; F. JAMES & G. HAZARD, CIVIL PROCEDURE, at 19-21 (names of people are mentioned but without any biographical or historical background) (3d ed. 1985) [hereinafter cited as JAMES & HAZARD (3rd ed.)].

4. See, e.g., in addition to *infra* notes 7, 8, 12, F. JAMES, JR., CIVIL PROCEDURE Sec. 2.5, at 65, 66; Sec. 2.11, at 85, 86 (1st ed. 1965) [hereinafter cited as JAMES]; C. A. WRIGHT, THE LAW OF FEDERAL COURTS 436 (4th ed. 1983) [hereinafter cited as WRIGHT]; Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, esp. 1061, 1062 (1955) [hereinafter cited as Holtzoff]; and Clark & Moore, *A New Federal Civil Procedure, I. The Background*, 44 YALE L.J. 387, 393 (1935) [hereinafter cited as Clark & Moore, *Background*]; Clark, *The Federal Rules and State Practice (in Ten Years Under Colorado Rules, A Symposium)*, 23 ROCKY MTN. L. REV. 520 (1951); Gavit, *The New Federal Rules and State Procedure*, 25 A.B.A. J. 367 (1940).

5. See *infra* text accompanying notes 126, 127, 216-24, 227-41.

6. See, e.g., COUND, ET AL., *supra* note 3, at 430-48; CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, at 34-35 (2nd ed. 1947); JAMES & HAZARD (3rd ed.), *supra* note 3, at 227 (on discovery), 465-68 (on joinder); M. ROSENBERG, J. WEINSTEIN, H. SMIT, & H. KORN, ELEMENTS OF CIVIL PROCEDURE, at 599-600, 808-9 (3d ed. 1976).

7. Clark, *Code Pleading and Practice Today* [hereinafter cited as Clark, *Code*], in DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM 64 (A. Reppy ed. 1949) [hereinafter cited as CENTENARY ESSAYS]. Distinguishing the Field Code from the Federal Rules, Clark notes that the Code was legislation rather than court rules, and that the Federal Rules state "procedural norms to be flexibly applied in the discretion of the trial courts." Clark's conclusion, however, stresses the continuity between the Federal Rules and the Field Code. "But these are more the modifications in execution suggested by experience than departures from the master's standards. Still do we have in essence a code—in modern form—containing detailed directions for court administration. Yet more important, these directions actually embody his principles: the complete coalescing of law and equity actions, the broad party-joinder rules of equity, and the simple informative pleadings directed to the particular case in issue. . . ." But some scholars have not been misled by the stark shift in law, procedural and otherwise, from the nineteenth to twentieth century. See, e.g., Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L.R. 1249 (1980) [hereinafter cited as Atiyah].

8. Burger, *Rx for Justice: Modernize the Courts*, NATION'S BUSINESS, Sept. 1974, at 61.

9. See, e.g., JAMES, *supra* note 4, Sec. 2.5, at 65; Clark, *Code, supra* note 7, at 57, 58; and C. REMBAR, THE LAW OF THE LAND, THE EVOLUTION OF OUR LEGAL SYSTEM 236-39 (1980) [hereinafter cited as REMBAR].

10. See, e.g., JAMES, *supra* note 4, Sec. 2.6, at 66, Sec. 2.11, at 85; Clark, *Code, supra* note 7, at 61-63; REMBAR, *supra* note 9, at 239-48; C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 47-51, 255-56, 270-73, 296-98 (1928) [hereinafter cited as CLARK 1928 HANDBOOK]; and 2 J. MOORE, MOORE'S FEDERAL PRACTICE Sec. 1.02 (2d ed. 1984) [hereinafter cited as MOORE].

11. See, e.g., MOORE, *supra* note 10, Sec. 1.02; 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE Sec. 1008 [hereinafter cited as WRIGHT & MILLER]; Clark, *Code, supra* note 7, at 63-67; and C. E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 34-41 (2d ed. 1947) [hereinafter cited as CLARK 1947 HANDBOOK]. The Rules Enabling Act of 1934: Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. The present version is contained in 28 U.S.C. Sec. 2072 (1976).

12. Pound, *David Dudley Field: An Appraisal*, in CENTENARY ESSAYS, *supra* note 7, at 14. See, also, Clark, *Code, supra* note 7, at 64-66; JAMES, *supra* note 4, at 84.

13. See, e.g., CLARK 1928 HANDBOOK, *supra* note 10, at 44-52; LOOMIS, *infra* note 228, at 26.

14. E.g., merger of law and equity, more general, simplified rules, ease of amendment, some expansion of joinder, some limited discovery. See, e.g., *infra* text accompanying notes 139-89.

15. E.g., supporters of uniform federal procedural rules gave assurance that the new rules would include the best of the common law and the codes, and somehow be half-way between the two. See, e.g., *Reforms in Judicial Procedure American Bar Association Bills: Hearings Before the House Comm. on the Judiciary*, 63d Cong., 2d Sess. 23 (1914) (Statement of Thomas W. Shelton); H.R. REP. no. 462, 63d Cong., 2d Sess. 15 (1914): "It is in order to say that the new system of rules will preserve all the merit of the

common law and of the code procedure. It will occupy a middle state between the two extremes." Edgar Tolman, secretary of the advisory committee that drafted the Fed. R. Civ. P., gave a similar assurance of continuity soon after the Rules became effective: "The effort has another objective. It is to have a system, so well selected from the best provisions of the codes of every state, that it will be a model which may command itself to the states, and may justify an approach on the part of the states to this ideal, an ideal that is not a federal invention but one that is made up from the best features of modern state practice." FEDERAL RULES OF CIVIL PROCEDURE, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C., OCTOBER 6, 7, 8, 1938, at 28 [hereinafter cited as WASHINGTON & NEW YORK 1938 INSTITUTES].

16. On modern procedure, see, e.g., Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as Chayes]; MOORE, *supra* note 10, at Sec. 1.02; F. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 20-21 (2d ed. 1977) [hereinafter cited as CARRINGTON & BABCOCK]; McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123 (1952); R. MILLAR, THE OLD REGIME AND THE NEW IN CIVIL PROCEDURE (N.Y.U. School of Law Contemporary Law Pamphlets, Series 1, Number 1, 1937) reprinted in R. MILLAR, THE FORMATIVE PRINCIPLES OF CIVIL PROCEDURE (1923); Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648 (1981) [hereinafter cited as Subrin]; and Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter cited as Subrin, *How Equity Conquered Common Law*]. On contemporary law generally, see, e.g., G. GILMORE, THE DEATH OF CONTRACT, esp. 58, 65, 87, 94-103 (1974); G. GILMORE, THE AGES OF AMERICAN LAW, esp. 68-98, "The Age of Anxiety" (1977); J. LIEBERMAN, THE LITIGIOUS SOCIETY, esp. Ch. 1 (1981) [hereinafter cited as LIEBERMAN]; Fiss, *The Social and Political Foundation of Adjudication*, 6 LAW AND HUMAN BEHAVIOR 121 (1982) [hereinafter cited as Fiss]; Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter cited as Fiss, *Forms of Justice*]; Oakes, "A Plague of Lawyers?": *Law and the Public Interest*, 2 VT. L. REV. 1 (1977) [hereinafter cited as Oakes]; Atiyah, *supra* note 7, at 1255-59.

17. H. FIELD, THE LIFE OF DAVID DUDLEY FIELD 1-15, 337-48 (1898) [hereinafter cited as H. FIELD].

18. Nurse's comments, *id.* at 15. Field quote, D. D. Field, *Commonplace Book, 1824-1827* [hereinafter cited as Field, *Commonplace Book*], Field-Musgrave Family Papers, Manuscript Department, William R. Perkins Library, Duke University [hereinafter cited as Field-Musgrave MSS.]. Other examples of self-appraisals on his birthdays: D. D. Field, *My Journal, from December, 1831 to April, 1835*, Feb. 13, 1832, Feb. 13, 1834, Feb. 13, 1835 [hereinafter cited as Field, *Journal*]; D. D. Field, *Journal Continued (1836)*, Feb. 13, 1836 [hereinafter cited as Field, *Journal Continued*]; D. D. Field, *Journal of Visit to Europe, 1836-1837*, Feb. 13, 1837: "My birthday! I am now thirty-two years old; & how little have I done! I am ashamed of myself" [hereinafter cited as Field, *Journal of Visit to Europe*]. Each of these journals is in Field-Musgrave MSS. On personality generally, see, e.g., D. Van Ee, *David Dudley Field and the Reconstruction of the Law*, esp. 2-7 (1974) (Unpublished Ph.D. Diss., The Johns Hopkins Univ., to be published as part of Garland Publishing's series of dissertations, entitled AMERICAN LEGAL AND CONSTITUTIONAL HISTORY; the citations are to the original, unpublished dissertation) [hereinafter cited as Van Ee], citing, *inter alia*, D. D. Field, *Recollections of My Early Life Written in the Spring of 1832* [hereinafter cited as Field, *Recollections*] and D. D. Field, *Recollections of Myself No. 2* [hereinafter cited as Field, *Recollections No. 2*], both in Field-Musgrave MSS.; Hobor, *The Forms of The Law: David Dudley*

Field and the Codification Movement in New York, 1839-1888, esp. 68, 69 (1975) (Unpublished Ph.D. Diss., U. of Chicago) [hereinafter cited as Hobor]; G. MARTIN, CAUSES AND CONFLICTS, THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970, esp. at 87-91 (1970) [hereinafter cited as MARTIN].

19. See, e.g., Fiero, *David Dudley Field and His Work*, 51 ALB. L.J. 39 (1895); MARTIN, *supra* note 18, esp. at 30, 55, 88, 89, 91, 106, 143 ("the state's most contentious lawyer") and cites therein; C. B. SWISHER, STEPHEN J. FIELD—CRAFTSMAN OF THE LAW 274 (1963) [hereinafter cited as SWISHER], and J. HENKE, LAWYERS AND THE LAW IN NEW YORK 96-98 (1979) [hereinafter cited as HENKE].

20. See, e.g., MARTIN, *supra* note 18, at 92-94; Hobor, *supra* note 18, at 68, 69; Van Ee, *supra* note 18, which describes Field's prewar practice (Ch. 2, 57-112), political battles (Ch. 3, 113-61), post-Civil War practice (Ch. 4, 162-211), conduct of the Erie litigation (Ch. 5, 212-52), fights with journalists (Ch. 6, 253-310), and battle for an international code (Ch. 7, 311-39); and MARTIN, *supra* note 18, at 55-60, 87-103, 104-7, 110-19, 142-57.

21. From a letter dated Feb. 22, 1873 to Stephen J. Field, quoted in H. FIELD, *supra* note 17, at 82, 83 and MARTIN, *supra* note 18, at 156 n. 13.

22. H. FIELD, *supra* note 17, at 23, 24; Field to his father, June 25, 1819, Letters, 1739-1872, Field-Musgrave MSS., *supra* note 18.

23. See, e.g., MARTIN, *supra* note 18, at 89; H. FIELD, *supra* note 17, at 61, 63 (on Jonathan Field); 4 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 37, 38 (1898) (on David Josiah Brewer and his parents, Emilia Field and Rev. Josiah Brewer).

24. Field, *Recollections*, *supra* note 18, at 2, 4. See, also, Field, *The Theory of American Government*, 146 N. AM. REV. 543 (1888) [hereinafter cited as Field, *Theory*] reprinted in III SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 372-88 (T. Coan ed. 1890) [hereinafter cited as 3 FIELD SPEECHES], the text accompanying notes 109-15 *infra* and those notes. Unless otherwise noted, citations to any of Field's works found in the three volumes of SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD will give the page numbers found in those volumes, rather than in the original source.

25. The bequest ends: "fidelity in every position, private or public; and the traditions of truth, justice and honor." The quote is given in H. FIELD, *supra* note 17, at 336 and can also be found in D. D. Field, *Personal Recollections* [hereinafter cited as Field, *Personal Recollections*], Field-Musgrave MSS., *supra* note 18, at 45.

26. "I mixed little with the students. My habits were rather solitary. . . . The solitariness of my habits made me, in some small measure, misanthropic." Field, *Recollections No. 2*, *supra* note 18, at 6. See, also, Field, *Recollections*, *supra* note 18, at 3. Obituary: *New York Daily Tribune*, Apr. 14, 1894, in Field-Musgrave MSS., *supra* note 18. Also see, e.g., MARTIN, *supra* note 18, at 88, 89, citing T. STRONG, LANDMARKS OF A LAWYER'S LIFETIME 420 (1914) [hereinafter cited as STRONG]. Strong's description of Field: "Tall, erect, dignified in bearing, of extensive learning and unquestioned ability, there was also something cold and repellent in his demeanor, and although his manner was polished and elegant, he lacked every element of sympathy and magnetism, and his distinguished achievements and successes were not because of an outwardly attractive presence and manner but in spite of them."

27. See, e.g., H. FIELD, *supra* note 17, at 30 and Van Ee, *supra* note 18, at 9, 10, which cites Field to his father, Nov. 7, 1821; May 1, 1822; and Oct. 10, 1825, and Field to Emiliar [sic] Field, Apr. 1824, Field-Musgrave MSS. (*supra* note 18).

28. Field, *Recollections No. 2*, *supra* note 18, at 2 1/2. See also Field, *Magnitude*

and Importance of Legal Science (address at the opening of the Law School of the University of Chicago, Sept. 21, 1859) [hereinafter cited as Field, *Legal Science*] reprinted in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, at 517-33, described *infra* in text accompanying notes 129-31. (A. Sprague ed. 1884) [hereinafter cited as FIELD SPEECHES]. According to his brother, Henry, Field gave \$25,000 to endow a professorship of astronomy at Williams, out of interest in the subject and personal regard for Albert Hopkins, a professor of astronomy. H. FIELD, *supra* note 17, at 29.

29. See, e.g., *supra* notes 20-21 (on offending people and carrying on fights). Quote on mathematics: Field, *Recollections No. 2*, *supra* note 18, at 2 1/2.

30. H. FIELD, *supra* note 17, at 38 (marriage was on Oct. 26, 1829).

31. Field, *Journal Continued*, *supra* note 18, at 2, 11. On wife's death, daughter Isabella's death, and Field's despair, see, e.g., Field, *Journal Continued*, *supra* note 18, which ends: "There seems little for me in this world, but to train up well the dear children that are left me, and to prepare to meet them all in a world, where there is no more pain nor sorrow" (Apr. 7, 1836). Also, see, Field to his son, D. David Field, Feb. 13, 1836, in Field-Musgrave MSS., *supra* note 18; Field, *Journal of Visit to Europe*, *supra* note 18, esp. May 13, Sept. 12, Oct. 26, Nov. 21, 1836; Jan. 1, Jan. 21, 1837. The *Family Tree* (in a box that includes *Genealogy*), Field-Musgrave MSS., *supra* note 18, shows Field's brother, Timothy Beals, born on May 21, 1809, and dead "at sea" in 1836.

32. See Van Ee, *supra* note 18, at 16-18 and H. FIELD, *supra* note 17, at 34-41.

33. On relatives associated with Field's office, see, e.g., SWISHER, *supra* note 19, at 21-24; H. FIELD, *supra* note 17, at 61; Van Ee, *supra* note 18, at 216; and 1 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIBLIOGRAPHY 37 (1898) (on David Brewer). Some of Field's improved circumstances were probably attributable to his second marriage to a wealthy widow. SWISHER, *supra* note 19, at 23. For a detailed account of Field's prewar practice, see Van Ee, *supra* note 18, at 57-112.

34. D. D. Field, *Notes For My Autobiography 2* [hereinafter cited as Field, *Notes For My Autobiography*], in Field-Musgrave MSS, *supra* note 18. Also see Field, *Personal Recollections*, *supra* note 25, at 3; 2 E. K. EARLE, SHEARMAN AND STERLING, 1873-1973 8, 9 (1973) [hereinafter cited as EARLE].

35. Van Ee describes the shift of Field's practice to more lucrative clients after the Civil War, but also explains that before the War Field represented the business interests of his successful brother, Cyrus. See Van Ee, *supra* note 18, at 57-112; 212-52. On Field's representation of Fisk, Gould, and Tweed, see, e.g., MARTIN, *supra* note 18, at 4-15, 29-30, 66, 67, 105-19; Van Ee, *supra* note 18, at 218-52, 293-310.

36. See, e.g., *Letter of David Dudley Field to Samuel Bowles, Jan. 5, 1871*, reprinted in THE LAWYER AND HIS CLIENTS, THE RIGHTS AND DUTIES OF LAWYERS, THE RIGHTS AND DUTIES OF THE PRESS; THE OPINIONS OF THE PUBLIC, CORRESPONDENCE OF MESSRS. DAVID DUDLEY AND DUDLEY FIELD, OF THE NEW YORK BAR, WITH MR. SAMUEL BOWLES OF THE SPRINGFIELD REPUBLICAN, which includes letters written in 1870 and 1871 [hereinafter cited as FIELD-BOWLES CORRESPONDENCE] (Dudley Field was Field's son, who practiced law with his father. In May 1868, Thomas Gaskell Shearman was admitted into full partnership with the Fields and the firm became Field & Shearman. John W. Sterling became a partner in 1869. Field left his law practice in 1873. Shearman and Sterling then formed their own firm. EARLE, *supra* note 34, at 10, 18, 19 (1973); Field's Dec. 10, 1872 defense of himself before the Bar Assn. of the City of New York, reprinted in part in MARTIN, *supra* note 18, at 92-98, evidently taken from an account in the *New York Herald*, Dec. 11, 1872: "Then it was charged, and that was the burthen

of the controversy with Bowles, that two of my clients were bad men. . . . Now, whether it was proper for me to try the characters of my clients before trying their causes is a question I leave to those members of the association who have refused such retainers or taken only retainers of saints." But, cf., Field, *Study and Practice of the Law*, DEMOCRATIC REVIEW (April 1844) [hereinafter cited as Field, *Study and Practice*], reprinted in FIELD SPEECHES, *supra* note 28, at 489; Field, *Reform in the Legal Profession and the Laws* (Address to the graduating class of the Albany Law School, March 23, 1855), reprinted in FIELD SPEECHES, *supra* note 28, at 494-514 [hereinafter cited as Field, *Reform in Legal Profession*].

37. See, e.g., H. FIELD, *supra* note 17, at 41, 46; Van Ee, *supra* note 18, at 21, 28; and C. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 186 (1981) [hereinafter cited as COOK]. Field's first public effort at procedural reform was a Dec. 26, 1839 letter to New York State Senator, Gulian C. Verplanck (also "a minor American literary figure," COOK, at 186) [hereinafter cited as Field, *Letter to Verplanck*], reprinted in part in FIELD SPEECHES, *supra* note 28, at 219-23.

38. COOK, *supra* note 37, at 143-53.

39. *Id.*, at 185, 186.

40. N.Y. Const. of 1846, Art. XIV, Sec. 5, Art. VI, Sec. 3.

41. N.Y. Const. of 1846, Art. VI, Sec. 27.

42. See, e.g., H. FIELD, *supra* note 17, at 46-49; COOK, *supra* note 37, at 189-91, and D. D. Field, *A Third of a Century Given to Law Reform*, 2-4 in Field-Musgrave MSS., *supra* note 18 [hereinafter cited as Field, *A Third of a Century*].

43. H. FIELD, *supra* note 17, at 49; COOK, *supra* note 37, at 190, 191. For accounts of the appointment of the initial "Commissioners on Practice and Pleadings" and of Field's succession to Nicholas Hill as a commissioner, see Hobor, *supra* note 18, at 200-16, and LOOMIS, *infra* note 228, at 13-17.

44. N.Y. Const. of 1846, Art. I, Sec. 17.

45. See, e.g., COOK, *supra* note 37, at 194-96. For a detailed description of the failure of the original Code Commission and its demise in 1850, see Hobor, *supra* note 18, at 205, 212, 213, 219-22, 230-32, 247-52, 260-63. For Field's role in restoring the Code Commission and having himself and the other commissioners appointed, see Hobor, *supra* note 18, at 277-85.

46. COOK, *supra* note 37, at 196. On the part played by Field, see, e.g., H. FIELD, *supra* note 17, 76-83; Hobor, *supra* note 18, at 286-300.

47. COOK, *supra* note 37, at 196-98. California, the Dakotas, Idaho, and Montana adopted large portions of the substantive codes. *Id.*, at 198.

48. (1848) N.Y. Laws, c. 379 (71st Sess., April 12, 1848) [hereinafter cited as 1848 Field Code]. On Field's role, see LOOMIS, *infra* note 228, esp. 17-23. H. FIELD, *supra* note 17, at 46-52; and Hobor, *supra* note 18, at 218. An 1842 letter from Field to John L. O'Sullivan, a member of the New York Assembly, accompanying three bills Field had drafted, contemplated separate courts of law and equity; many of his procedural concepts in this letter and the bills were included, though, in the 1848 Field Code (e.g. abolition of common-law forms of action, brief complaint, fewer pleadings, testimony in equity court to be oral, abolition of statutory fees restricting amount lawyers could charge). A summary of reforms suggested by Field in 1842 is given in Hobor, *supra* note 18, at 103-12. The letter is reprinted in part in FIELD SPEECHES, *supra* note 29, at 223-26 [hereinafter cited as Field, *Letter to O'Sullivan*]. Loomis implicitly discounts the importance of Field's 1842 proposals on the grounds of their late arrival and their substantial duplication with his own proposals. Loomis was in the New York legislature

in 1842 and was chairman of the Committee on the Judiciary in the Assembly. He became a delegate from Herkimer County to the 1846 New York constitutional convention. LOOMIS, *infra* note 228, at 7, 8, 12. For the draft bills, see NEW YORK STATE ASSEMBLY DOCUMENTS, Doc. no. 81, at 62 (1842). The 1848 Report (*infra* note 56) that accompanied the partial procedural code presented to the New York legislature was probably drafted by Commissioner David Graham.

49. LOOMIS, *infra* note 228, at 17, 22, 23.

50. *Id.* at 22.

51. COMMISSIONERS ON PRACTICE AND PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK, REPORTED COMPLETE (1850) [hereinafter cited as 1850 NEW YORK PROCEDURAL CODE]. See, e.g., COOK, *supra* note 37, at 194; Hobor, *supra* note 18, at 252-60.

52. On pre-Field codification and codifiers, see COOK, *supra* note 37, *esp.* at 86, 87, 96-198. "Field's importance as a codifier derives in good measure from his relentless, but what became his almost solitary, promotion of codification throughout most of his professional career." COOK, *supra* note 37, at 18. See, also, H. FIELD, *supra* note 17, at 50-52.

53. On Field's knowledge of E. LIVINGSTON, REPORT OF A CIVIL CODE (1825) and W. SAMPSON, AN ANNIVERSARY DISCOURSE DELIVERED BEFORE THE HISTORICAL SOCIETY OF NEW YORK, ON SAT., DEC. 6, 1823; SHOWING THE ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND NATURE OF THE COMMON LAW (1824) [hereinafter cited as SAMPSON], see Field, *A Third of a Century*, *supra* note 42, at 1. H. Sedgwick had reviewed Sampson's speech in *The Common Law*, 19 N. AM. REV. 411-39 (1824).

54. See SAMPSON, *supra* note 53.

55. Field, *Journal of Visit to Europe* (Nov. 4, 1836), *supra* note 18, at 121. Von Savigny criticized the codification of law at too early a time in the nation's history. F. SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (1831). Field also wrote in his journal about the statutory law of Denmark. Field, *Journal of Visit to Europe* (July 20, 1836), *supra* note 18, at 54.

56. See, e.g., STATE OF NEW YORK FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS, CODE OF PROCEDURE, at 70-71, 80-81, 89-90, 139-41, 144-45 (1848) [hereinafter cited as 1848 REPORT]; Field, *What Shall Be Done with the Practice of the Courts?*, at 226-60 (essay, pub. Jan 1, 1847) [hereinafter cited as Field, *What Shall Be Done?*]. On erosion of common law prior to Field, see, e.g., S. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW 247-52 (1969) [hereinafter cited as MILSON]; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 414, 415 (5th ed. 1956) [hereinafter cited as PLUCKNETT]; W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 77-88 (1975) [hereinafter cited as NELSON]; 1 THE ADAMS PAPERS—LEGAL PAPERS OF JOHN ADAMS 28, 29 (L. Wroth & H. Zobel eds. 1968); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 128-29 (1973) [hereinafter cited as FRIEDMAN]; REMBAR, *supra* note 9, at 207-23.

57. See, e.g., Field, *What Shall Be Done?*, *supra* note 56, at 235-37.

58. See, e.g., 1848 REPORT, *supra* note 56, at 73-75.

59. For Bentham's attacks on common law, customary law, and judge-made law and his support of legislation, see, e.g., J. BENTHAM, A COMMENT ON THE COMMENTARIES 186-99 (1934 ed.); J. BENTHAM, THE HANDBOOK OF POLITICAL FALLACIES 74-75 (1962 ed.); J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 274-84 (1945 ed.); Bentham, *Bentham's Letter, Letter IV*, reprinted in CODIFICATION OF THE COMMON LAW, LETTER OF JEREMY BENTHAM AND REPORT OF JUDGES STORY, METCALF AND OTHERS 3, 4 (1882) [hereinafter cited as CODIFICATION (BENTHAM AND STORY)]: "Would you wish

to know what a law—a real law—is? Open the statute book—in every statute you have a real law; behold in that the really existing object, the genuine object, of which the counterfeit, and pretended counterpart, is endeavored to be put off upon you by a lawyer, as often as in any discourse of his the word *Common Law* is to be found." On the commissioners' admiration of Bentham's RATIONALE OF JUDICIAL EVIDENCE, which they called the "most profound and original work ever written upon this subject," see 1850 NEW YORK PROCEDURAL CODE, *supra* note 51, at 694, 695.

60. Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 945-48, 950-51, 956-61, 962-73.

61. On Field's political involvement, see, e.g., H. FIELD, *supra* note 17, at 108-20; Van Ee, *supra* note 18, at 113-61; and Hobor, *supra* note 18, at 96-98. On his opposition to the extension of slavery, see, e.g., Field, *The Political Questions of 1844 to 1848 (A sketch of the April 1844 speech at the Broadway Tabernacle)* reprinted in 3 FIELD SPEECHES, *supra* note 24, at 1, 11; Field, *Free Soil, Free Speech, Free Men (address before the Democratic Republican State Convention at Syracuse, July 24, 1856)* reprinted in 3 FIELD SPEECHES, *supra* note 24, at 45, 47.

62. D. D. Field and J. L. Field (Field's daughter), *Reform, The Bond Street Gazette*, Mar. 5, 1842, in Field-Musgrave MSS., *supra* note 18 under "Miscellany." (The children's second article is providently entitled "Mistakes in punctuation, orthography, etc.") See, also, SCHLESINGER, JR., THE AGE OF JACKSON 332, 333 (1945) [hereinafter cited as SCHLESINGER, JR.]. The Enabling Act and the Federal Rules of Civil Procedure became law during the New Deal, another period of urgent calls for reform.

63. See, e.g., COOK, *supra* note 37, at 188-90. In a petition Field drafted to the New York legislature, he and others called for "a radical reform of legal procedure." *Memorial of Members of the Bar in the City of New York, relative to legal reform*, Feb. 9, 1847, NEW YORK ASSEMBLY DOCUMENTS, 2 DOCUMENTS OF THE ASSEMBLY, Doc. No. 48 (1847), reprinted in FIELD SPEECHES, *supra* note 29, at 261 [hereinafter cited as Field, *Memorial*].

64. See, e.g., Field, *Reasons for the Adoption of the Codes* (substance of address before the Judiciary Committee of the two Houses of the Legislature, at Albany, on Feb. 19, 1873) [hereinafter cited as Field, *Reasons for Adoption*], reprinted in FIELD SPEECHES, *supra* note 28, at 361, 368, 372; Field, *The Codes of New York and Codification in General* (address to Buffalo law students, Feb. 6, 1879) [hereinafter cited as Field, *The Codes of New York*], reprinted in FIELD SPEECHES, *supra* note 28, at 374, 377; FIRST REPORT OF THE CODE COMMISSIONERS, Feb. 27, 1858 [hereinafter cited as CODE COMMISSIONER'S FIRST REPORT], reprinted in FIELD SPEECHES, *supra* note 28, 309, at 313; and FINAL REPORT OF THE CODE COMMISSION, Feb. 13, 1865 [hereinafter cited as CODE COMMISSIONERS' FINAL REPORT], reprinted in FIELD SPEECHES, *supra* note 28, at 317, 322.

65. Field, *Theory*, *supra* note 24, at 376. See, also, e.g., Field, *The Political Writings of William Leggett*, N.Y. REV. (Apr., 1841), reprinted in 2 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 209, 216, 218 (A. Sprague ed. 1884) [hereinafter cited as 2 FIELD SPEECHES]. On importance of "equality of opportunity" theme in New York during the 1830s, see, e.g., D. MILLER, JACKSONIAN ARISTOCRACY, CLASS AND DEMOCRACY IN NEW YORK, 1830-1860, at 3-25 (Ch. 1, Equality) (1967) [hereinafter cited as D. MILLER].

66. Rabkin, *The Origins of Law Reform: The Social Significance of the Nineteenth Century Codification Movement and Its Early Contribution to the Passage of the Early Married Women's Property Acts*, 24 BUFFALO L. REV. 683, 714 (1974) [hereinafter cited as Rabkin].

67. Field thought he was a preserver of the common law and traditional values. See, e.g., H. FIELD, *supra* note 17, at 42, 43. He also thought, though, that some changes in the law should be made during codification, but “[t]hey should, without doubt, be cautiously admitted.” CODE COMMISSIONERS’ FIRST REPORT, *supra* note 64, at 311. Also: “We are satisfied that this work should be performed with delicacy, caution and discrimination, that nothing should be touched from the mere desire of change, or without great probability of solid advantage” (*id.* at 312). Such statements probably are made, in part, to reassure the audience—legislators, lawyers, and the public—that the proposed codes will not be radical or unsettling, and will not require relearning the law. Notwithstanding this, Field was consistent in not wanting to change a great deal of the substantive law as he found it in the decisions. Field mentions three “major” alterations of the law in his introduction to the completed Civil Code. They relate to intestate succession, real estate transfer, and adoptive parents. COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK, xxxi (1865).

68. It is problematic, however, whether codification had the breadth of support sufficient to call it a movement. See Gordon, *Book Review* (reviewing COOK, *supra* note 37) 36 VAND. L. REV. 431, 433-36 (1983) [hereinafter cited as Gordon].

69. See, e.g., COOK, *supra* note 37, at 158-62; THE GOLDEN AGE OF AMERICAN LAW 99-210 (C. Haar ed. 1965) [hereinafter cited as GOLDEN AGE OF AMERICAN LAW]; and M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 at 84, 85 (1976) [hereinafter cited as BLOOMFIELD, AMERICAN LAWYERS].

70. See, e.g., Field, *Study and Practice*, *supra* note 36; Field, *Responsibility of American Lawyers for the Government of Their Country* (address to the graduating class of the Albany Law School, May 15, 1875), reprinted in FIELD SPEECHES, *supra* note 28, at 562; Field, *The Law and the Legal Profession* (dinner of the Mercantile Library Association in New York, November 1874), reprinted in FIELD SPEECHES, *supra* note 28, at 539, 540-41. William Sampson, an earlier codification advocate (*supra* note 53), and others who favored codification in the 1830s, also rejected the “every man his own lawyer” theme, and looked to legal experts to draft codes. See, e.g., BLOOMFIELD, AMERICAN LAWYERS, *supra* note 69, at 76-81.

71. Field, *A SHORT RESPONSE TO A LONG DISCOURSE. An Answer to Mr. James C. Carter's Pamphlet on the Proposed Codification of Our Common Law*, 29 ALB. L.J. 127, 129 (1884) [hereinafter cited as Field, *Answer to Carter*] (referring to J. C. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW. A PAPER PREPARED AT THE REQUEST OF THE COMM. OF THE BAR ASSN. OF THE CITY OF N.Y., APPOINTED TO OPPOSE THE MEASURE (1884) [hereinafter cited as CARTER]). See, also, LOOMIS, *infra* note 228, at 6: “Many of the better class of the profession appreciated the justness of the criticisms.”

72. See, e.g., H. FIELD, *supra* note 17, at 41; ENCYCLOPEDIA OF AMERICAN HISTORY 213, 746, 747 (R. Morris ed. 1976); D. MILLER, *supra* note 65, at 128, 129. On Field's embarrassment, see Field, *Notes For My Autobiography*, *supra* note 34, at 2. “Returning to America in July, 1837, I found the country in a financial collapse, and my property, which had been mortgaged before I left the country, had so fallen in price that it was difficult to sell for enough to meet the mortgage. This embarrassed me for several years. But I entered at once into the practice of my profession, and by degrees reinstated myself financially.”

73. See, e.g., Pessen, *The Working Men's Party Revisited*, at 4 LH (1963) reprinted in ESSAYS ON JACKSONIAN AMERICA (F. O. Gatell ed. 1970), at 178 (bibliography), 185, 188, 192; L. SYMS & T. CLEMENT, REBEL AMERICA THE STORY OF SOCIAL REVOLT IN

THE UNITED STATES 9, 38-50, 78-91 (1972, originally published in 1934); SCHLESINGER, JR., *supra* note 62, at 159-266.

74. See, e.g., D. ELLIS, LANDLORDS AND FARMERS IN THE HUDSON-MOHAWK REGION, 1790-1850, esp. ch. 7 (*The Antirent Movement, 1839-1846*) and 8 (*Antirentism in Politics*) [hereinafter cited as ELLIS]; C. LINCOLN, 2 CONSTITUTIONAL HISTORY OF NEW YORK 10-27 (1906) [hereinafter cited as LINCOLN]; HENKE, *supra* note 19, at 79-83. “An eminent historian declares that the antirent crusade coming at that particular time gave the final push to the public pressure for a constitutional convention.” ELLIS, at 277, 278, citing Cheyney, *The Antirent Movement and the Constitution of 1846*, in FLICK, 6 HISTORY OF NEW YORK 308 ff. (1933). For labor unrest and labor organizing during the 1830s until approximately the end of 1837, see D. MILLER, *supra* note 65, at 26-55, 128-29: “General economic distress caused a growing class consciousness on the part of New York workers, while at the same time respectable persons feared the possibility of class warfare” (129).

75. HENKE, *supra* note 19, at 79.

76. A traditional lawyer's response to criticism of the profession, law, or the economic order has been to focus on technical and procedural agendas. See, e.g., Gordon, *supra* note 68, esp. at 438-39; FRIEDMAN, *supra* note 56, at 354-55; Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351 (1969): “But what is significant about American ‘reform’ is that it is not revolutionary. . . . No torchlight parades ever demanded the union of law and equity.” Although, “court reform can be one way to seize the courts and turn them over to new masters” (355).

77. Field, *Letter to Verplanck*, *supra* note 37, at 219, 220. Field called his suggestions “radical.” See, e.g., Field, *What Shall Be Done?*, *supra* note 56, at 227, 229; Field, *Memorial*, *supra* note 63, at 85.

78. Such an argument was also used by twentieth-century procedural reformers. See, e.g., Taft, *The Attacks on the Courts and Legal Procedure* (Delivered at Cincinnati Law School Commencement, May 23, 1914), reprinted in 5 KY. L. J. 3, at 24 (Nov., 1916) (last paragraph); *Report of the Comm. on Uniform Judicial Procedure* (T.W. Shelton, Ch.), 40 A.B.A. REP. 502, 503 (1915): “It became manifest that the lawyers must modernize the machinery of the courts or it would be done by some less competent agency.”; T. SHELTON, THE SPIRIT OF THE COURTS 98-99 (1918) [hereinafter cited as SHELTON, SPIRIT]; Comm. of Nine, Phi Delta Phi Club of New York City (H.W. Jessup, Ch.), *The Simplification of the Machinery of Justice With a View to Its Greater Efficiency*, LXXII, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 1, at 6, 7 (1917): “As an alternative, we must be satisfied to have our system of jurisprudence seized upon and dissected in the laboratory of the doctrinaire, or the ‘social reformer,’ often unsympathetic with the value and influence of precedent. . . . ; *Procedure in the Federal Courts: Hearing Before House Comm. on the Judic. on H.R. 2377 and H.R. 90*, 67th Cong., 2d Sess. 28 (1922) (statement of T.W. Shelton): “I want to suggest that one of the great criticisms of our present system is that it is utterly impossible for a client, in many instances, when his case is thrown out on a technicality to understand why. That is an important thing. As I said over in the Senate the other day, when arguing this matter, this is one of the things that is making Bolsheviks in this country. . . .”; Cummings, *Statement of the Atty. Genl. Before Subcomm. No. 2 of the Comm. on the Judiciary of the House of Reps., re. Rules of Civ. Pro. for the Dist. Cts. of the U.S. Promulgated by the Sup. Ct., and re. H. R. 8892* [hereinafter cited as Cummings, *On H. R. 8892*], in Papers of Homer S. Cummings (No. 9973), Manuscripts Department, University of Virginia Library, Box No. 103, at 4: “Unless we lawyers clean our own house, the rest of the people will do it for us” [hereinafter cited as

Cummings Papers]. As Professor Stephen Burbank has suggested, one is uncertain whether the bar leadership in these instances really fears the worst, or is merely using a rhetorical device to drum up support for a procedural change they want, or some of both.

79. Field, *Letter to Verplanck*, *supra* note 37, at 223. *See, also*, Field, *What Shall Be Done?*, *supra* note 56, at 227, 229.

80. *See, e.g.*, P. MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 156-64* (1965) [hereinafter cited as P. MILLER]; M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 257-258 (1977) [hereinafter cited as HORWITZ] Twentieth-century procedural reformers such as Roscoe Pound and Thomas Shelton consistently wrote about law as if it were a science. *See, e.g.*, Pound, *The Causes*, *infra* note 221, at 181; and SHELTON, *SPIRIT*, *supra* note 78, at xx, xxix, 33, 51, 63, 124, and 135: "The law is a science, and the administration of it is a highly technical governmental function." It is difficult to know what reformers mean by the "law as science" rhetoric. During the nineteenth century, particularly in the debate over codification, "science" may mean the arranging of law in some order. *See, e.g.*, R. FOWLER, *CODIFICATION OF THE STATE OF NEW YORK* 43 (1884): "Science is most commonly referable to a body of knowledge arranged in an orderly manner." In this article, however, I am suggesting that Field was also attracted to the predictability and controlled variables aspects of science.

81. FIELD-BOWLES CORRESPONDENCE, *supra* note 36, at 2 (for quotes from editorial). The series of letters was written in 1870 and 1871.

82. *Id.* at 9 (Letter of Field to Samuel Bowles, Jan. 5, 1871). *Cf.* Field, *Study and Practice*, *supra* note 36, at 489; and Field, *Reform in Legal Profession*, *supra* note 36, at 494, 497-98, for a somewhat more community-oriented and, perhaps, loftier vision of the legal profession.

83. *See, e.g.*, Hobor, *supra* note 18, at 56.

84. N.Y. Rev. Stat. (2d ed. 1836), Part III, Ch. X, Title 3, Sec. 18. For a description of the system in operation, *see* Hobor, *supra* note 18, at 54-59. "By the 1820s and 1830s, courts were recognizing vast discrepancies between costs awards and usual fees." (Citations omitted.) Leubsdorf, *Toward A History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9, 13, 14 (1984) [hereinafter cited as Leubsdorf].

85. Hobor, *supra* note 18, at 59-64, citing, *inter alia*, LOOMIS, *infra* note 228, at 6, and H. HASTINGS, *AN ESSAY OF CONSTITUTIONAL REFORM* 28 (1846) [hereinafter cited as HASTINGS].

86. LOOMIS, *infra* note 228, at 5.

87. *Id.* at 5-7.

88. *Id.* at 7, 8.

89. Field, *Study and Practice*, *supra* note 36, at 485.

90. New York (State), *ASSEMBLY DOCUMENTS*, No. 81, at 57 (1842), cited in Hobor, *supra* note 18, at 108.

91. Field, *Letter to O'Sullivan*, *supra* note 48, at 225.

92. Hobor, *supra* note 18, at 236-40, 253, 254, 256. Hobor cites an 1849 majority legislative committee report that suggests that the Field Code caused higher fees (*Report of the Committee on the Judiciary, on the Bill to continue in Office the Commissioners on Practice and Pleading*, 2 *ASSEMBLY DOCUMENTS*, Doc. 47, at 4, 15, 16 [1849]), and the minority report, which he finds more creditable, that suggests "its tendency to lessen the fees of attorneys" (*Minority Report of the Committee on the Judiciary, on the bill providing for the continuance in office of the present commissioners on "practice and pleadings"*, 2 *ASSEMBLY DOCUMENTS*, Doc. 51, at 12 [1849]).

93. 1848 Field Code, *supra* note 48, Secs. 258-64. "We shall thus provide an indemnity approaching, in a degree, the amount which the client will have to pay to his attorney and counsel." (1848 *REPORT supra* note 56, at 207)

94. On Field's and his son, Dudley's, fees, *see, e.g.*, Van Ee, *supra* note 18, at 251, 252, and text accompanying note 34, *supra*.

95. Many informed commentators have found the period from approximately 1820 to 1860 pivotal in American legal history. *See, e.g.*, R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938) [hereinafter cited as POUND, *THE FORMATIVE ERA*] and *GOLDEN AGE OF AMERICAN LAW*, *supra* note 69. Professor Horwitz finds important conceptual changes during an earlier period as well. HORWITZ, *supra* note 80. For critiques of some aspects of HORWITZ, *supra* note 80, including the degree of transformation of American law and the class-based analysis, *see, e.g.*, Genovese, *Book Review*, 91 *HARV. L. REV.* 726 and the citations in n. 4 (726) and at 729, 730 (1978); Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 *YALE L.J.* 1717, 1718-21 (1981); and McClain, *Legal Change and Class Interests: A Review Essay on Morton Horwitz' The Transformation of American Law*, 68 *CALIF. L. REV.* 382, *esp.* at 394-95 (1980).

96. The term "entrepreneurial and commercial groups" is from HORWITZ, *supra* note 80, *e.g.* at xvi. Professor Horwitz sees the transformation in terms of meeting the needs of these emerging groups. "By the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society." (*Id.* at 253, 254) *See, also*, L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-24 (1965).

97. *See, e.g.*, Rabkin, *supra* note 66, at 686. "[T]he American codification movement sought, among other things, to defeudalize the law of property in order that it conform to a commercial economy, and . . . this movement to reform property law had ramifications in other branches of law as well." For a summary of how the Civil Code sought to alter trust law to the detriment of the public in the view of one writer who protested codification, *see* G. ADAMS, *THE "TRUSTS" AND THE CIVIL CODE: AN EXAMINATION OF THE PROVISIONS OF THE PROPOSED CIVIL CODE AS AFFECTING 'TRUSTS,' OR TRUST COMBINATIONS IN BUSINESS*, *Comm. on the Code of the Assn. of the Bar of City of New York* (Mar. 8, 1888). For assertions of how the Civil Code favored corporations, *see* G. RIVES, *TORTS UNDER THE CODE. AN EXAMINATION INTO THE PROVISIONS OF THE PROPOSED CIVIL CODE RELATING TO THE LAWS OF TORTS, WITH AN ENQUIRY INTO THE EFFECT OF THE CODE UPON LITIGATION AGAINST THE ELEVATED RAILWAYS* 19, 21-24, 32 (1885) (Printed by Direction of the *Comm. on the Code of the Assn. of the Bar of the City of New York*) [hereinafter cited as RIVES].

98. Sedgwick, *Law Reform*, 3 *WESTERN L. J.* 151 (1846), cited in COOK, *supra* note 37, at 187. *See, also*, C.M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND PLEADING* 18 (1897) [hereinafter cited as HEPBURN].

99. *See* HORWITZ, *supra* note 80, at 253-66.

100. The term "treatise tradition" is from HORWITZ, *supra* note 80, at 257. Professor G. Edward White puts it this way: "The treatises constituted an American version of small codes. They were not, technically, regarded as 'authorities' in the same sense as were decisions of courts or statutes, but at a time when other published resources were scarce, they became for countless practitioners the starting points for research. . . . [T]he writings of Kent and Story, ostensibly collections of and glosses on the 'authorities,' became authoritative in themselves." G. WHITE, *THE AMERICAN JUDICIAL TRADITION*

46 (1976) [hereinafter cited as WHITE, AMERICAN JUDICIAL TRADITION]. See, also, POUND, THE FORMATIVE ERA, *supra* note 95, at 149-51.

101. HORWITZ, *supra* note 80, at 253-66. These pages comprise a chapter entitled *The Rise of Legal Formalism*. Field, however, was too much of a realist and a believer in progress to believe that law would or should never change, notwithstanding his conviction about the importance of certainty in law. See, e.g., Field, *Improvements in the Law*, 22 N. AMER. L. REV. 59 (1881); Field, *Duty of the Lawyer to Improve Law, Address to the Yale Kent Club, New Haven, Conn.* (April 19, 1887), in 3 FIELD SPEECHES, *supra* note 24, at 259. In the 1850 New York Procedural Code, *supra* note 51, at iv, the commissioners said their goal was a "middle path between a judicial discretion, too wide for safety on the one hand, and too narrow for convenience on the other. . . ." *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842) was decided during the period that Field commenced his reform activities. It permitted federal judges to create a federal commercial law when there was not a state statute in point. In 1847, judges of the New York Supreme Court and New York Court of Appeals first became subject to election by the public at large. N.Y. Laws 1847, c. 276 (Act of May 12, 1847). It is tempting to argue that by trying to place all of state law in statutes, Field was attempting to reduce judicial interference with the law by federal judges, under *Swift v. Tyson*, or by state judges, who would now be elected. Although *Swift v. Tyson* was appealed from the Circuit Court of the Southern District of New York, and involved disregarding New York decisional law, I do not know when Field became aware of the case, or whether it influenced him in that manner. At the time it was decided, *Swift v. Tyson* may not have been considered so important as it appeared to some later commentators. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514 (1984). At some point, Field did become aware of the case. In behalf of a client, he tried to extend the boundary for federal judicial law-making under *Swift v. Tyson* (see Van Ee, *supra* note 18, at 67, 68), but his political views were firmly against extensions of federal power to the detriment of state sovereignty. See, e.g., Field, *Centralization in the Federal Government*, 132 N. AMER. REV. 420, 421, 426 (1881) [hereinafter cited as Field, *Centralization*], reprinted in 2 FIELD SPEECHES, *supra* note 65, at 185. It is also problematic whether the election of state judges would have motivated Field to codify. He favored codification by an elected legislature.

102. See *infra* text accompanying note 106.

103. See, e.g.: Pound's first principle of procedural reform: "It should be for the court, in its discretion, not the parties, to vindicate rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals; and such discretion should be reviewable only for abuse." (Emphasis in original.) Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 402 (1910) [hereinafter cited as Pound, *Some Principles*]. CLARK 1928 HANDBOOK, *supra* note 10, at 31: "The rules of practice should simply point out the purpose to be subserved, leaving the application thereof to the discretion of the trial judge." (The bold lettering is Clark's, as part of the "black-letter" law.) (See, also, Clark's criticism of the lack of flexibility under the Field Code, *id.* at 34.) Clark & Moore, *A New Federal Civil Procedure II. Pleadings and Parties*, 44 YALE L.J. 1323 (1935): "In fact if the vital provisions for a completely united procedure with clear specifications as to jury trials and waiver thereof are adopted, and if flexible rules as to pleadings and parties, leaving much to the discretion of the trial court, are drafted, we feel that the reform is assured of success, whatever the detailed provisions may be." On creative opportunities under the Federal Rules, see note 16, *supra*.

104. See, e.g., BLOOMFIELD, AMERICAN LAWYERS, *supra* note 69, at 63, 64 (on William Sampson).

105. RANTOUL, *Oration at Scituate*, July 4, 1836, in R. RANTOUL, JR., MEMOIRS, SPEECHES AND WRITINGS 251, 278, 279 (L. Hamilton ed. 1854).

106. The first two quotes are from *Introduction to the Completed Civil Code* (1865) [hereinafter cited as *Introduction, Civil Code*], reprinted in FIELD SPEECHES, *supra* note 28, at 323, 330, 331. The third quote is from *Codification of the Law (correspondence between the California Bar and Field, Nov. 28, 1870)* [hereinafter cited as Field, *Corres. to Cal. Bar*], reprinted in FIELD SPEECHES, *supra* note 28, at 349, 354. The fourth quote is from Field, *Mr. Field On the Codes*, 7 ALB. L.J. 193, 196 (1876). In a defense of codification, Field cited to the well known Massachusetts REPORT ON CODIFICATION (1836) by Judges Story, Metcalf, and others (reprinted in CODIFICATION [BENTHAM AND STORY], *supra* note 59), which emphasized "certainty, clearness, and facility of reference" as benefits of partial codification. D.D. FIELD, ANSWER TO THE REPORT OF THE NEW YORK CITY BAR ASSOCIATION AGAINST THE CIVIL CODE BY THE SURVIVING CODE COMMISSIONER 19 (1881). See, also, Rabkin, *supra* note 66, at 712, 713. But cf. LOOMIS, *infra* note 228, at 25, to the effect that the Commissioners on Practice and Pleading used "little detail, allowing to the Courts freedom of construction and application, as the administration of justice might require."

107. See, e.g., *infra* text accompanying notes 215-44; Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 965-70.

108. *Cummings v. Missouri*, 71 U.S. 277 (1866); *Ex Parte Milligan*, 71 U.S. 2 (1866); *Ex Parte McCordle*, 73 U.S. 318 (1868); *U.S. v. Cruikshank*, 92 U.S. 542 (1875). Field's arguments before the Supreme Court in these cases are reprinted as the initial section, *Constitutional Questions*, in FIELD SPEECHES, *supra* note 28, at 3-215. The cases are discussed in detail in Van Ee, *supra* note 18, at 162-211. "Field considered these four cases the most important in his career." Hobor, *supra* note 18, at 125.

109. See, e.g., Field, *Centralization*, *supra* note 101; Field, *Some Reprehensible Practices of American Government, Address before the Reform Club of New York, Jan. 10, 1890*, reprinted in 3 FIELD SPEECHES, *supra* note 24, at 423; Field, *Theory*, *supra* note 24, at 382: "There are two theories of government, the liberal and the meddlesome. . . . The meddlesome theory leads to irritation, failure, reaction. Most certainly we promote our own individual happiness best when we mind our own business most."

110. Field, *Municipal Officers, Address to the Young Men's Democratic Club of New York, Mar. 13, 1879*, reprinted in 2 FIELD SPEECHES, *supra* note 65, at 177, 183.

111. Field, *Theory*, *supra* note 24.

112. *Id.* at 379.

113. *Id.* at 378, 381.

114. CODE COMMISSIONERS' FIRST REPORT, *supra* note 64, at 313.

115. Field, *Address: The Needs of Legislation*, 10 N.Y. STATE BAR ASSN. REPTS. 86 (1887), cited in Hobor, *supra* note 18, at 132.

116. Demurrer to bill of complaint in *John B. Heath, and others. against The Erie Railway Company and others., United States Circuit Court*, filed by Field and Shearman, says on top right of first page, in handwriting, "[ca. 1869]," at 6, in Field-Musgrave MSS., *supra* note 18.

117. Hobor, *supra* note 18, at 191. See, also, Lincoln, *supra* note 74, at 73-91, and HASTINGS, *supra* note 85, at 4: "Have we not evils to complain of? The credit of the State has been pledged and nearly prostrated, and a heavy debt entailed upon us by log-rolling legislation, to carry through party measures, private corporations and public works for local and private benefit. Special legislation, for private schemes, has been

carried to such an extent, that the laws now and then made for the public interest, have been almost lost and overlooked, in the numerous volumes of private acts, till occasionally sprung upon the unsuspecting offenders!"

118. Hobor, *supra* note 18, at 194. *See, also*, LINCOLN, *supra* note 74, at 59-83, and the Hastings quote in *supra* note 117.

119. Hobor, *supra* note 18, at 193, 194. *See, also*, charts on pp. 192 and 195. Moreover, "[t]he public remarks of prominent convention members further indicates [sic] the connection between support for codification and laissez-faire policies. . . . The major opponents of codification were strong supporters of active state involvement in the economy and opposed both the debt referendum provision and incorporation exclusively by general laws." (at 196)

120. *See, e.g.*, D. MILLER, *supra* note 65, at 106-89.

121. *See, e.g.*, J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM 3-32 (1967); J.W. HURST, A LEGAL HISTORY OF MONEY IN THE U.S. 1774-1970, at 31 (1973); K. MARX, THE GERMAN IDEOLOGY: PART I (1845-1846), *reprinted in* R. TUCKER, THE MARX-ENGELS READER 185 (2d ed. 1978).

122. U.S. v. Cruikshank, 92 U.S. 542 (1875). *See, e.g.*, FIELD SPEECHES, *supra* note 28, at 180, and Van Ee, *supra* note 18, at 205-211, citing, *inter alia*, LONN, RECONSTRUCTION IN LOUISIANA: AFTER 1868, at 240-45 (1918); C. FAIRMAN, RECONSTRUCTION AND REUNION 1377-78 (1971); DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC, 219, 263-64.

123. From the time of the first A.B.A. Enabling Act resolution that was introduced in Congress in the twentieth century, it was provided that the Supreme Court would be authorized to prescribe the new procedural rules. *See* H.R. 26, 462, 62d Cong., 3d Sess. (1912), *reprinted in* 38 A.B.A. REP. 542 (1913). *See, also*, the A.B.A. Enabling Act resolution, 37 A.B.A. REP. 434, 435 (1912). If Field had suggested court-made rules for New York after 1847, those rules would have been drafted by elected judges. *See* note 102, *supra*.

124. R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 78 (First Vintage Books ed., paperback, 1974). *See, also, e.g.*, Llewellyn, *The Good, The True, The Beautiful in Law*, 9 U. CHI. L. REV. 224, 240, 241 (1942) [hereinafter cited as Llewellyn, *The Good*]; WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 100, at 118; and SCHLESINGER, JR., *supra* note 62, at 315 (on influence of Adam Smith on Jefferson, Theodore Sedgwick, Field, and others. "The little village of Stockbridge in Massachusetts [where Field had lived as a teenager] was a particular center of free-trade thought"). For the relationship of contract law in the nineteenth century to laissez-faire economics, *see, e.g.*, L. FRIEDMAN, CONTRACT LAW IN AMERICA 18-24 (1965).

125. Gordon, *supra* note 68, at 457. For an analysis of conceptual problems in a philosophy that attempts to "maximize the ability of each autonomous individual to act freely so long as he did not infringe the liberty of anyone else," *see* Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WISC. L. REV. 975, 995-1014 [hereinafter cited as Singer] and *infra* text accompanying notes 251-53.

126. *See, e.g.*, *supra* notes 16 and 103; Holtzoff, *supra* note 4, at 1059, 1060; Moore, *supra* note 10, at para. 0.523[2]; WASHINGTON & NEW YORK 1938 INSTITUTES, *supra* note 15, at 39-42, 58-59, 75 (Clark); and 80-89 (W. Calvin Chesnut, Judge, U.S. Dist. Ct., Dist. Md.); Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937) [hereinafter cited as Clark, *The New Federal Rules*]; Clark, *The*

Handmaid of Justice, 23 WASH. U.L.Q. 297, *esp.* 308, 316 (1938) [hereinafter cited as Clark, *The Handmaid*].

127. *See, e.g.*, Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 940, 962-64, 976-77.

128. *See, e.g.*, 1848 REPORT, *supra* note 56, at 8, 76, 87, 141, 147; Field, *Letter to Verplanck*, *supra* note 37, at 223; Field, *What Shall Be Done?*, *supra* note 56, at 260; Field, *Memorial*, *supra* note 63, at 261; FINAL REPORT OF THE (NEW YORK STATE) PRACTICE COMMISSION, *reprinted in* FIELD SPEECHES, *supra* note 28, 290, 292 [hereinafter cited as FINAL REPORT OF THE PRACTICE COMMISSION]; SECOND REPORT OF THE (NEW YORK STATE) CODE COMMISSION (Mar. 31, 1859) [hereinafter cited as SECOND REPORT OF CODE COMMISSION], *reprinted in* FIELD SPEECHES, *supra* note 28, at 315; CODE COMMISSIONERS' FINAL REPORT, *supra* note 64, at 319, 320; INTRODUCTION, CIVIL CODE, *supra* note 106, at 337; Field, *Corres. to Cal. Bar*, *supra* note 106, at 352. For a similar approach in the international arena, *see, e.g.*, Field, *First Project of an International Code*, *Address before British Social Science Association* (Oct. 5, 1866), *reprinted in* FIELD SPEECHES, *supra* note 28, at 384, 387, 389.

129. Field, *Legal Science*, *supra* note 28, at 523.

130. *Id.* at 524, 525.

131. *Id.* at 529. (On the relationship of nineteenth-century legal thought about rights and predictability to broader political and philosophic currents of the time, *see* Atiyah, *supra* note 7, at 1260-64.)

132. Field, *Recollections No. 2*, *supra* note 18, at 2 1/2.

133. *See, e.g.*, Field, *Journal*, *supra* note 18, at 7 (Sept. 9, 1832—English writers); 10, 11 (Mar. 16, 1833—books); 12, 13 (Apr. 7, 1833): "I have been reflecting on my legal studies since last Autumn. It was my plan to make for myself a classification of legal knowledge, and in that order revise all my previous studies. With this view, I made the following arrangement. . . ." He first divided "Political" from "Social" laws. "Social laws may be divided into those which concern (1) Protection of the person from violence, injury or restraint. (2) Reputation, (3) Domestic relations and duties, and (4) Property. There is also a second division of laws into those which establish the rules to be conformed to, and those which provide the modes of procedure in the courts."

134. Field, *Recollections No. 2*, *supra* note 18, at 7, 8.

135. Field, *Commonplace Book*, *supra* note 18, at no. 13. A loose scrap of paper at the end of the book raises a similar theme: "I consider the attempts to prove or illustrate moral truths by comparisons and analogies as a most fruitful source of errors. . . ." This scrap has "[ca. 1821-4]" written on it in pencil.

136. Field, *Legal Science*, *supra* note 28, at 530.

137. 1848 REPORTS, *supra* note 56, 139.

138. *See, e.g.*, 1848 REPORT, *supra* note 56, at 68-87, 139-41, and text accompanying notes 56-58 *supra*, and those notes.

139. 1848 Field Code, *supra* note 48, at Sec. 120 (2). For the provision, as amended, *see* N.Y. Laws, 1851, c. 479, sec. 1.

140. *See, e.g.*, *supra* note 29 (attraction to mathematics) and *supra* note 28 (attraction to astronomy).

141. *See, e.g.*, Field, *What Shall Be Done?*, *supra* note 56, at 239, 240; and 1848 REPORT, *supra* note 56, at 141, 142: "Since the facts give the right to relief, it must be proper, that they should be stated as they exist. . . . We propose, that the plaintiff shall state his case according to the facts, and ask for such relief as he supposes himself entitled to; that the defendant shall by his answer point out his defence distinctly. This form of allegation and counter allegation will make the parties disclose the cause of

action and defence, so that they may each come to the trial prepared with the necessary proofs." See, also, HEPBURN, *supra* note 98, at 12, 13. Loomis had found it difficult to apply a common-law procedural system to equity cases. LOOMIS, *infra* note 228.

142. Clark, *Code Cause*, *infra* note 270, at 820, n. 16, citing, *inter alia*, Y.B. Ed. IV, f. 3, pl. 2 (1477).

143. On difficulty with "fact," see, e.g., Cook, *Statement of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416 (1921) [hereinafter cited as Cook, *Statement of Fact*]; Cook, 'Facts' and 'Statement of Fact', 4 U. CHI. L. REV. 233 (1937) [hereinafter cited as Cook, 'Facts']; CLARK 1928 HANDBOOK, *supra* note 10, at 150-63. On difficulty with "cause of action," see, e.g., Clark, *Code Cause*, *infra* note 270, and McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614 (1925) [hereinafter cited as McCaskill, *Actions*]. McCaskill summarizes the attempts of others, including Pomeroy and Clark, to define the term (614-19), and then argues for his own definition (638). Clark, who consistently disparages the aspects of the Field Code that are confining and narrowing, gives the Code cause of action a meaning that is consonant with the modern transactional analysis test for joinder, compulsory counterclaim, and amendment purposes, or with a modern "trial convenience" test. See, e.g., CLARK 1928 HANDBOOK, *supra* note 10, at 75-87. Clark's cause of action apparently embraces several of Field's. If one sued a car dealer for damages as a result of purchasing a "lemon," I believe that the alleged breach of express warranty, breach of implied warranty, negligence claim, and violation of consumer protection statute would each be a separate right or cause of action for Field; Clark would apparently call the "aggregate of operative facts giving rise to a right or rights termed 'right' or 'rights of action' which will be enforced by the courts" one cause of action. (75, headnote)

144. See, e.g., Field, *What Shall Be Done?*, *supra* note 56, at 239-41, 253-56; 1848 REPORT, *supra* note 56, at 67-87.

145. See, e.g., 1848 REPORT, *supra* note 56, at 87, in which the commissioners conclude: "Let our courts be hereafter confined in their adjudications to questions of substantial right, and not to the nice balancing of the question, whether the party has conformed himself to the arbitrary and absurd nomenclature, imposed upon him by rules, the reason of which, if they ever possessed that quality, has long since ceased to exist, and the continuance of which is a reproach to the age in which we live." For the emphasis on rights, see, e.g., the citations in note 128, *supra*.

146. 1848 Report, *supra* note 56, at 141, 142.

147. Fed. R. Civ. P. 8 (a) (2). See, also, Fed. R. Civ. P. 12 (b) (6). On difficulties interpreting "facts" and "cause of action," see *supra* note 143 and *infra* note 222.

148. See text accompanying notes 216-24 *infra*, and those notes; Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 962-70, 975-82.

149. See, e.g., HEPBURN, *supra* note 98, at 32, 33, and R.W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 5, 6 (1952). Millar, curiously, changes his position in midstream. First, "[w]hen form is supreme no place is afforded for arbitrary decision. . . . Form . . . stands as a protection against the arbitrary exercise of authority. It ties the wielder of power just as it ties those subject to that power" (5). But, then, perhaps in an attempt to make sense out of modern procedure: "But, as in other systems, with increasing stability of the courts and growing confidence in their justice, judicial discretion becomes by degrees a surrogate of the old supremacy of form, and there is progression from rigidity to flexibility in the rules of procedure"(6).

150. Unlike Charles Clark and other twentieth-century procedural reformers, procedural simplicity for Field did not mean the absence of definition and constraint nor

did it mean discretion and flexibility. See Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 944-48 (Pound), 948-61 (Shelton), 961-73 (Clark).

151. 1848 Field Code, *supra* note 48, Sec. 120 (2), at 521. In 1849, it became N.Y. Laws 1849, c. 438, Sec. 142. In 1851, it was amended to: "A plain and concise statement of the facts showing a cause of action without unnecessary repetition." N.Y. Laws 1851, c. 479, Sec. 1.

152. 1848 Field Code, *supra* note 48, Sec. 122 (6), at 522.

153. On pleading under the Federal Rules, see, e.g., Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944) (Clark, J. opinion); Conley v. Gibson, 355 U.S. 41 (1957); F. JAMES & G. HAZARD, CIVIL PROCEDURE 84-88 (2d ed. 1977) [hereinafter cited as JAMES & HAZARD (2D ED.)] (on the ambiguity of the pleading requirement under the Federal Rules); Pound's earlier endorsement of a liberal pleading philosophy, Pound, *Some Principles*, *supra* note 103, at 296, 297.

154. 1848 Field Code, *supra* note 48, Sec. 121, Sec. 128, at 521-22. *Id.*, Sec. 129, at 523. This was amended by N.Y. Laws 1852, c. 392, to require that each defense "refer to the causes of action to which they are intended to answer." There was also a reply requirement. *Id.*, Sec. 131, at 523.

155. *Id.*, Sec. 124, at 522.

156. Fed. R. Civ. P. 12 (b).

157. 1848 REPORT, *supra* note 56, at 152, 153. On the importance of facts and the oath to Field, see, also, a fascinating letter from what looks like Bramwell (an Englishman) (Temple, July 25, 1851 or 1857) to Field, Field-Musgrave MSS., *supra* note 18, in "Letters 1830-1859," describing a conversation that Field had with the writer at Westminster Hall when Field was visiting England and describing procedural reform efforts of the writer, evidently as part of some committee or commission. He talks about "our first report" and asks Field to "remember that we move here more slowly than you do. Prejudice and personal interest are stronger with us than with you. . . . On the other hand, it contains a great defect which you warned me against, but which I could not prevent. I mean it retains the old mode of stating subtle implications, instead of the facts themselves. Money had and received and similar abominations. All I could do on this . . . (unclear), was to procure the insertion in the report of a doubt, and of one or two illustrations showing their absurdity. Do you remember saying, 'Alter that mode of pleading and the (junction?) of law & equity is easy.' Besides how can a man swear to his pleading being true, when the facts are so stated. Still it is a step, and I hope will meet the approval of so distinguished a reformer as yourself." Clark, as reporter of the original advisory committee, initially drafted a more demanding verification requirement. His draft was scorned by some of the members of the committee, and rejected. See, Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 976.

158. 1848 Field Code, *supra* note 48, Sec. 133, at 523.

159. 1848 REPORT, *supra* note 56, at 153.

160. 1848 Field Code, *supra* note 48, Sec. 144, at 525.

161. 1848 REPORT, *supra* note 56, at 153.

162. Field, *What Shall Be Done?*, *supra* note 56, at 239.

163. FINAL REPORT OF THE PRACTICE COMMISSION, *supra* note 128, at 302, 303. Unlike the 1848 Field Code, Fed. R. Civ. P. 8 (e) (2) permits inconsistent claims and defenses. Such a provision would not appeal to Field, who relied so heavily on truth in pleadings.

164. The Fed. R. Civ. P. 11 oath requirement now states, in part: "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed

after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . ." The 1983 amendments are discussed in historical context in Subrin, *supra* note 16.

165. Field, *What Shall Be Done?*, *supra* note 56, at 240.
166. *Id.* at 240, 241.
167. 1848 Field Code, *supra* note 48, at Sec. 149, at 526.
168. *Id.* Sec. 145, Sec. 147, at 525-26.
169. *See* F.R.C.P. 15(b).
170. Probably the most surprising to Field would be Fed. R. Civ. P. 18, permitting a party to join "as many claims, legal, equitable, or maritime, as he has against an opposing party." *See, also*, Fed. R. Civ. P. 19-25, which, along with 18, are subject to severance under Fed. R. Civ. P. 42 (b).
171. 1848 Field Code, *supra* note 48, Sec. 97, Sec. 98, at 516. *See, also*, Sec. 100, a distinct rule for "[p]ersons severally liable upon the same obligation or instrument. . . ."
172. *See, e.g.*, JAMES & HAZARD (3rd ed.), at 470-475.
173. 1848 Field Code, *supra* note 48, Sec. 143, at 525. *See, infra*, note 175 for cite on how the courts narrowed the Field Code joinder provisions.
174. 1848 Field Code, *supra* note 48, Sec. 143, at 525. The categories were: contract; injuries by force; injuries without force; injuries to character; claims to recover real property, with or without damages; claims to recover personal property, with or without damages; and claims against a trustee. McCaskill, *Actions*, *supra* note 143, at 624-26.
175. N.Y. Laws 1852, c. 392, Sec. 167. On narrowing, *see, e.g.*, JAMES & HAZARD (2d ed.), *supra* note 153, at 466-67, and 460, 461: "But . . . [the transaction clause] too often received a narrow judicial interpretation so that it enlarged but little the scope of joinder provided in the other classes" (460, n. omitted).
176. Fed. R. Civ. P. 18(a).
177. N.Y. Laws 1852, c. 392, Sec. 150. Counterclaims were also limited to a definition close to that contained in the present compulsory counterclaim in Fed. R. Civ. P. 13 (a).
178. Class Action: N.Y. Laws 1849, c. 438, Sec. 119. Interpleader: N.Y. Laws 1851, c. 479, Sec. 122. Intervention: N.Y. Laws 1851, c. 479, Sec. 122. Impleader: 2 N.Y. Laws 1922, c. 624, Sec. 193 (a). On restrictive form, *see, e.g.*, JAMES & HAZARD (2d Ed.), *supra* note 153, at 500-26.
179. *See, e.g.*, Field, *What Shall Be Done?*, *supra* note 56, at 226, 232, 260. *Also see* 1848 REPORT, *supra* note 56, at 244 (commentary on Sec. 350).
180. 1848 REPORT, *supra* note 56, at 177, 178.
181. 1848 Field Code, *supra* note 48, Sec. 343, at 559.
182. 1848 REPORT, *supra* note 56, at 241.
183. JAMES, *supra* note 4, at 180, 181 and ns. 8-12.
184. 1848 Field Code, *supra* note 48, Sec. 342, at 558.
185. *Id.*
186. *Id.* Sec. 341. Compare with the language of Fed. R. Civ. P. 36 ("any matters within the scope of Rule 26 (b) set forth in the request that relate to statements or opinions of facts or of the application of law to fact, including the genuineness of any documents described in the request." And Fed. R. Civ. P. 26 (b) (1): "relevant to the subject matter involved in the pending action . . ." and "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.")
187. *Id.* Sec. 341. *See* a similar provision in Fed. R. Civ. P. 37 (c).
188. *Id.* Sec. 345—"instead of." *See, also*, comment in 1848 Report, *supra* note 56,

at 245: "But if the examination be once had, we would not permit it to be repeated, else it might become the means of annoyance." Sec. 344—"subject to the same rules of examination, as any other witness."

189. *Id.* Sec. 345—"before a judge of the court or a county judge."
190. D.D. FIELD, RE-ORGANIZATION OF THE JUDICIARY, FIVE ARTICLES ORIGINALLY PUBLISHED IN THE EVENING POST ON THAT SUBJECT 3, 4 (1846) [hereinafter cited as FIELD, RE-ORGANIZATION OF THE JUDICIARY].
191. 1848 REPORT, *supra* note 56, at 139.
192. N.Y. Constitution, Art. I, Sec. 2, quoted in 1848 REPORT, *supra* note 56, at 177. The new provision is Sec. 208, 1848 Field Code, *supra* note 48, at 536.
193. *See* comment to Sec. 208 in 1848 REPORT, *supra* note 56, at 185: "We propose an extension of the right of trial by jury to many cases, not within the constitutional provision."
194. 1848 Field Code, *supra* note 48, sec. 221, at 538. (Fed. R. Civ. P. 38 (d)).
195. Fed. R. Civ. P. 49.
196. 1848 Field Code, *supra* note 48, Sec. 215, Sec. 216, at 537. The test in Sec. 216 for when the jury could decide the type of verdict it wished to enter was the same as the new test for entitlement to jury trial (Sec. 208).
197. For a history of the directed verdict in New York, *see* Smith, *The Power of the Judge to direct a Verdict: Section 457-a of the New York Civil Practice Act*, 24 COLUM. L. REV. 112 (1924) [hereinafter cited as Smith].
198. 1848 REPORT, *supra* note 56, at 180.
199. *Id.* at 178.
200. *Id.* at 189, accompanying Sec. 221.
201. For several New York courts, the judges were first elected in 1847. *See supra* note 101.
202. *See* text accompanying notes 42-47, and those notes. The code commissioners thought some law should be omitted from a codification. "[T]here are certain special laws which are long, full of details, and liable to constant change, and which ought to be separately printed and distributed; as, for example, the poor laws, the health laws, and the militia laws." CODE COMMISSIONERS' FIRST REPORT, *supra* note 64, at 314.
203. *See, e.g.*, CODE COMMISSIONERS' FIRST REPORT, *supra* note 64; CODE COMMISSIONERS' FINAL REPORT, *supra* note 64, and INTRODUCTION TO THE COMPLETED CIVIL CODE (New York, 1865), *reprinted in* FIELD SPEECHES, *supra* note 28, at 323-28 [hereinafter cited as INTRODUCTION TO COMPLETED CODE].
204. *See, e.g.*, CODE COMMISSIONERS' FIRST REPORT, *supra* note 64, at 321. In fact, Loomis believed the duty of the Commissioners on Practice and Pleadings was to use "language apt and appropriate, general yet comprehensive, scrutinized with the nicest care and diligence, to cover the whole ground in comprehensive terms, with but little detail, allowing to the Courts freedom of construction and application, as the administration of justice might require." LOOMIS, *infra* note 228, at 25.
205. *See, e.g.*, CODE COMMISSIONERS' FIRST REPORT, *supra* note 64, at 313; INTRODUCTION TO COMPLETED CODE, *supra* note 203, at 330, 331.
206. *Id.* at 321, 322. For the commissioners' description of all substantive law, *see id.*, at 317: "the law of civil rights and obligations affecting all the transactions of men with each other in their private relations, the law of crimes and punishment, and the law of government, including every branch of administrative and political action."
207. INTRODUCTION TO COMPLETED CODE, *supra* note 203, at 330.
208. *Id.* at 178, 179, Sec. 687, Sec. 693.
209. Here are typical Draft Civil Code Rules that are about as precise as laws can

be, if they are to cover more than an extremely narrow range of circumstances (and bearing in mind that many of the terms are defined elsewhere in the Code):

Sec. 690. Unless it is otherwise agreed between the parties, the thing sold, or agreed to be sold, is deliverable at the place at which it is at the time of the sale or agreement to sell, or if it is not at that time in existence, it is deliverable at the place at which it is produced.

Sec. 691. The seller must bear the expense of putting the property out of his own building, but further transportation is at the risk and expense of the buyer.

The Commissioners of the Code, DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK, Secs. 690, 691, p. 179 (1862).

210. This is a traditional view of substantive law. See, e.g., *Risinger, "Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 203, 204 (1982) [hereinafter cited as *Risinger*]. For the position that the code commissioners were not precise enough, see, e.g., RIVES, *supra* note 97; and A. SEDGWICK, DAMAGES IN THE CODE, AN EXAMINATION OF THE SECTIONS OF THE PROPOSED CIVIL CODE RELATING TO THE MEASURE OF DAMAGES, OR COMPENSATORY RELIEF (1885) (printed by direction of the Comm. on the Code of the New York Bar Assn.).

211. COMMISSIONERS, DRAFT CODE OF EVIDENCE (STATE OF NEW YORK) Sec. 2, Sec. 301 (1887) [hereinafter cited as DRAFT EVIDENCE CODE]. The Commissioners at this time were Field, David L. Follett, and William Rumsey. In 1850, as part of the Code of Civil Procedure (1850 NEW YORK PROCEDURAL CODE, *supra* note 51), Commissioners Arphaxed Loomis, David Graham, and Field had submitted an evidence code as *Part IV. Of Evidence*. There are many differences in form and content between the 1850 and 1887 versions. The concentration on "facts," however, is similar. See *infra* note 212. The "Purpose and Construction" Rule of the Federal Rules of the Evidence (Fed. R. Ev. 102) states that the rules "shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined," but does not mention facts. *But see* Fed. R. Ev. 201, 401.

212. DRAFT EVIDENCE CODE, *supra* note 211, at Sec. 5. 1850 NEW YORK PROCEDURAL CODE, *supra* note 51, at Sec. 1659, is identical, except for a comma after "proceeding" in the 1887 version. Sec. 1660 states: "Proof is the effect of evidence, the establishment of a fact by evidence." For the stressing of facts in the Evidence part of the 1850 NEW YORK PROCEDURAL CODE, see, e.g., Secs. 1659, 1660, 1667-70, 1672, 1702, 1704-1, 1705, 1706.

213. DRAFT EVIDENCE CODE, *supra* note 211, at Sec. 2.

214. See, e.g., Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) and J. FRANK, LAW AND THE MODERN MIND 118-47 (1935) [hereinafter cited as FRANK, LAW].

215. David Dudley Field, *Commonplace Book, 1824-1827* (this entry, ca. 1825), Field-Musgrave MSS., *supra* note 18.

216. Holtzoff, *supra* note 4, at 1060. Holtzoff was a special assistant to Attorney General Homer Cummings, who, in 1934, sponsored the Enabling Act that finally passed. On Cummings sponsorship of the Enabling Act, see, e.g., Burbank, *supra* note 1, at 1095-1101; Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 969. On Holtzoff, see, 1 W. BARRON & A. HOLTZOFF (revised by C.A. Wright) FEDERAL PRACTICE AND PROCEDURE WITH FORMS VII (1960).

217. See, e.g., Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 962-64, and n. 309.

218. See, e.g., Pound, *Reforming Procedure by Rules of Court*, 76 CENTRAL L.J. 211

(1913); Shelton, *Uniformity of Judicial Procedure and Decision*, 22 THE LAW STUDENT'S HELPER 5, 8 (1914) [hereinafter cited as Shelton, *Uniformity*]; Shelton, *The Drama of English Procedure*, 17 VA. L. REV. 215, at 220, 221 (1931); SHELTON, SPIRIT, *supra* note 78, e.g. at xix-xix, 89-91, 96.

219. See, e.g., A.B.A., SPECIAL SESSION ON LEGAL EDUCATION OF THE CONFERENCE OF BAR ASSOCIATION DELEGATES 112 (1922) (James Byrne, citing Pound on the need for "a yoke" to be placed on the "neck" of "these commissions") and CUMMINGS, LIBERTY UNDER LAW AND ADMINISTRATION 130, 131 (1934) (White Lectures at U. of Va. Law School) [hereinafter cited as CUMMINGS, LIBERTY].

220. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459, esp. at 570 (1979); CUMMINGS, LIBERTY, *supra* note 219, esp. at 96; and C. CLARK & H. SHULMAN, LAW ADMINISTRATION IN CONNECTICUT 202-42 (1937). On the importance of considering all of the facts for modern substantive law, see Atiyah, *supra* note 7, at 1258-59.

221. See, e.g., Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906) (Address delivered at annual convention of A.B.A. in 1906. Proc. A.B.A. 1906, at 395), reprinted in 20 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 178, 180 (1937) [hereinafter cited as Pound, *The Causes*]; SHELTON, SPIRIT, *supra* note 78, at, e.g., xxix, 33, 51, 63, 120: "The law is a science, and the administration of it is a highly technical governmental function." Clark's son, Elias Clark, professor of law, Yale Law School, recalled that his father had received a mathematics prize at Yale College, and that Clark thought that mathematics was the best preparation for law school. Interview, Stephen N. Subrin with Elias Clark, Dec. 18, 1978, New Haven, Conn.

222. See, e.g., citations in note 143, *supra*; and RISINGER, *supra* note 210, at 199-202, citing, *inter alia*, Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 336-37, 341, 345 (1933).

223. See, e.g., J. FRANK, COURTS ON TRIAL, MYTH AND REALITY IN AMERICAN JUSTICE, esp. 14-36 (Facts are Guesses) and 108-25 (The Jury System) (1949); FRANK, LAW, *supra* note 214, at 116, 172; W. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS 107-36 (1968).

224. See, e.g., *supra* note 126, and Clark, *Federal Procedural Reform and States' Rights; To a More Perfect Union*, 40 TEXAS L. REV. 211 (1961).

225. See, e.g., F. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW, TWO COURSES OF LECTURES 1-20 (A. Chaytor & W. Whittaker eds. 1913) [hereinafter cited as MAITLAND].

226. See, e.g., *id.*; MILSOM, *supra* note 56; MCDOWELL, *supra* note 1.

227. See, e.g., Subrin, *How Equity Conquered Common Law*, *supra* note 16.

228. On Field's debt to equity, see, e.g., Field, *What Shall Be Done?*, *supra* note 56, at 258: "The pleadings in equity being formed on simple and just principles, will naturally serve as a model for the rest"; 1848 REPORT, *supra* note 56, at 124 (on real party in interest rule and joinder of parties); 127 (note to Sec. 99, on mandatory joinder); 135 (note to Sec. 114, on notice to absent defendants); 142 (note to Sec. 118 on few pleading steps in chancery); 185 (note to Sec. 210, on use of one judge to decide legal issues, as in equity); 214 (security required on appeal similar to chancery practice); and 250, 251 (note to Sec. 356, on examination of witnesses outside of county, compared to witnesses questioned before examiners in chancery); STATE OF NEW YORK SECOND REPORT OF THE COMMISSIONERS OF PRACTICE AND PLEADINGS, CODE OF PROCEDURE (1849), reprinted in FIELD SPEECHES, *supra* note 28, at 281: "The basis adopted for [the commissioners'] action was substantially that upon which courts of equity were originally

founded; the natural course by which the means to be used, are directed solely by the end to be attained, without regard to the forms of action." A. LOOMIS, HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS 16 (1879) [hereinafter cited as LOOMIS], describing how he, one of the New York Commissioners of Practice and Pleadings, who helped draft what later became known as the Field Code, was forced to turn to equity principles in order to draft a procedural code for a merged system of law and equity: "I prepared and submitted partly to Mr. Hill (referring to Nicholas Hill, whom Field replaced as a commissioner) about 60 sections of law, based on the Common Law system, abolishing forms of action and general issues and requiring all pleadings to be sworn to, as to belief. I found serious difficulty in applying it to Chancery cases and in framing fixed Common Law issues under it. I then abandoned it and drew up some 70 or 80 sections based on Chancery principles, abolishing forms of action, applying it to all kinds of actions" (16), and "The system approaches and assimilates more nearly with the equity forms than with those of the common law" (25).

229. See, MAITLAND, *supra* note 225, at 19.

230. See, e.g., Lincoln, *supra* note 73, at 69, 70; and Hobor, *supra* note 18, at 50-55. Equity, of course, was disfavored in many parts of America, starting from the earliest colonization. See, e.g., Wolford, *The Law and Liberties of 1648*, 28 B.U.L. REV. 426 (1948); Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21-23 (1921); FRIEDMAN, *supra* note 56, at 47-48; MCDOWELL, *supra* note 1; Katz, *The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the 18th Century*, in PERSPECTIVES IN AMERICAN HISTORY 257-84 (Bailyn and Fleming eds. 1971); Smith & Hershkowitz, *Courts of Equity in the Province of New York: The Cosby Controversy, 1732-1736*, 16 AM. J. LEGAL HIST. 1 (1972); Woodruff, *Chancery in Massachusetts*, 9 B.U.L. REV. 168 (1929); and Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 B.U.L. REV. 269 (1951).

231. FIELD, RE-ORGANIZATION OF THE JUDICIARY, *supra* note 190, at 8.

232. LOOMIS, *infra* note 228, at 7, 10.

233. 1848 REPORT, *supra* note 56, at 71. The quote also said positive things about equity—equity "was nevertheless, in its own nature, flexible, highly convenient, and capable of being made to answer all the ends of justice. There was literally no form about it."

234. For example, in the Erie litigation, according to George Martin, "[a]t the end of a month of legal action five judges had issued seven injunctions, all enjoining or commanding things wholly inconsistent." MARTIN, *supra* note 18, at 5. At Field's death, the New York World reported: "He was reproved by the lawyers for his development of the possibilities and capabilities of the writ of injunction to a degree never before practised." David Dudley Field Dead, THE WORLD (New York, Apr. 14, 1894), in Field-Musgrave MSS., *supra* note 18.

235. New York HERALD (July 23, 1857), cited in Van Ee, *supra* note 18, at 137.

236. Field, *What Shall Be Done?*, *supra* note 56, at 226, 227.

237. *Id.* at 227-33. Although according to Field not all equity pleadings in New York had to be verified, equity did traditionally require sworn pleadings. JAMES, *supra* note 4, at 11.

238. 1848 REPORT, *supra* note 56, at 179-81. On joinder under the Field Code, see, *supra*, pages accompanying notes 170-78.

239. E.g., long, detailed pleadings; oath not required on all pleadings; broad joinder; emphasis on discovery; written, rather than oral, testimony; judge instead of jury; heavy reliance on masters; extreme flexibility; and judicial discretion. Even with respect to

equitable relief, Field criticized injunctions and the commissioners attempted to specify what relief should apply to most types of cases (see, *supra* note 234).

240. HEPBURN, *supra* note 98, at 8, 12, and 19.

241. Pound, *Some Principles*, *supra* note 103, at 403. Pound added a sentence that is probably true for the period Field was writing the procedural code, but untrue for a later period, given Field's wide use of the injunction in his post-Civil War practice: "Field was not an equity lawyer and thinking only of the legal situation, drafted some important sections in such a way as seriously to embarrass proceedings in equity."

242. See, *supra*, pages accompanying notes 110-12. I thank my colleague, Karl Klare, for his helpful suggestions on Field as a transitional figure, and for his critique of Field's rights-oriented philosophy, much of which I have drawn on in this article. For a summary of various attacks on "rights" thinking, see Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1860-1865 (1987) [hereinafter cited as Minow, *Interpreting Rights*].

243. See, e.g., F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 826 (1935) [hereinafter cited as Cohen, *Transcendental Nonsense*].

244. See, *supra* note 222.

245. See, *supra* note 223.

246. See, e.g., *supra* note 243; *infra* note 248.

247. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974) [hereinafter cited as Galanter, *The Haves*.]

248. See, e.g., Singer, *The Player and The Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, at 14-19 (1984) [hereinafter cited as Singer, *Legal Theory*]; *supra* text accompanying notes 221-24, and those notes; Llewellyn, *The Good*, *supra* note 124, at 262-64; Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 437-38 (1930); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, *esp.* at 1700 (1976) [hereinafter cited as Kennedy]; F. Cohen, Book Review, 17 A.B.A. J. 111 (1931) (reviewing J. FRANK, LAW AND THE MODERN MIND (1930) [hereinafter cited as Cohen, Book Review]: "Frank's fundamental thesis is that the law is not and ought not to be certain and predictable and that those who think otherwise are simply infantile." On inequality of citizens in their ability to litigate, see, e.g., Galanter, *The Haves*, *supra* note 247.

249. For adoption of standards, rather than rules, see, e.g., LIEBERMAN, *supra* note 16, at 18-25. For a description of the types of global issues often confronted in modern litigation, see, e.g., Chayes, *supra* note 16; Fiss, *Forms of Justice*, *supra* note 16; Oakes, *supra* note 16.

250. See, *supra* note 242.

251. In his argument in *Cummings v. Missouri*, 71 U.S. 277 (1866), Field addresses the problem of what becomes of natural rights in a political system with codes, statutes, and a constitution. FIELD SPEECHES, *supra* note 28, at 113, 114. He does not, though, talk about the effect of their continued vitality on his predictability theme.

252. For an exploration of inconsistencies and tensions in rights-based jurisprudence, see Singer, *supra* note 125.

253. *Id.* Singer quotes Abraham Lincoln (978): "The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act, as the destroyer of liberty. . . . Plainly the sheep and the wolf are not agreed upon the definition of the word liberty." (Citation omitted)

254. See, e.g., *supra* notes 204, 205.

255. See, e.g., Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222,

1253 (1931). On Llewellyn's vision of "Grand style judging," and why he thought such judging would lead to more, not less predictability, see Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rule*, 100 HARV. L. REV. 465, 492-99, 507-8, 537, 539-40 (1987).

256. See, e.g., Childres, *Conditions in the Law of Contracts*, 45 N.Y.U. L. REV. 33, 34-35 (1970).

257. See, e.g., McDowell, *supra* note 1; R. BERGER, GOVERNMENT BY JUDICIARY (1977); Minow, *Interpreting Rights*, *supra* 242, at 1863, 1864 (describing this view).

258. *Supra* notes 243, 248.

259. For a description of some of the theses of those associated with the critical legal studies movement concerning "legitimation" and "mystification," see Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 467-70, and citations therein [hereinafter cited as Solum]. For a more extensive bibliography of critical legal studies literature, see Kennedy and Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

260. For a description of, and citations to, this type of criticism, see Minow, *Interpreting Rights*, *supra* note 242, at 1862, 1869-1870, 1871, n. 40; Cornell, *In Union: A Critical Review of "Toward a Perfected State"* (by P. Weiss), 135 PA. L. REV. 1089, 1089-94 ("The Problem of the Individual and Community") (1987).

261. Yntema, *Legal Science and Reform*, 34 COLUM. L. REV. 207, 210 (1934).

262. If you do, or have the characteristics of, A, B, and C, then you can count on Y as the result. If X does D, E, and F to you, then you can have Z relief from X. The alternative, absent a homogeneous society in which people somehow agree on rights, how to provide them, and how to cure breaches without formal articulation and enforcement by the state, is to keep the populace from having and receiving expectancies, and to keep them guessing about the consequences of behavior. Even those who strongly cherish community values (as opposed to or in addition to values of individuality and competition) want society, with the aid of law, to protect rights or preannounced expectancies. See, e.g., Singer, *Legal Theory*, *supra* note 248, at 68; Minow, *Interpreting Rights*, *supra* note 242, at 1884-93; and R. UNGER, FALSE NECESSITY—ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (ON THE SYSTEM OF RIGHTS) (1987). Ironically, elements of Field's "rights thinking," as it relates to procedure, may ultimately prove attractive to critics of "rights thinking."

263. For instance, the nonconstitutional privileges indicate a priority given other values, such as privacy and human relationships, and the Fifth Amendment privilege is also based, in part, on humanitarian concerns. See, e.g., Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 109-15 (1956); E. Griswold, THE FIFTH AMENDMENT TODAY (1955).

264. See text accompanying *supra* notes 154, 158-66, 170-78, 181-89.

265. Singer, *Legal Theory*, *supra* note 248, at 22, citing Kennedy, *supra* note 248, at 1687-89. For the thesis that the "indeterminacy" of law claim is unsupported dogma, and that "undeterminacy" is a more accurate description of the real legal world, see Solum, *supra* note 259. See, also, Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 352-69 (1986) (critique of the critical legal studies indeterminacy thesis, especially as expressed by Professor Singer) [hereinafter cited as Stick].

266. Further, Singer concedes that most judges often "enforce rules with which they strongly disagree." Singer, *Legal Theory*, *supra* note 248, at 14-19, 21, 23-24.

267. The list of rights is taken from Singer, *Legal Theory*, *supra* note 248, at 68, although Singer lists them "[w]ithout arguing about whether these are rights, or what sort of rights they are." Solum argues that "[w]ithout a notion of the possibility of

change, no theory of law can claim to be truly critical. . . . We must imagine a progressive and humane social order, and we must imagine a way to get there from here." Solum, *supra* note 259, at 503.

268. On the interconnectedness of human endeavors, Edmund Wilson quotes the French historian, Jules Michelet: "Woe be to him who tries to isolate one department of knowledge from the rest. . . . All science is one: language, literature and history, physics, mathematics and philosophy; subjects which seem the most remote from one another are in reality connected, or rather they all form a single system." E. WILSON, TO THE FINLAND STATION 6 (1972 edition).

269. See, e.g., *supra* note 227.

270. Given Singer's belief in the deficiencies of liberal thought, and of legal doctrine and a society based on that thought (or of which that thought and doctrine are both a part and a reflection), I suspect he might argue that attempts to dramatically improve society through different laws and different rights, without changing the underlying thought and structure, are doomed to failure; or, to put it another way, the present structure will not permit the rights he lists and that the contradictions in the thought and structure will thwart both achieving the rights and determinacy. Singer, *Legal Theory*, *supra* note 248.

271. For an in depth analysis of how and why it is difficult to achieve governmental compliance with law, and some suggestions for improving the likelihood of such compliance, see P. SCHUCK, SUING GOVERNMENT, CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983).

272. See, *supra* text accompanying notes 106, 128-36.

273. Empirical data suggests that at least professionals, when informed, take legal rights and obligations seriously and attempt to comply with the demands of doctrine; and that the more concrete the doctrine, the more likely it will be followed: "the prevailing view that courts should not attempt to set specific standards of conduct needs reexamination." Givelber, Bowers, Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WISC. L. REV. 443, 490.

274. See, e.g., CLARK 1928 HANDBOOK, *supra* note 10, at 19, 150, 151, 255, 256, 270-73, 296-98; *Comments, Pleading Negligence*, 32 YALE L.J. 483, 484, 489 (1923); Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 528, 529, 534, 540, 541, 545, 550 (1925); Clark, *The Code Cause of Action*, 33 YALE L.J. 817, at 817, 837 (1924); Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 266 (1926). See, also, Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 962, n. 309.

275. For Field's awareness of the uncertainty inherent in fact ascertainment and law application, see FIELD-BOWLES CORRESPONDENCE, *supra* note 36, Letter from Field to Bowles, Jan. 5, 1871: "If the lawyer were omniscient and the judge infallible, if all the facts on both sides and all the law could be known from the beginning, then, indeed, the lawyer would be justified in saying to a client, I will not assist you. But in the present condition of humanity, facts are often misunderstood, the law often mistaken, and one court frequently pronounces right what another court has pronounced wrong. . . ."

276. J. DICKINSON, MY PHILOSOPHY OF LAW (1941), reprinted in part in THE AMERICAN JURISPRUDENCE READER 41, 42, 43 (T. Cowan ed. 1956). See, also, Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?*, 70 MASS. L. REV. 10, at 10-11 (1985).

277. F. Cohen, *Book Review*, *supra* note 248, at 111. On the relationship of critical legal theory to indeterminacy, nihilism, and pragmatism, see Stick, *supra* note 265.

278. See *supra* note 257; J. ELY, DEMOCRACY AND DISTRUST (1980). Nor is this the

place to enter the philosophic debate of where rights come from and how to order their priority. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

279. See, *supra* notes 204, 205, 275.

280. See L. TRIBE, *CONSTITUTIONAL CHOICES* vii, viii, 3, 6, 11, 55-60 (1985).

281. Solum, *supra* note 259, at 501, 502.

282. "The evil of mystification would produce only false consciousness, not bad decisions." *Id.* at 502.

283. *Id.* at 498-502.

284. Minow, *Interpreting Rights*, *supra* note 242, at 1871-88.

285. See citations in *supra* note 262.

286. See, e.g., Amsterdam, *Proceedings of the Forty-Fifth Judicial Conference of the District of Columbia*, 105 F.R.D. 251, 290, 291 (1984).

287. Minow, *Interpreting Rights*, *supra* note 242, at 1880, 1881. It is true that Field conceived of rights in a considerably more wooden and static way than a current scholar such as Minow, who uses the concept of rights not as part of a relatively inflexible legal universe, but rather as part of what she calls "interpretation," "In law, scholars of many political stripes join in the interpretive turn" (1860, 1861). See, also, Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 239, 279-283 (1987), in which Leubsdorf explores the concept of judging as "constrained dialogue." This is explicitly a recognition that both the "mechanical" or "cognitive," and "political" views of adjudication have shortcomings, and an attempt to find a more realistic and defensible view. It does not seem to me, however, that Field's positions on the importance of predictably enforcing rights, and on the place of procedure in that quest, are inherently at odds with viewing legal discourse as interpretation or constrained dialogue. Understanding legal discourse as a type of ongoing interpretation, a specialized conversation, or constrained dialogue does treat law application as a more wide-open, flexible enterprise than did Field, and takes more account of politics and individual emotions and agendas. Such modern views, however, do not necessarily eliminate the goals of predictability, treating like cases alike, and expectancy definition and protection. If the modern views do eschew such goals, I maintain that their proponents have more to learn from David Dudley Field than the reverse. Stick has recently explored and explained how legal discourse is nonmechanical; takes into account politics, morals, and values; is somewhat predictive; and is a rational enterprise. Stick, *supra* note 287, esp. 347-52, 360-65, 372-76, 384, 393, 397-400.

288. See, e.g., Brown, Givelber, & Subrin, *Treating Blacks As If They Were White: Problems of Definition and Proof In Section 1982 Cases*, 124 U. PA. L. REV. 1 (1975) (discrimination law); Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27 (1979) (with respect to legislation).

289. For discussion of the legal realist tenet that judges make law, and criticism of trends in appellate procedure that seem to have sprung from that tenet, see Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A. J. 860 (1980). (Carrington stresses the importance of litigants' feeling that decisions are "made in conformity with law and not the personal whim of a judge," and that the role of appellate courts should not be primarily "oracular" [860].) "Is there a danger that the pursuit of individualized justice may raise doubts about the legitimacy of the judicial role?" Atiyah, *supra* note 7, at 1270 (see, also, 1271, 1272).

290. MAITLAND, *supra* note 225, at 19: "Had the legislature said, 'Common Law is hereby abolished,' the decree if obeyed would have meant anarchy." The merger of law and equity under the Field Code and the Federal Rules may have caused modern lawyers, judges, and legislators to forget that the common law courts and Chancery

heard different types of cases, to which different types of procedure applied. For an empirical look at the difference in case loads between law and equity, see King, Comment, *Complex Litigation and the Seventh Amendment Right to a Jury Trial* 51 U. CHI. L. REV. 581, 584-606 (1984). The different procedural system of equity was perhaps appropriate to the typical case-type in that court. See Subrin, *How Equity Conquered Common Law*, *supra* note 16, at 977, 985, 991. Those cases heard by common-law courts also had their own disparate procedures, which may have been appropriate to the particular type of case. *Id.* at 915.